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With regard to the first issue the lower Court ordered the defendant [plaintiff?] to pay the sum of Rs. 328-8, being the difference between the stamp on an application and the Court-fee on a plaint for property of the value of the subject-matter of the award. On the second and third issues the Court made the following remarks:—"It is to be observed that the plaintiff seeks in this case to have an arbitration award filed under s. 525 of the Civil Procedure Code. The defendant contends that the award is collusive and fraudulent, the arbitrator guilty of corruption, and that matters, which were not intended to be referred to arbitration, have been included in the award. These objections of the defendant are such as are contemplated by ss. 520 and 521 of the Civil Procedure Code. When such objections are raised against an attempt to file an award under s. 525, the rule laid down by PONTIFEX, J., in the case of *Siceeram Chowdhry v. Dinobundhoo Chowdhry* (I. L. R., 7 Cal., 490), must be followed. His Lordship says. But in my opinion this goes to show that it was not intended that an award should be filed under s. 525 if either of the parties to the reference showed cause against it by affidavit or verified petition within the provisions of s. 520 or s. 521. In such cases I think it would be the duty of the Court, without enquiring into the validity of the cause so shown, to refuse the application to file the award, and to leave the applicant to his remedy by suit." In this case the defendant's objections amount to those mentioned in ss. 520 and 521, and when such objections have been [13] made, the plaintiff's prayer for filing the award must, under the above precedent, be refused.

"On all these accounts I am of opinion that the relief claimed by the plaintiff cannot be allowed to him in this case, and that his case must fail both on facts and law."

The plaintiff appealed to the High Court.

Baboo Chunder Madhub Ghose and Baboo Abinash Chunder Banerjee for the Appellant.

Baboo Mohesh Chunder Chowdhry and Baboo Kali Kissen Sen for the Respondent.

The Judgment of the Court (MITTER and TOTTENHAM, J.J.) was delivered by

Mitter, J.—We are of opinion that in this case there is no appeal, because the proceedings in the lower Court were held under ss. 525 and 526 of the Civil Procedure Code. While rejecting this appeal upon this ground, we are at the same time of opinion that the lower Court has exercised a jurisdiction not vested in it by law, in deciding the question raised in the second issue mentioned in its judgment, viz., whether the defendant did not agree to the terms of the ekrarnama, and they were fraudulently made. It appears from s. 526 that the Court has jurisdiction to adjudicate only upon the grounds of objection mentioned in ss. 520 and 521. Now, the defendant's objection that he did not agree to the terms of the ekrarnama, and that he was imposed upon in being persuaded to put his signature to the particular ekrarnama, which was the foundation of the award in this case, is not one which comes within the purview of ss. 520 and 521. When an objection of this nature was raised it was the duty of the Court to reject the application under s. 525, and refer the parties to a regular suit. No doubt the defendant also raised certain other objections which came within the purview of ss. 520 and 521, but the lower Court has not disposed of them, being of opinion that the mere fact of their having been mentioned in the petition of objection would oust it of its jurisdiction to deal with the case under ss. 525 and 526. Whether this view of the law is correct or not, it is not necessary to determine, but it is quite clear to us that the lower Court was not competent in this case to

adjudicate upon the second issue raised before it, [14] viz., "whether the defendant did not agree to the terms of the ekrarnama and they were fraudulently made." We, therefore, set aside the decree of the lower Court by which the plaintiff's suit was dismissed, and direct that the application under s. 525 should be rejected upon the ground that the defendant had raised an objection which the Court under ss 525 and 526 could not dispose of. It further appears that the lower Court, upon the objection of the respondent before us on the 28th March 1881, directed that the plaintiff should pay a Court-fee stamp of Rs. 328-8-0 to make up the deficiency in the Court-fee stamp required for the plaint. The lower Court was evidently under the impression that this being a suit the plaintiff was bound to pay the Court-fee for a plaint according to the value of the suit as required by the Court Fees Act, but it has evidently overlooked the provision of the law that the application for enforcing an award under s. 525 shall be simply numbered and registered *as a suit* between the parties. It is not considered a suit, but it is to be numbered and registered *as a suit*. Therefore, under the Court Fees Act, the plaintiff appellant was only bound to pay the Court-fee for an application to the lower Court. The order of the lower Court, dated 28th March 1881, directing the plaintiff to pay Rs. 328-8 Court-fee stamp to make up the deficiency is therefore erroneous, and in making that order the Court acted in the exercise of its jurisdiction *illegally*. We, therefore, set aside that order also. That order being set aside the plaintiff will be entitled from the lower Court to a certificate for the refund of that stamp. Under the circumstances of this case, we think that in the lower Court each party should bear their own costs. In this Court the respondent is entitled to recover his costs from the appellant.

Decree modified.

NOTES.

[APPLICATION TO FILE AWARD IN PURSUANCE OF AN ARBITRATION WITHOUT THE INTERVENTION OF A COURT—

The Court is competent to inquire into questions relating to the factum and validity of the agreement to refer and of the award, 25 Cal., 757 (F. B.) overruling 10 Cal., 11, 17 All. 21 F. B. 28 All. 621, 20 Mad., 89 *Contra* 20 Bom. 590. The above all decisions under section 525 of the Code of 1882. In the corresponding section, para 21, schedule II of the Code of 1908 the words, "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" were added thus negating the view of the Court of Bombay and giving effect to the view of the other High Courts. An order made on an application under s. 525 of the Code of 1882 (para 20, sch. II of the Code of 1908) is now made appealable under section 167, (1) cl f of the Code of 1908.]

[15] APPELLATE CIVIL.

The 3rd May, 1883

PRESENT

MR. JUSTICE MITTER AND MR. JUSTICE WILKINSON.

Fuseehun. Defendant

versus

Kajo and others ... Plaintiffs.

Guardian—Guardianship of female minor—Mahomedan law—Regulation X of 1793, s. 21—Act XL of 1858, s. 27—Act IX of 1861.

The effect of s. 21 of Regulation X of 1793, and of s. 27 of Act XL of 1858 is, that no person other than a female shall in any case be entrusted with the guardianship of a female minor

* Appeal from Original Order No 316 of 1882, against the order of H. Beveridge, Esq., District Judge of Patna, dated the 31st July 1882.

Held, therefore, where a Mahomedan mother had by marrying a stranger forfeited her right to the guardianship of her children, that in the case of her female children their grandmother was entitled to be appointed guardian to the exclusion of male relatives. And the fact that the proceeding in which the right is sought to be established is under Act IX of 1861 does not affect the rule.

THIS was a suit under Act IX of 1861 for the guardianship of infant children, brought by their maternal grandmother, one Mussamut Kajo, against their mother, Mussamut Fuseehun, and their paternal uncles, Abu Saleh and Abu Mahomed. One of the children was a boy over the age of seven years, one a girl aged twelve years, who, according to Mahomedan law, had attained the age of puberty, and the other two children were girls under twelve years of age. The plaintiff claimed the guardianship of the children, on the ground that their mother had married a stranger.

The District Judge held that the mother had by marrying a stranger forfeited her right to the guardianship of the children, and appointed the uncles guardians of the boy and the eldest girl, and appointed the plaintiff guardian of the younger girls. Mussamut Fuseehun appealed to the High Court.

Mr. *Branson* and Baboo *Saligram Singh* for the Appellant.

Mr. *Amir Ali* and Moonshi *Serajul Islam* for the Respondents.

The **Judgment** of the Court (MITTER and WILKINSON, JJ.) was delivered by

Mitter, J.—This case was once before this Court, and was remanded to be retried with reference to the observations made in the remand judgment.

[16] The proceeding in the lower Court was commenced by a suit under the provisions of Act IX of 1861 brought by Mussamut Kajo, the mother of Fuseehun, claiming the custody of her four grandchildren, *i.e.*, the children of Fuseehun. One of these children is a boy, and the other three are girls. They are all admittedly under age.

The District Judge finds that the boy is over seven years of age, and the eldest girl, Beebee Sulima, is nearly twelve years old, and has arrived at puberty in the sense in which that term is used in the Mahomedan law.

There was a counter-application made by Abu Saleh and Abu Mahomed, their uncles, and Mussamut Sobi, their father's mother, in which they opposed Mussamut Kajo's claim, and set up their right to the guardianship of these minor children.

The Judge has found that the other two girls, *viz.*, Surah and Habilea, have not yet arrived at puberty. Upon these findings he has declared that Mussamut Kajo is entitled to the custody of these two girls, and the uncles to the custody of the boy and Beebee Sulima. It was admitted before the learned Judge that the mother Fuseehun, having contracted a second marriage with a stranger, had forfeited her superior right of guardianship under the Mahomedan law.

In this appeal the order of the lower Court as regards the two younger girls is not questioned, but it has been contended that Mussamut Kajo is also entitled to the guardianship of the other two children.

So far as the question of guardianship of the boy is concerned, we see no reason to interfere with the order of the lower Court. It is in strict accordance with the provisions of the Mahomedan law on the subject.

But as regards the girl Sulima, we are of opinion that the order of the lower Court is not correct. It seems to us that the law upon this subject has been laid down by the Legislature, which, if it has modified the Mahomedan law, must govern our decision.

In s. 21, Regulation X of 1793, it was enacted that the guardianship of a female minor shall in no instance be entrusted to a person other than a female.

[17] This law was applicable to persons whose estates were under the jurisdiction of the Court of Wards. But as regards minors, whose property could not be brought under the superintendence of the Court of Wards, it was enacted by s. 2 of Act XL of 1858 that the care of the persons of such minors, and the charge of their property, shall be subject to the jurisdiction of the Civil Court. Section 27 of that Act says that nothing in this Act shall authorize the appointment of any person other than a female as the guardian of the person of a female.

Whatever may have been the provisions of the Mahomedan law upon the subject, the two legislative enactments referred to above have laid it down that a person, other than a female, shall in no case be entrusted with the guardianship of a female minor. The District Judge, referring to s. 27 of Act XL of 1858, says that the parties were not bound by the provisions of that section, because the proceeding before him was under Act IX of 1861. But this latter Act only lays down the procedure regulating a suit for the custody of minor children by guardians or other person entitled to their custody.

The Regulation and the Act referred to above on the subject of the guardianship of the person of a female minor laying down the substantive law with reference thereto must be followed in a suit under Act IX of 1861.

Although the order of the lower Court is in strict accordance with the Mahomedan law, as laid down in Baillic's Digest and Hamilton's Hadya, we may as well point out here that the law laid down by the late Mahomedan Jurists is more in accordance with the spirit of the legislative enactments referred to above. This is pointed out in a recent work of Mahomedan law by Syed Amir Ali, who, in page 196, says: "Among the Hanafis the mother is entitled to the custody of her daughter until she arrives at puberty. Among the Maliki Shafees and Hanabalīs the custody continues until she is married. According to the judgment of the Court of Algiers it appears that in several notable instances the Hanafi Kajis have followed the Maliki doctrines, and decided that the mother is entitled to the custody of her daughters until their marriage."

[18] The result is that the order of the lower Court as regards Beebee Sulma will be set aside, and Mussamut Kajo will be declared entitled to the guardianship of her person. The parties will bear their own costs.

Decree modified

NOTES

[GUARDIANSHIP—

All the enactments referred to in the judgment of this case (Regulation X of 1793, Act XL of 1858, Act IX of 1861) have been repealed by the *Guardians and Wards Act* (Act VIII of 1890) which lays down both the law and the procedure to be followed.

Section 17 says:—(a) In appointing or declaring the guardians of a minor, the Court shall subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject* appears in the circumstances to be for the welfare of the minor.

(b) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes if any of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property

(c) If the minor is old enough to form an intelligent preference, the Court may consider that preference. The above provisions are in conformity with the Mahomedan law and the Courts are bound to administer strictly in all questions affecting the custody of Moslem children the provisions of the Mussalman law regarding *Hizanat* (Ameer Ali's Muhammadan Law, Vol. II, p. 803.)

See also 11 Cal. 574, 14 Cal., 615.]

[10 Cal 18]

APPELLATE CRIMINAL

The 2nd August, 1883.

PRESENT

MR. JUSTICE PRINSEP AND MR. JUSTICE TOTTENHAM

In the matter of the petition of Anand Lall Bera and others

Anand Lall Bera and others

versus

The Empress, on the prosecution of Azim, peon

*Public servant—Resistance to public servant—Warrant—**Return of warrant—Penal Code, s 183.*

A person was convicted under s 183 of the Penal Code for offering resistance to the attachment of property by a public servant. The offence was committed on the 4th of February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held* that the conviction was bad.

IN this case the accused were found guilty by the Deputy Magistrate of Tumlook, in that they offered resistance to the taking of property by the lawful authority of a public servant, and thereby committed an offence punishable under s 183 of the Penal Code. The facts were that one Azim, a revenue peon in the service of Government, was charged with the execution of a warrant under the Public Demands Recovery Act, 1880, for the attachment of the moveables of one Tulseeram Bera. On the 4th of February last, the peon proceeded to execute the warrant, and while doing so, he met with obstruction and resistance from the accused. The warrant under which the peon acted was returnable on or before the 3rd of February.

The accused moved the High Court to quash the order of the Magistrate.

Baboo Jogesh Chunder Dey and Baboo Dwarkanath Mookerjee for the Petitioners.

The **Judgment** of the Court (PRINSEP and TOTTENHAM, JJ.) was delivered by

[19] **Prinsep, J.**—The petitioners were convicted under s 183 of the Penal Code for offering resistance to an attachment of the property of one Tulseeram Bera, which the Deputy Collector had ordered in execution of a certificate under the Public Demands Recovery Act (Beng Act VII) of 1880. The warrant under which the peon acted stated that the return should be made on or before the 3rd February.

The resistance, it has been found in the present case, was offered on the 4th February, and it is contended before us that under such circumstances, no lawful order was in force, and consequently the prisoner has committed no offence. It appears to us that, having regard to the terms of the second clause of

* Criminal Motion No. 166 of 1883, against the order of Baboo U. C. Batavyal, Deputy Magistrate of Tumlook, dated the 6th April 1883.

s. 251 of the Code of Civil Procedure, this objection is fatal to the conviction, and that the conviction, therefore, must be set aside and the fine, if paid, refunded.

Conviction set aside.

NOTES.

[PUBLIC SERVANT—

Resistance to a peon attaching under a warrant, the term of which had already expired is no offence under section 183 of the Penal Code, 10 Cal., 18, 1 Weir 184. So also resistance to a sheriff attaching under a defective warrant 49 P. R. 1905—6 P. L. R., 578. or to a Chaukidar attaching without the requisite written authority, 25-Cal., 274; or to a public servant who fails to bring the warrant with him under which he purports to act, *per* AIKMAN, J. In 27 All., 258]

[10 Cal. 19]

PRIVY COUNCIL.

The 4th April, 1883.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH AND SIR A. HOBHOUSE.

Nilmoni Singh Deo.Petitioner

versus

Umanath Mookerjee and others.Defendants.

Nilmon: Singh.....Defendant

versus

Bhoyharini Debi..... .Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Probate—Application for order revoking probate—Succession Act (X of 1865), s. 243—Locus standi of attaching creditor of next-of-kin to apply for revocation.

A will, on the evidence, was held duly proved. An application for revocation of probate was made by a judgment-creditor who had attached his debtor's right, title, and interest in family estate, whereof a one-fourth share would, but for this will, which made other dispositions, have been inherited by such debtor. Whether such an attaching creditor can oppose the grant of probate, or apply to have it revoked, is a matter of grave doubt, at least, in a case which is not founded on the ground that the probate has been obtained in fraud of creditors, *Baynath Sahar v. Desputty Singh* (I L R 2 Cal., 208, s c, 25 Suth W. R., 189) referred to, and *Komolochun Dutt v Nilruttun Mundle* (I. L R., 4 Cal., 360) distinguished.

[20] APPEALS consolidated and heard as one from two decrees of the High Court (10th September 1880), founded on one judgment, reversing decrees of the Judge of the Nuddea district (24th March 1879).

The judgment of the High Court, against which these appeals were preferred, disposed of two suits relating to the execution of the Will of the late Bamundas Mookerjee of Nuddea. One of the suits had been instituted on the 1st April 1876 by Bhoyharini Debi, wife of Tarachurn Mookerjee, to obtain a declaration of her right to a four annas share of a zamindari under the Will of Bamundas Mookerjee, her husband's father. The latter died on the 5th of January 1876, having devised by Will his zamindari and other property to his sons (of whom one was the respondent, Umanath Mookerjee), and grandsons, but excluding from the inheritance, except as to a house for residence and a small legacy for maintenance, his son Taranath. This son's share, had it gone

to him, would have been absorbed in payment of his debts; and accordingly it was withheld from him, and was given instead to Bhoyharini, his wife, as a provision for herself and her family. Bhoyharini's suit was brought against the Raja Nilmoni Singh Deo, who, holding decrees against Taranath for rent, had immediately, on his father's death, attached his share in the immoveable property understood to belong to the family.

This attachment had been held good, so far as that objection filed against it under s 246 of Act VIII of 1859 had been disallowed on the 11th February 1876.

The other proceeding out of which this appeal arose was an application by the Raja as Taranath's creditor, made on the 22nd December 1876, under s. 234 of Act X of 1865 (The Indian Succession Act), to obtain revocation of the probate of the Will of the said Bamundas, which on the day before, on the 21st December, had been granted to his sons (excepting Taranath), his grandsons, and Bhoyharini.

On the 20th February preceding, the same parties had obtained a certificate under Act XXVII of 1860 for collecting the debts due to the deceased Bamundas.

The Raja's petition for revocation, and Bhoyharini's suit, were heard together

[21] On the 3rd September 1877 the Judge of the Nuddea district gave judgment in both, and treating the question as being one between the Raja on the one side and Bhoyharini on the other, regarding the genuineness of the Will, he pronounced against it. He made an order revoking the probate. This order was, however, defective in this, that the Court had acted in disposing of the case in the above manner, without due notice to the members of the family, other than Bhoyharini, interested in the Will.

An appeal to the High Court (MARKBY, J., and PRINSEP, J.) resulted in a remand on July 9th, 1878, in regard to the above defect. On a re-hearing the Nuddea Court, then represented by another District Judge, gave a similar decision against the Will on the 24th March 1879.

This decision was reversed by the High Court on the 10th September 1880. in the judgment under appeal, delivered by MORRIS, J. (with the concurrence of PRINSEP, J.), the Will, on a complete view of the evidence, being held to have been duly executed. So much of that judgment as related to the right of Raja Nilmoni Singh to come forward as attaching creditor of Taranath and contest the factum of his father's Will, is reported under the title of *In the Matter of the Petition of Nilmoni Singh, Umanath Mukhopadhyaya v. Nilmoni Singh* (I. L. R., 6 Cal., 431).

The two Judges of the High Court were of opinion that a judgment-creditor who has attached property of his debtor, believed to have been inherited from his deceased father, may, where a Will of such father, at variance with the debtor's interests, is set up, apply for revocation of the order granting probate, if he has reason for disputing the genuineness of the Will. The High Court followed the law laid down in *Komolochun Dutt v. Nibruttun Mundle* (I. L. R., 4 Cal. 360).

Mr. R. V. Doyne appeared for the Appellant, the Raja Nilmoni Singh Deo, Bahadur.

Mr. Leith, Q. C., and Mr. C. W. Arathoon, for the Respondents, Umanath Mookerjee, Bhoyharini Debi, and others.

Mr. *R. V. Doyne* was heard upon the question of fact, whether the Will had been duly executed. He argued that the conclusion [22] of the two District Judges, given at distinct times, was correct, and that the deceased Bamundas Mookerjee had not executed it, whatever his intention might have been in having the draft prepared

• Counsel for the respondents were not called upon.

• Their Lordships' Judgment was delivered by

Sir R. Couch.—The question in these appeals relates to the execution of the Will of Bamundas Mookerjee, a large landed proprietor in the district of Nuddea, in Bengal, who died on the 7th of January 1875. He had at the time of his death three sons living, Umanath, Taranath, and Srinath, and three grandsons, Girendronath, Horendronath, and Norendronath (the sons of a deceased son named Arundas). The respondent Bhoyharini is the wife of Taranath. The appellant, the Raja, had in the years 1863 and 1864 obtained decrees against Taranath for over Rs. 60,000 in the district of Manbhoom, which had in 1872 been transferred into the district of Nuddea for execution

Immediately after the death of Bamundas, namely, on the 11th of January 1875, Umanath, Srinath, the three grandsons, and Bhoyharini presented a petition to the District Court of Nuddea, stating that Bamundas had given the whole of his property to them, by a Will dated 24th Pous 1281 (7th January 1875), and praying for a certificate for collecting the debts due to the deceased under Act XXVII of 1860. A deposition of Norendronath, one of the witnesses to the Will, proving its execution, was made on the 5th of February, and on the 20th of February the certificate was granted. On the 2nd of February the Raja, the appellant, applied for the attachment of the right, title, and interest of Taranath in certain immoveable property of the deceased Bamundas, and the attachment was made a few days after. Thereupon Umanath, Srinath, the grandsons, and Bhoyharini presented a petition to the District Court of Nuddea, under s. 246 of Act VIII of 1859 (the then Procedure Code) claiming to be in possession under the Will. On the 29th of June their claim was disallowed by the Officiating Judge, but by an order of the High Court, dated the 7th of September 1875, the order of disallowance was set aside, and the Court was instructed to take up the claim again, with special [23] reference to the question of possession. The Officiating Judge having called upon Bhoyharini to prove the execution of the Will (which he ought not to have done), and tried the case as if the question was the validity of the Will. The result of the hearing on the remand was that, on the 11th of February 1876, three-fourths of Bamundas' share and interest in the estates under attachment were released, and the attachment was held good as to the remaining one-fourth. The s. 246 provides that the order passed by the Court under that section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right within one year from the date of the order. Accordingly, on the 1st of April 1876, Bhoyharini filed her plaint in the District Court of Nuddea for a declaration of her right under the Will to a fourth share of the Zamindaries, etc., mentioned in the schedule thereto, left by Bamundas Mookerjee, situated within the jurisdiction of the Court. The suit was brought against the Raja, and against Taranath as a *pro forma* defendant. The Raja in his written statement, filed on the 7th of June 1876, objected that, as no probate had been taken out under the Will, as was required by law, the plaintiff was not entitled to bring a suit for declaration of her right, and alleged that Bamundas did not execute the Will, and that it was fabricated after his death by Taranath and his co-sharers in order to deprive him of the money due to him.

Before this Umanath, Srinath, Bhoyharini and the grandsons had, on the 14th of March 1876, presented a petition to the Judge of Nuddea, praying that probate of the Will, or if the Court thought they were not appointed executors under it, letters of administration with the Will annexed might be granted to them. The 24th of March was fixed for the hearing, and notice was ordered to be issued. On that date an order was made for granting probate, but before it was given Bhoyharini was to put in her husband's consent to her taking probate. It was not until the 21st of December 1876 that the Judge granted the certificate of probate, and what caused the delay in granting it did not appear. On the next day, the 22nd of December, the Raja presented a petition to the Judge of Nuddea, under [24] s. 234 of Act X of 1865, praying for an order setting aside the probate, on the ground that as by the Will the right of his debtor Taranath had, in a manner, been destroyed, and the Will had been got up with a view to defraud him, he ought to have had notice of the application for probate, and he had not had notice. Bhoyharini in her petition in answer, said that the Will was genuine, and was duly executed by Bamundas, and that the Raja could not become an objector in the probate case, and, consequently, was not entitled to apply to have it set aside.

It may be well to mention here that by Act XXI of 1870, the Hindu Wills Act, certain portions of Act X of 1865, the Indian Succession Act, are made applicable to Wills of Hindus in the territories subject to the Lieutenant-Governor of Bengal, and these portions include the different sections of the Act of 1865, which have been referred to in the course of this litigation.

The petition of the Raja for revocation of the probate and the suit by Bhoyharini were heard together, and issues were framed by the first Court on the 7th of June 1876.

The principal, and now the only material one is, was any Will executed by Bamundas on the 7th of January 1875? Evidence was given on both sides, and the Officiating Judge of Nuddea, on the 3rd of September 1877, ordered the probate to be revoked and dismissed Bhoyharini's suit against the Raja. Bhoyharini appealed to the High Court, which, on the 9th of July 1878, set aside the order as irregular, on the ground that notice of the application to revoke the probate had not been given to all the members of the family who were interested under the Will, the parties being at liberty to take fresh proceedings upon the original petition of the Raja. The decree in the suit by Bhoyharini was also set aside, and the case remanded to the lower Court to be reheard.

Fresh proceedings were taken and more witnesses were examined, and on the 24th of March 1879, the Judge of Nuddea gave his judgment. He first considered the question whether the Raja was entitled to be heard against the Will, and held that holding a decree against Taranath, and having attached Taranath's supposed share of the paternal estate immediately after the death of the father, the Raja did acquire such an interest in it as entitled him to oppose probate of the Will, which he contended was not executed by his debtor's father, and which purported to disinherit the debtor. He then held that the Will was not genuine, saying he concurred generally in the reasons for the conclusion that the Will was not executed by Bamundas given by the Officiating Judge in the judgment of the 3rd of September 1877. He said, however, that the propounders of the Will had succeeded in showing, beyond a doubt, that Bamundas did certainly contemplate the execution of such a Will, and that he caused a draft to be made. The probate granted on the 21st December 1876 was ordered to be cancelled, and the suit by Bhoyharini was dismissed with costs. The parties appealed to the High Court, which gave judgment on

the 10th of September 1880. The Court held that the Raja had such an interest in the property of the deceased as entitled him to dispute the genuineness of a Will which purported to divert the succession from Taranath to another, but that the Will was duly executed by Bamundas, and made an order in the application for revocation of the probate, and a decree in the suit by Bhoyharini accordingly, from which order and decree the Raja has appealed to Her Majesty in Council. The following passage from the judgment of Mr. Justice MORRIS states the reasons for the decision upon the former question:—

“ The first question that arises is, whether Nilmoni Singh, as a creditor of Taranath, has any *locus standi*, whether he has such an interest in the estate of the deceased Bamundas as gives him a right to apply for revocation of the probate granted of his Will. In support of the proposition that he cannot apply for revocation of probate, several authorities have been cited. In the matter of *Mee Tsee* (15 W. R., 351), petitioner, Mr. Justice NORMAN, delivering the judgment of the Court, says, ‘ We have no doubt of the soundness of the proposition that a person who is not next-of-kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the Will. In England it has been held, that even a creditor cannot controvert the validity of a Will, because it is a matter of indifference whether he should receive his debt from the executor or from an administrator.’ Then the case of **[26]** *Barj Nath Sahar v. Desputty Singh* (I. L. R., 2 Cal., 208, 25 W. R., 489) is quoted to show that the learned Judges there considered that, in this country too, creditors of the next-of-kin to the deceased are not entitled to have citation served upon them under s. 250, Act X of 1865, calling upon them ‘ to come and see the proceedings before the grant of probate or letters of administration.’ But this case came subsequently under the consideration of another Bench of this Court of whom a member of the present Bench was one, in connection with the case of *Komollochun Dutt v. Nibruttun Mundle* (I. L. R., 4 Cal., 360), and Mr. Justice MARKBY, in giving the judgment, made the following observations:— ‘ If we thought that the decision in *Barj Nath Sahar v. Desputty Singh* (I. L. R., 2 Cal., 208, 25 W. R. 489) went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling.’ We entirely concur in the opinion here expressed, and consider that it is applicable to, and meets the circumstances of, the present case. There is no question that Nilmoni Singh, immediately after the death of Bamundas, and before probate of his alleged Will had been taken out, attached the property, which is the subject of the suit of Bhoyharini, as the property of his judgment-debtor, Taranath, to which he had succeeded on the death of his father owing to the devolution of the property of Bamundas by natural succession to Taranath.”

In the case of *Barj Nath Sahar v. Desputty Singh* (I. L. R., 2 Cal., 208, 25 W. R., 489), a Hindu testator died, leaving B, alleged to be his adopted son, and C, who would be his heir in default of adoption, and made a Will of which B applied for probate, and it was held under the Succession Act and Hindu Wills Act that creditors of C were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision.

In *Komollochun Dutt v. Nibruttun Mundle* (I. L. R., 4 Cal., 360), the facts were that Komollochun and Joynarain, two brothers, originally held possession of certain joint properties in which they each had a half share. On the 8th of January 1872 Joynarain died childless, leaving a widow, who would, therefore, under the Hindu law, succeed to his estates. It did not appear that she ever got into possession of her husband's property, and on the 13th **[27]** November 1875 Komollochun obtained probate of a Will, executed by Joynarain shortly before his death. Before the grant of probate, namely, in

June 1875, the widow had sold her interest in her husband's estate to the plaintiff, Nilruttun, who brought a suit to recover her share of the property upon the strength of his purchase, alleging the Will to be a forgery. Komolochun, who was in possession, defended the suit, upon the ground that the Will was genuine, and that by it the property was bequeathed to himself for certain purposes therein specified. The Will having been found to be a forgery, the District Judge gave the plaintiff a decree for the share of the property which had belonged to the deceased. The High Court held that the probate was conclusive, and that an application should have been made to revoke it, and they postponed the final decision until the plaintiff had had an opportunity of making one. The whole passage, from which Mr. Justice MORRIS quotes a part, is as follows —

• “ If this procedure be followed we do not see what are the disastrous consequences of holding probate to be conclusive, to which the District Judge alludes. It was said that the plaintiff in this case would be remediless, because according to the decision in *Bainath Sahai v. Desputty Singh* (I L R, 2 Cal. 208, 25 W R, 489) he could not apply to revoke the probate. The point is not directly before us but, as at present advised, we think that the plaintiff could apply to revoke the probate. He is interested by assignment in the estate of the deceased, and if there be no Will he has a good title, at any rate, against Komolochun, as far as the Will is concerned, whether the sale by the widow Bogolamoye would be good as against the reversioners does not appear to have been raised and tried, we do not, therefore, see why he should not apply to revoke the probate. The ground of the decision in *Bainath Sahai v. Desputty Singh* (I. L R, 2 Cal., 208, 25 W. R., 489) was that the party there, a creditor of one of the next-of-kin, had no interest in the estate of the deceased. A purchaser from the next-of-kin is in a very different position from a creditor. If we thought that that decision went as far as to hold that a purchaser, or an attaching creditor, could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling ”

The case in which this judgment was given was that of a purchaser from the heir, but no distinction is made between a purchaser and an attaching creditor. Assuming that a purchaser can oppose the grant of a probate, or apply to have it revoked [28] (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. But as, after hearing the appellant's Counsel upon the question of the execution of the Will, their Lordships did not consider it necessary to hear the Counsel for the respondents, the question whether the Raja could apply for the revocation of the probate has not been argued before them, and therefore they give no final opinion upon it.

They consider that the appeal should be decided in favour of the respondents, on the ground that the High Court was right in holding that the Will was duly executed by the testator. The effect of the Will is to give the share of Taranath to his wife Bhojharini, and it is expressly stated in it that it is the object of the testator to prevent Taranath's share falling into the hands of his creditors. Some time before his death the testator had had a draft Will prepared, and sent it to be inspected by two members of his family, and a vakeel named Parasaram Mustafi. The latter drew up a revised draft Will, and took it to Bansbaria, where Bamundas then resided. He approved of it, and directed Chunderkant Surbogy to take and show it to his sons at Birnuggur, where the family residence was. This he did, and returned with it to Bansbaria. On the day of his return, and the next day, Bamundas was unwell; but on the day

after he asked him about the draft, and on Chunderkant saying that he had shown it to his sons and grandsons, who had no objection to offer, he directed him to make a fair copy of it. The fair copy was made, and was read and approved by Bamundas, and then entrusted to his grandson Norendronath to keep. This was done a fortnight before his death, and the respondents' case was that, on the evening on which he died he asked for the Will and duly executed it. The Raja's case was that he died without having executed it, being too unwell to do so, and that it was taken to Birnuggur, and his signature put to it there on the next day. The Will was attested by Norendronath and Chunderkant Mookerjee, who was the gomashita at Birnuggur, and they deposed to its execution as required by the Hindu Wills Act. Dinonath Sen, the gomashita at Bansbaria, did not attest it, but he deposed to having [29] seen it executed. It was argued that his not attesting showed that the signature of Bamundas was forged, and that the signatures of the witnesses were put to the Will at Birnuggur on the next day when Dinonath was not there. Other circumstances of a similar character were relied upon as suspicious, and a case to prove that Bamundas died suddenly under entirely different circumstances from those described by the witnesses of the respondents was at first set up by the Raja, but it broke down, and was not pressed either in the first Court or in the High Court. After a full examination of the evidence and the judgments of the first Court on the original hearing and the remand, the High Court came to the conclusion that there was no sufficient reason for disbelieving the testimony of the attesting witnesses and Dinonath Sen, and that it was impossible to discredit the direct and indirect evidence which was presented to prove the genuineness of the Will. Their Lordships have come to the same conclusion. Looking at the facts which are not disputed, it appears to them that, so far from there being ground for disbelieving the witnesses, it is more probable that Bamundas carried out his intention to make the Will, and did execute it in the manner stated, than that he died so suddenly as to be unable to do so.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal, the costs of which will be paid by the appellant.

Appeal dismissed.

Solicitors for the Appellant: Messrs. Lambert, Patch, and Shakespear.

Solicitor for the Respondent: Mr. J. L. Wilson.

NOTES.

[WHO MAY APPLY FOR THE REVOCATION OF A PROBATE—

An application for the revocation of a probate can only be made by a person claiming an interest in the estate (i.e.) whose interest would be affected if the will in question was the legal will of the testator, 15 W. R. C. R. 351. See also 21 Cal. 697. An heir or one who is interested to support a previous will (17 Mad. 373) a presumptive reversioner even during the lifetime of the widow (8 Cal. 570 21 Cal. 539), a widow, though the testator may have left sons, (11 Cal. 492 1 C. W. N. 602) an assignee or mortgagee of an heir's interest in the estate (4 Cal. 360 20 Cal. 37)—all these were held to be persons claiming such an interest in the estate.

But an ordinary creditor of an heir of the testator would not, as such, have any interest to apply for revocation, 2 Cal. 208 17 Mad. 373... 25 W. R. C. R. 489. The Privy Council in 10 Cal. 19 entertained grave doubts whether an attaching creditor can apply for a revocation of probate at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. In a subsequent case the Calcutta High Court purporting to act on the opinion expressed by the Judicial Committee held that an attaching creditor was entitled to oppose the grant of probate on the ground of forgery and that it was in fraud of creditors. See also 28 Cal. 441, 16 C. W. N. 1099=15 I. C. 686=17 O. L. J. 230.

A creditor of the testator would not as such have any interest to oppose the will, nor a person disputing the right of the testator to deal with certain property as his own, 17 Cal. 48.

The objections referred to above should be taken at the earliest opportunity, 2 N. W. P. H. C. R. 268.]

[30] PRIVY COUNCIL.*The 28th and 29th June, 1883.*

PRESENT

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, and SIR A. HOBHOUSE

Situl PurshadPlaintiff

versus

Luchmi Purshad and others..... Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Mortgage--sale of perpetual lease, with conditional agreement to sell
back to vendor, not amounting to mortgage—Reservation of
right to repurchase—Right to redeem.*

A purchaser of land, another person advancing the purchase-money for him, granted to the latter a mokurari potta or perpetual lease, not as a security for the debt, but as an absolute acquittance of it. At the same time an ekrarnama was executed, whereby it was stipulated that when the grantor or his heirs should pay to the grantee or his heirs the amount of the above debt without interest, out of his or their own moneys without borrowing from any other person then the potta should be cancelled, the grantor having no claim to mesne profits during the possession of the mpkuraridai

Held that, with regard to the terms of the instruments, and the circumstances under which they were made, this transaction was not a contract of mortgage, but evidence of a sale and acquittance of a debt with power reserved to the vendor to repurchase under certain conditions personal to him

Two appeals, consolidated and heard as one, from two decrees (21st July, 1880) of a Divisional Bench of the High Court, affirming two decrees (2nd and 3rd July 1879) of the Subordinate Judge of Bhagulpore.

The first of these appeals arose out of a suit brought on 19th March 1879, by the appellant against the respondents, and one Chuknarain Singh, since deceased. The second arose out of proceedings taken in execution of a decree obtained by the appellant against the last-named person, in which the respondent, Luchmi Purshad, had intervened as objector. Both related to interests in fifty-two villages, part of taluk Barasha in the Bhagulpore district, and both raised the question whether the appellant, Situl Purshad, in the one case, as purchaser of an interest in part of that estate, and in the other case, as decree-holder who had attached another part, had or had not acquired through Chuknarain a right to treat the property as subject to a mortgage which he was entitled to redeem.

[31] A mokurari potta of all the abovementioned villages had been executed by Chuknarain in favour of the predecessor in estate of Luchmi Purshad, the respondent, a right being reserved to Chuknarain, by ekrarnama of even date with the potta, to cancel the lease on making a certain payment out of his own money without borrowing for the purpose. Whether this transaction was in effect a mortgage from which the estate was redeemable by Chuknarain's assignee was the question in dispute.

Chuknaram was half-brother of Ramchurn Singh, who was father of Luchmi Purshad, and had a brother Chundi Purshad Singh. In 1857 these three brothers purchased for Rs. 1,30,000 a fourteen-annas share in taluk Barasha, Ramchurn taking a ten-annas share, and the other two each taking two annas. Ramchurn furnished the whole purchase-money, and for the price of the others' shares he obtained a decree in September 1862. This not being paid, Ramchurn took from Chuknaram, on the 15th January 1864, a mokurari potta of his share, consisting of fifty-two villages. The potta contained a statement that Rs. 30,005 were paid as consideration for it, this sum being made up of Chuknaram's debt under the decree of 1862, other amounts due by him, and a sum of Rs. 10,000 paid in cash.

On the same date Ramchurn Singh by ekrarnama bound himself and his heirs to restore the property to either Chuknaram or his heirs, whenever he or they should pay the Rs. 30,005 without interest.

In May 1865 Chuknaram mortgaged his share above mentioned to the plaintiff (nominally to another person) for Rs. 50,000. This was paid off by sale to the plaintiff of Chuknaram's share in twenty-one of the fifty-two villages. The present question was not affected by an alteration, on a family allotment of the villages forming part of Chuknaram's share, nor by disputes which occurred in 1864 as to the terms of the ekrarnama, nor by the deaths of Ramchurn and of Chuknaram.

In the first of the present proceedings Situl Purshad, offering to pay the Rs. 30,005 mentioned in the potta of 1864, claimed, as assignee of Chuknaram, to redeem the twenty-one villages. The defence was that the stipulation in the ekrarnama was personal to Chuknaram and his heirs, admitting repurchase by him or [32] them, but giving no right to an assignee to redeem as upon a mortgage transaction. And this defence the Subordinate Judge held good. The High Court on appeal upheld the decree dismissing the suit.

In the other proceeding Situl Purshad had obtained a decree on the 8th December 1876 against Chuknaram Singh and his sons for Rs. 2,25,280, in execution of which decree he applied to the Court to bring to sale "the rights and interests of the debtors in the profits of the mokurari property," so far as regards thirty-one of the villages included in it. Afterwards, on the 3rd February 1879, he applied for the sale, in execution of "the entire right and interest of the debtor, and the right to obtain back exclusive possession by repaying Rs. 30,005 the amount of nazurana bearing no interest according to the ekrarnama of 1864." Luchmi Purshad intervened as an objector under s. 247 of Act VIII of 1859 on the grounds taken in the defence above mentioned. This objection was allowed by the Subordinate Judge whose order was confirmed by the High Court.

Mr. J. F. Leith, Q.C., Mr. J. T. Woodroffe, and Baboo Otool Chunder Mullick appeared for the Plaintiff.

Mr. T. H. Cowie, Q.C., Mr. R. V. Doyne, Mr. J. D. Mayne, and Mr. H. Cowell for the Respondents.

For the appellant it was argued that the potta and ekrarnama of 1864 constituted a mortgage, and that according to the rule of equity, which maintained the right of redemption in all such transactions, the Courts should have held that a right to redeem had passed to the appellant as assignee of the mortgagor. The ekrarnama showed that this transaction was not a mere grant of a perpetual lease on the payment of a premium, with a condition for surrender on repayment. The true construction was that the re-transfer was to be on the footing of

redemption. Reference was made to Lord HARDWICK'S dictum in *Longuet v. Scawen* (1 Vesey Sen, 402), that equity leans extremely against contracts of repurchasing where the right of re-purchase is created at the same time, concomitant with the grant. Such a right as was reserved by [33] the ekrarnama was not of a purely personal character, only exercisable by those in whose favour it was stipulated, in this case Chuknarain and his heirs. Once established as a mortgage, a stipulation precluding the right of an assignee of the mortgagee would be void and ineffectual. According to Story's Equity Jurisprudence, para. 1019, if it should be expressly stipulated that unless the money should be paid by a particular person the estate should be irredeemable, the stipulation would be void—Story's Eq. Jurisp. 12th edition. Reference was made to the judgment in *London and South-Western Railway Company v. Gomm* (L. R., 20 Ch. D., 562), *Cummins v. Fletcher* (L. R., 14 Ch. D., 699, 708), *Dookchore Rai v. Hajeer Hidayat Ulla* (Agra H. C. F. B., 7), *Arman Pande v. Naurutton Koonwur* (3 Sel. Rep., S. D. A., 78), *Ichumbit Singh v. Kesho Lal* (20 W. R., 128).

By Regulation XV of 1793, s. 10, all mortgages are to be considered as in effect redeemed whenever the principal with simple interest due upon it shall have been realized from the usufruct or otherwise, and the same rule applies in zuripeshgi leases to the latter, the present transaction being closely analogous—see *Tewarce Loll v. Kasseenauth* (2 Hay, 256), Macpherson on Mortgages, Chap. VIII, Reg. XVII of 1806.

Counsel for the respondent were not called upon.

Their Lordships' Judgment was delivered by

Sir R. P. Collier.—The sole question to be decided in both these appeals is whether the plaintiff, in the first appeal as assignee, in the second appeal as execution-creditor, of one Chuknarain Singh, derived from Chuknarain a right to redeem certain villages which he alleged to have been mortgaged by Chuknarain. On the part of the respondents it is not disputed that if he is correct in his interpretation of these deeds, and the villages were mortgaged, he has the right which he claims. But it is contended that the deeds in question did not create a mortgage, but were a sale of the property with a provision for its re-purchase on certain conditions personal to the mortgagee.

In order to determine this question it is necessary to consider the circumstances under which the two documents which are relied [34] upon, namely a potta and an ekrarnama of the 15th January 1864, were executed, as well as to examine the documents themselves.

The circumstances were shortly these. Ramchurn was the eldest of three brothers, Chuknarain being a half-brother of the other two. Chuknarain purchased a 14-annas share of some 52 villages in a zamindari in the joint names of himself and his two brothers. It was intended that he should have 10 out of the 14 annas, and that each of his brothers should have two annas. He paid the greater part of the purchase-money, the brothers paid a comparatively small part of it, and they were indebted to him. In order to recover that debt, amounting with interest to upwards of Rs. 40,000, he brought an action, and obtained judgments against both of them for something more than Rs. 20,000. These were the transactions between the brothers at the time of the deeds being entered into.

On the 15th January 1864 a potta was entered into by Chuknarain Singh, in which he purports to grant in mokurari on perpetual tenure, to his brother Ramchurn, his two annas share in the 52 villages, at an annual rental of

Rs. 497. The deed contains these recitals. It speaks of the sum of Rs 30,005 as the consideration or peshkas nazurana money, "out of which," Chuknarain says, "I have taken Rs. 10,000 in cash for payment of the debt due to Baboo Ramchurn Lal Mahajun,"—that is another Ramchurn,—and the balance, Co.'s Rs. 20,005, was paid on account of the decretal monev, principal with interest, and costs incurred in the Zillah Court and the Sudder Court, as contained in the decision of the Principal Sudder Amin of Zillah Bhagulpore, dated the 10th September 1861, which was confirmed by the decision of the High Court of Calcutta, dated 10th September 1863, due to Baboo Ramchurn Singh, plaintiff decree-holder, from me, the declarant, defendant, judgment-debtor, after deduction of Rs 1,323 remitted out of the decretal money due to the said decree-holder, and of the amount of costs incurred in the Zillah Court, and also after deduction of one-half of the decretal money due from Baboo Chundi Purshad Singh, second defendant. and whereas a deed of acquittance of this date, with a receipt stamp affixed thereto, has been obtained by me from the said [35] decree-holder. I, the declarant, have, from the beginning of 1271 Fasli, executed this potta of perpetual mokurari lease," and so on. The potta, therefore recites that his mokurari lease was given upon an absolute acquittance of the debt, and not as a security for its payment

The ekrarnama of the same date must now be taken to be in these terms (there has been a dispute about the terms, which it is not necessary now to refer to). It was stipulated between the contracting parties that when Baboo Chuknarain Singh, or his heirs, paid off the said nazurana monev of Rs. 30,000, without interest, from their own pocket, without taking money from any other person, to Baboo Ramchurn Singh and his heirs, then Baboo Ramchurn Singh, or his heirs, would without demanding interest, return the said potta or perpetual lease to the said Baboo Chuknarain Singh, and Chuknarain Singh should have no claim in respect of the mesne profits for the period of the mokuraidar's possession

Now the question is, whether, as contended by the appellants. these documents, though they purport on the face of them to be a sale with a power of re-purchase, really amount to a mortgage, or whether, as contended by the respondents, the real intention of the parties was that which appears upon the face of them, namely, that there should be a sale, that the debt should be acquitted, and that there should be a power of re-purchase under certain conditions personal to Chuknarain.

Both Courts have found in favour of the contention of the respondents. Such finding, in the first place, is entirely consistent with the terms of both documents. The opposite finding would not be consistent with the terms of either, certainly not with the terms of the potta, which speaks of the debt having been acquitted and discharged. To hold that it was not acquitted and discharged, but that these documents were really a security for it, would be to contradict the terms of the instrument.

Then, again, looking at the surrounding circumstances, among other things, at the value of the property, which appears to have been fairly ascertained, and at the relations of the parties, their Lordships are of opinion that the Courts have come to the right conclusion, that this transaction is in fact what it purported to be, [36] and there is no sufficient ground for holding it to be what it did not purport to be, namely, a mortgage.

Under these circumstances their Lordships will humbly advise Her Majesty that these appeals be dismissed, and the judgment be affirmed. The appellant must pay the costs of the appeals, but as they have been consolidated, there will be only one set of costs

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Watkins & Lattey*

Solicitors for the Respondent: Messrs. *Barrow & Rogers*

NOTES.

[Followed in 29 Mad 307=16 M L J. 106, 8 All. 452 (457), 1 L B R 257 (258) See, as to cases on the construction of similar documents, paras 996-998, Gour's Transfer of Property Act, Vol. 2, 3rd edition].

[10 Cal. 36]

APPELLATE CIVIL

The 3rd May, 1883

PRESENT

MR. JUSTICE MITTER and MR JUSTICE WILKINSON

Abdool Hossein.....Plaintiff

versus

Lall Chand Mohtan Dass. . . Defendant.

Beng Act VIII of 1869, s. 38—Measurement of land—Fractional proprietor.—Parties

A part proprietor of an estate is competent under s 38 of Beng Act VIII of 1869 to apply for measurement of its lands after making the remaining proprietors parties to the proceedings.

Mr. *Twidale* and Moonshi *Serajul Islam* for the Appellant

Baboo *Ras Behary Ghose* for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and WILKINSON, JJ.) which was delivered by

Mitter, J.—The question in this appeal is, whether a part proprietor of an estate is competent under s. 38 of Beng. Act VIII of 1869 to apply for measurement of its lands after making the remaining proprietors parties to the proceeding. The plaintiff in this case had a fractional share in a certain estate. He applied for measurement of its lands under the aforesaid section, making his co-sharers defendants, alleging that they had colluded with the tenants. His application was allowed by the Collector. On appeal, the District Judge, relying upon a ruling of this Court, [37] in *Baba Chowdry v. Abedooddeen Mahomed* (4. L R., 7 Cal. 69), has reversed the order of the lower Court, holding that it had no jurisdiction to order a measurement on the application of a fractional owner of an estate.

It is contended before us that the ruling quoted is not applicable, inasmuch as it is not clear from it that all the proprietors were made parties in that case.

It seems to us that this contention is well founded. It does not appear from the report of the case cited that all the proprietors of the estate were

* Appeal from Appellate Order No 281 of 1882, against the order of H. Beveridge, Esq., District Judge of Patna, dated the 31st August 1882, reversing the order of C. Vowell Esq., Collector of that district, dated the 22nd April 1882.

parties to it. In another case—*Ishan Chunder Roy v. Busaruddeen* (5 C. L. R. 132), in which this question was raised and discussed, the learned Judge said: "It is contended that here the co-sharer proprietor has been made a party to the suit, and, therefore, the Court having all the parties before it is not prevented from dealing with the rights of the parties, and determining whether the lands can be measured or not, we are not prepared to say that there are not cases in which co sharer proprietors being made parties to the suit the right of the plaintiff to measure the lands may not be determined, but we think that under the special circumstances of this case it is unnecessary to determine this point."

It is clear that in this decision too the point now before us was not determined. The application of the plaintiff was dismissed upon certain special circumstances which are not applicable to this case. The same reservation was made in the case of *Moolook Chand Mundul v. Madhoo Soodun Bachasputty* (10 B. L. R., 398, note, 16 W. R. 126)

The point, therefore, comes up for decision before us for the first time. In *Chuni Singh v. Hera Mahata* (1 L. R., 7 Cal., 633), a question similar to the present was discussed and decided. That question was whether a suit for arrears of rent at enhanced rate brought by all the shareholders will lie, notice under s. 14 of Beng. Act VIII of 1869 having been issued at the instance of some of the persons entitled to the rent. The majority of the Judges on the Full Bench decided this [38] question in the affirmative. It appears to us that the reasons given by the learned Judges in that case will equally apply here, and will warrant us in deciding this question in favour of the plaintiff. Referring to the injustice of not allowing a part proprietor to make an application for the notice of enforcement being issued at his instance alone in a case where his co-sharers would not join him, GARTH, C.J., said "The reason of their refusing to join may be that they are colluding with or influenced in some way by the tenant. Are these recusants to be allowed to deprive their co-sharers of the means of enforcing their just dues or, on the other hand, to drive them to expensive, tedious, and inconvenient alternation of a butwara? I think not. The simple and obvious remedy for such a state of things is to allow the co-sharers, who wish to sue, to do so, by making the recusant co-sharers defendants in the suit. The Court will thus have all the parties before it and the means of doing justice between them." In another part of his judgment His Lordship says "The notice is to be given to the persons in receipt of the rent, which is the phrase used generally in the rent law, as signifying the landlord or landlords, and I think that those persons who are entitled to sue as landlords have also the right under this section to give the necessary persons notice."

These reasons equally apply to a fractional shareholder of an estate applying for measurement on the ground that his co-sharers have refused to join him. If the co-sharers are made parties, the tenants can have no reasonable ground of complaint. The proceedings will have the effect once for all of settling all questions regarding the measurement between themselves and all the landlords. As regards the question of costs, if it appears that the necessity for the application arose, not from the recusancy of the tenants, but of the co-sharers, the latter will be made liable for them.

We are, therefore, of opinion that the decision of the lower Court upon this point is erroneous. We accordingly set it aside, and remand the case to be tried upon the other points.

Appeal allowed and case remanded.

NOTES.

[Under the Bengal Act VIII of 1869 an application under sec 38 can be made by a part proprietor making the remaining proprietors parties to the proceedings, 7 Cal. 633, 10 Cal. 36; 11 Cal 615, 11 Cal. 644, 14 Cal 201 But it is extremely doubtful whether after the passing of the Bengal Tenancy Act (VIII of 1885) and in view of sec 188 of that Act these things may not now be done by a joint co-sharer, 17 Cal. 538; and it was also held that an application under sec. 158 of the Bengal Tenancy Act (sec 38 of Act VIII of 1869) cannot be made by one of several joint landlords]

[39] APPELLATE CIVIL.

The 19th July, 1883.

PRESENT

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Bakhr MohammedPlaintiff

versus

Doorga Churn Shaha and another... ..Defendants

Attachment—Civil Procedure Code (Act XIV of 1882), s. 266 —Property exempted from attachment—Execution of decree

Before property of a judgment-debtor can be exempted from execution as falling under the head of the property described in s. 266 of the Code of Civil Procedure, it is necessary that the Court should first express its opinion that such property is necessary to enable the execution-debtor to earn his livelihood, and the Court which must decide this point is the Court which issues the execution.

Section 14 (a), part II, chapter V, of the General Rules and Circular Orders of the High Court commented on.

THIS was a suit for recovery of possession of an ox (or for the value thereof), which had been seized and sold by a peon of the Court, in execution of a decree obtained by the first defendant against the plaintiff, the ox was purchased by defendant No. 2

The plaintiff, who was a cultivator, alleged in his plaint that the ox seized was one of a pair, which were kept by him for agricultural purposes, and that, as such, it was exempt from attachment under s 266 of the Civil Procedure Code.

The Small Cause Court Judge gave the plaintiff a decree for Rs. 15, the value of the ox, with proportionate costs against defendant No. 1, but dismissed the suit against defendant No 2, at the same time referring the question to the High Court, whether the plaintiff should be given a decree for damages, such a decree being of no use to him, inasmuch as it would be liable to be attached by defendant No. 1 in execution of the very decree in which his exempted property had been seized.

No one appeared for either party in the High Court.

The **Opinion** of the Court (GARTH, C.J., and MACPHERSON, J.) was given by

Garth, C.J.—It seems to me that in this case the plaintiff had no right of action.

* Civil Reference No 6 of 1883, from Baboo Jagaddurlabh Mozoomdar, Judge of Small Cause Court of Furrreedpore, dated the 23rd February 1883.

As a general rule, the defendant (the execution-creditor) would [40] have had a right to sell any moveable property of the plaintiff's for satisfaction of his debt, but amongst the exceptions to this rule are *such cattle as, in the "opinion of the Court, are necessary to enable the execution-debtor to earn his livelihood as an agriculturist"*

In order, therefore, to exempt from execution any cattle of the execution-debtor, it is necessary, as I take it, that the Court should first express its opinion that such cattle are necessary to enable the execution-debtor to earn his livelihood, and I also think it is clear that the Court which has to decide this point is the Court which issues the execution

If this is so, it follows that neither the execution-creditor nor the execution-debtor, nor any Court except that which issues the execution, has any right to determine this point, and in order that such Court may decide it, I think that the execution-debtor should have made some application to the Court on that ground

It may be that the rule laid down by the High Court renders it difficult, if not impossible, that the execution-debtor should make this application in proper time, and it is probable that this rule requires amendment. But this is not the fault of the execution-creditor, and it seems clear to me that, until the Court which issued the execution had declared the bullock in question to be necessary to enable the plaintiff to get his living, the bullock was not protected from execution

Furthermore, it does not appear that the plaintiff before the sale ever represented, either to the defendant or to the officer of the Court, that the beast was privileged from execution. This, I think, he was clearly bound to do.

Apart, however, from this first difficulty, which appears to me an insuperable one in the plaintiff's way, there is another, which arises upon the question of damages

Assuming that the sale was wrongful, still the proceeds of it were devoted to the payment of the judgment-debt due from the plaintiff to the defendant. The price of the bullock, Rs 15, which the Small Cause Court considers to be its full value, was paid to the defendant in execution *pro tanto* of the decree, and whatever may be the result of this suit, that money cannot be paid back again.

[41] As, therefore, the plaintiff has had full value for his beast in the shape of the Rs. 15 which was produced at the sale, it seems to me that even if the suit were maintainable the damages would be only the difference, if any, between the Rs 15 produced at the sale, and the value of a bullock of the same kind in the bazaar, plus the expenses of the sale, which of course the plaintiff had to pay.

The real truth seems to be that the High Court rule in this respect requires alteration. Those beasts used in agriculture are not privileged, until the Court has expressed an opinion that they are so, and the rule should be so framed as to allow of the execution-debtor making a claim in every case to have his beasts released, and to give the Court time to decide what may sometimes be a difficult question.

I think that the plaintiff's suit should be dismissed, but without costs.

Suit dismissed.

[10 Cal 41]

APPELLATE CIVIL

The 28th March, 1883.

PRESENT

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR JUSTICE MACPHERSON.

Ishan Chunder Chattopadhyia.....Plaintiff

versus

Shama Churn Dutt and others... ..Defendants

Landlord and Tenant - Ejectment, Suit for -- Denial by tenant of his landlords' title.

To a suit brought to recover rent in 1877, the defendant set up his lakeraj title, this suit was dismissed. In 1880, in a suit brought by the same plaintiff to obtain khas possession of the land in question in the former suit against the same defendant and three others claiming under the same title as himself the defence that the land was lakeraj was set up by all.

Held, that the case fell within the principle of the case of *Sullyabham Dassee v Krishna Chunder Chatterjee* (I L R, 6 Cal 55), and that the plaintiff, who had successfully proved that he had collected rents from the predecessors of the defendants, was entitled to evict them as trespassers on their failure to prove their lakeraj title.

IN 1880 the plaintiff (who formerly was a co-sharer with others [42] in, amongst other lands, the land in dispute in this case) brought this suit against the four defendants to establish his right and title to one bigha five cottahs out of the above-mentioned lands, and for the recovery of khas possession of the same.

In 1877 the present plaintiff had brought a suit against defendant No 1 (who had been registered as owner in the place of his deceased father, the former owner) for arrears of rent. In that suit defendant No 1 denied the tenancy, and set up a lakeraj title. This suit was dismissed, and the plaintiff thereupon obtained partition of the property from his co-sharers, and then brought this present suit against the four defendants for the recovery of the share which fell to him on partition.

All four defendants set up a lakeraj title to the land claiming under the same title.

The Munsiff found that the land was 'not the defendants' lakeraj land, but that it belonged to the plaintiff, and that he had formerly collected rent from the defendants' predecessors, and gave the plaintiff a decree declaring his right to the share claimed by him, but declined to evict defendants 2, 3 and 4, as no notice to quit had been served. Both parties appealed to the Additional Judge. As regards the defendants' appeal the Additional Judge found that they had failed to make out a lakeraj title, and dismissed their appeal. As regards the plaintiff's appeal the Additional Judge held that no notice to quit was necessary, inasmuch as the defendants had denied the plaintiff's title, but he further held that as the land sued for was held by the defendants as a single tenure under the plaintiff and his co-sharers, the plaintiff could not at his sole instance,

* Appeal from Appellate Decree No 1915 of 1881, against the decree of H. Beverley, Esq., Additional Judge of the 24-Pargunnahs, dated the 27th June 1881, affirming the decree of Baboo Uma Churn Dutt, First Munsiff of Baraset, dated the 28th July 1880.

turn out the defendants, but that his co-sharers should (notwithstanding that partition had been come to) be made co-plaintiffs in the suit, inasmuch as the defendants were no parties to the partition proceedings. He therefore held that the plaintiff was not entitled to khas possession, and dismissed their [his?] appeal.

The plaintiff appealed to the High Court and the defendants filed a cross appeal.

Baboo *Bhowanee Churn Dutt* for the Appellant

Baboo *Ambica Churn Bose* for the Respondents

[43] The Judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

Garth, C.J.—I confess I have had some doubt during the arguments, whether this case comes within the principle which has been so frequently acted upon in this Court, and of which the case of *Sattiyabhama Dassie v. Krishna Chunder Chatterjee* (I L. R. 6 Cal, 55) forms an example.

But on a closer investigation of the facts, and having regard to the way in which the defendants have framed their defence in the present suit, I am satisfied that it does come within that principle.

In the year 1877, one of the four defendants, who had registered himself as the owner of the property in the place of his deceased father, the former owner, was sued for rent by the plaintiff in respect of his, the plaintiff's share of this very land, and the defendant's answer in that suit was a denial of the plaintiff's title, and an assertion that he (the defendant) and his father had a lakeraj title to the property.

It is perfectly true that in his written statement in that case he also alleged that the land was so imperfectly described in the plaint, that he did not know for what rent the plaintiff was suing, but there was evidently nothing in that point, because there was no question at the trial as to the identity of the land in dispute any more than there has been in this suit. Any insufficiency of description, therefore, could not have misled the defendant.

It then appears that for some time before this former suit was brought, the plaintiff and his co-sharers had not obtained rent from the defendants, although their predecessors had done so in former years, when, therefore, the defendant in that suit denied the plaintiff's title, and set up a lakeraj title in himself, the plaintiff thought fit to proceed no further with his suit but he withdrew it, with the intention of bringing a fresh suit, for khas possession.

But before he brought this fresh suit, he and his co-sharers obtained a formal partition of the property, and he is now solely entitled by virtue of that partition to the particular area in the estate in respect of which he now sues for ejectment, and he brings his **[44]** suit against all the four defendants, who claim under the same title.

The lower Appellate Court has dismissed the suit upon the ground that the plaintiff's co-sharers should have been joined as co-plaintiffs, but I cannot understand upon what principle, because, since the partition, the plaintiff and his co-sharers have had no joint interest in the property, and the area, which the plaintiff now seeks to recover, belongs to himself alone, and his co-sharers have no interest in it.

Had the suit been for rent, it might have been different, because then, notwithstanding the partition, the obligation to pay rent would, in the absence of any separate collection, have been to the plaintiff and his co-sharers. But here the plaintiff sues to eject the defendants as trespassers from land which belongs to him alone; and to have joined his former co-sharers in such a suit would have been nothing short of a misjoinder of plaintiffs.

The real question in the case, which has been argued before us here, appears to be this—whether, in consequence of what the one defendant did when he was sued by the plaintiff in the year 1877, or in consequence of the defence which has now been set up in this suit, the plaintiff has any right to treat all the defendants as trespassers.

The point, I confess, which has rather weighed on my mind throughout the discussion has been, whether the three defendants, who were not sued in 1877, ought to be made answerable for the conduct of their co-defendant, so as to forfeit with him their rights as the plaintiff's tenants and if those three defendants in their defence to this suit had contended that they were the plaintiff's tenants, and that he could not sue to eject them without a proper notice to quit, I should be much disposed to hold that they had a good defence on that ground.

But instead of that line of defence these defendants are now urging here up to the very last the selfsame defence, which the one defendant raised in 1877, and taking that into consideration, I cannot doubt that what the one defendant did in the former suit was really the act of all the four and that he was in truth, as the registered owner defending the suit on behalf of them all.

[45] They now moreover set up an adverse title in their written statement. They say, and they have endeavoured to establish throughout, that they have a lakeraj (rent-free) title to the property.

This point has been found against them, and it being also found that formerly their predecessors in title did pay rent to the plaintiff or to his predecessors in title, it seems to me that the plaintiff's case is completely made out.

I have already said that I think the Court below was wrong upon the point of non-joinder of plaintiffs, and I consider that the plaintiff is entitled to recover the property in question. There appears to be no claim made here for mesne profits.

The judgment of the lower Courts will therefore be reversed, and the plaintiff will have his costs in all the Courts.

In accordance with this decision the Appeal No. 2142, which is a cross appeal by the defendants, will be decided in favour of the plaintiff.

That appeal will, therefore, be dismissed with costs.

Appeal allowed
Cross appeal dismissed

NOTES

[EJECTMENT—DENIAL OF LANDLORD'S TITLE—

It is now finally settled, that denial for the first time in the written statement is not sufficient; the denial should have been antecedent—2 Mad 346, 12 Mad 353, 15 Mad 123, 17 Mad 218; 13 Cal. 96, 23 Cal. 135, 28 Cal. 223, 33 Cal. 339; 36 Cal. 927, 15 Bom. 407, 18 M. L. J. 153. These are earlier cases—10 Cal. 41, 1 M. L. J. 218, 17 M. L. J. 287, 20 M. L. J. 415.]

[10 Cal 45]

APPELLATE CIVIL

The 21st May, 1883.

PRESENT

MR. JUSTICE MITTER AND MR JUSTICE WILKINSON

Lal Bahadoor Singh and others.Plaintiffs

versus

E. Solano and another... .Defendants.

Right of occupancy, Acquisition of—Occupation by ryot as malik—Rent Act (Beng Act VIII of 1869), s 6

It is only the holding of the father or other person from whom a ryot inherits that can be deemed to be the holding of the ryot within the meaning of s 6 of the Rent Act. Occupation by the predecessor in title is not such an occupation as will create in the holder of land any right of occupancy. Nor can the period during which the occupant of land is in possession as malik be included in considering whether he has acquired a right of occupancy such a right must be acquired against somebody, and cannot be acquired by a man against himself.

[46] Mr. Evans, Baboo Mohesh Chunder Chowdhry and Munshi Mahomed Yusuf for the Appellants

Mr. Trudale and Baboo Chunder Madhub Ghose for the Respondents

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and WILKINSON, JJ) which was delivered by

Mitter, J.—This was a suit to recover possession of 113 beegahs 5 cottahs of land in mouzah Mozufferpore. It appears that mouzah Mozufferpore was the estate of Koer Singh. It was confiscated for his rebellion, and was sold by Government in the year 1861. At that sale the defendants' predecessor in title, Mr. R. Solano, became the purchaser. The estate then continued in the possession of Mr Solano till the year 1878, when it was sold for arrears of Government revenue, and purchased by the present plaintiffs. This suit was commenced on the 23rd May 1879, and there is no dispute between the parties that the plaintiffs, after their auction-purchase, did not receive any rent on account of the land in suit from the defendants, who are the executors of the estate of Mr Solano. The defence in the case was that, although the estate was sold for arrears of revenue, Mr. Solano had another interest in the land in suit, viz. a gijashtadaree interest. In the second paragraph of the written statement the facts upon which this defence was raised are stated as follows — "That in 1222 Fasli (1814), the then proprietor of mouzah Mozufferpore settled with Mr Dalton, indigo planter of the Nonour Factory, 221 beegahs 15 cottahs 14 dhooors of land then covered with jungle. Mr Dalton cut down the jungle and brought the land under cultivation at his cost, and since that time Mr. Dalton and other owners of the Nonour Indigo Factory, one after another, continued to hold possession all along as ryots, and to pay the rent to the malik or proprietor and his representative. In 1264 Fash (1856), Mr. A. Louis conveyed by sale the Nonour Indigo Factory, together with the disputed and other lands, to Mr. Cole, who again transferred the same by

* Appeal from Appellate Decree No 893 of 1882, against the decree of J Tweedie, Esq., Judge of Shahabad, dated the 28th February 1882, affirming the decree of Baboo Ram Persad, Subordinate Judge of that District dated the 27th December 1879.

sale to Mr R. Solano, since deceased, ancestor of the defendants. The old papers relating to the disputed land were destroyed during the Mutiny by the rebels, along with other papers of the factory. Mr R Solano, [47] since deceased, ancestor of the defendant, purchased in 1861, mouzah Mozufferpore, wherein the disputed land lies, and, as shown above, he had before his purchase of the mouzah held an absolute gijashtadaree and occupancy right in the said land, which did not in any way become extinct or null and void after his purchase of the proprietary right and estate "

The lower Courts have dismissed the plaintiff's suit. They have held that it was proved on the evidence that at least from the year 1263 (1855), the land in suit has been in the possession of Mr Solano and his predecessors in title as ryots, and that the ryotee interest of Mr Solano in the aforesaid 113 beeghas was kept up after he became the proprietor of the estate. Upon this finding of facts the lower Courts, being of opinion that the defendants are in possession of the land in suit as ryots holding a right of occupancy under s 6 of the Rent Act, have dismissed the plaintiff's suit. It is contended before us that, accepting this finding of facts as correct, the lower Courts are in error in holding that any right of occupancy under s 6 of the Rent Act have been acquired by the defendants. This contention is based upon two grounds. 1st, that as before the purchase of the estate by Mr Solano it is not found by the lower Courts that he himself had been in possession of the lands in suit from the year 1263, but what has been found is that he and his predecessors in title had been in possession of it under s 6, the occupation by the predecessor in title is not such an occupation as would create in the holders of the land in suit any right of occupancy. The second contention is that supposing Mr Solano was entitled to tack on the possession of his predecessors in title to his own possession, yet the possession of Mr Solano between 1861 and 1878 could not be added to it so as to create a right of occupancy, because during that time he was in possession of the whole estate as mahik. We are of opinion that both these contentions are correct. It is quite clear that under s 6 of the Rent Act it is only the holding of the father or other person from whom a ryot inherits that can be deemed to be the holding of the ryot within the meaning of the section. That being so, Mr Solano could not rely upon the holding of his predecessors in title. Two cases have been cited before us in order to show that the contrary view [48] has been taken of this section. We have examined these cases, and we do not think that there is any foundation for the contention—*Huro Chunder Guha v Dutt* (5 W R Act X, Rul 55), *Watson & Co v Sharat Soondaree Dabee* (7 W R, 395). Then, as regards the question whether Mr Solano could rely upon his possession and holding as a ryot between the years 1861 and 1878, it seems to us that the decisions that have been cited before us are all one way. In an unreported case, viz., Regular Appeal No. 152 of 1877, decided on the 25th February 1879—*Kishen Pershad Singh v Rajah Radha Pershad Singh*, GARTH, C.J., with reference to the contention put forward in that case, viz., that one of the parties was entitled to a right of occupancy as he had held the lands in suit in that case in the double capacity of a ryot and as proprietor, said: "But we think that this view is contrary both to the letter and the spirit of the Rent law. A man cannot occupy the double character of landlord and ryot, or make a pretence of paying rent to himself for the purpose of acquiring an occupancy right against other people." It was held in that case that under the circumstances no right of occupancy could be acquired. The Chief Justice was of opinion that a ryotee holding would merge in the proprietary interest after the purchase of the latter. It is not necessary for us to express any opinion upon this question viz., whether a ryotee interest

merges and becomes extinguished as soon as the ryot purchases the estate in which the ryotee holding is situated, but the learned Chief Justice held in that case, for the reasons given in his judgment, that the ryots could not acquire a right of occupancy under the circumstances set forth above. In the case of *Savi v. Panchann Roy* (25 W. R., 503) it was held that, although a ryotee right would not merge, still it would remain in abeyance so long as the ryot would be in possession of the estate in another capacity. Mr. Justice AINSLIE, who delivered the judgment in that case, was also one of the Judges in another case of *Mokoondy Lall Doobey v. Crowdy* (17 W. R., 274). That case was decided by Mr. Justice LOCH and Mr. Justice AINSLIE. At first sight it would appear that that case was inconsistent with the decision of the learned Chief Justice [49] referred to above, but the explanation that Mr. Justice AINSLIE gave of his views upon the subject in the later case of *Savi v. Panchann Roy* (25 W. R., 503), goes to show that, so far as the actual decision of the subject is concerned, there is no inconsistency between the decision in *Mokoondy Lall Doobey v. Crowdy* (17 W. R., 274), and the unreported case cited above. Both in the cases of *Mokoondy Lall Doobey v. Crowdy* and *Savi v. Panchann Roy*, the Judges held that though the ryotee interest did not merge, yet so long as the ryot remained in possession of the land in a double capacity, that is as landlord and as ryot, he could not acquire a right of occupancy under s. 6, Beng. Act VIII of 1869. In this view we entirely concur. Section 6 says: "Every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him." This section, therefore, provides that cultivation or holding for a period of twelve years confers upon a ryot a right of occupancy, that is, a right to remain upon the land against the will of the landlord. This right of occupancy must, therefore, be acquired against somebody, and if a ryot is in possession of the land in a double capacity, both as a ryot and as a malik, it is almost impossible to conceive how he can, under these circumstances, acquire a right of occupancy against himself. Therefore, a reasonable view of the law is, that during the time a ryot remains in possession of the land in such double capacity, the operation of the acquisition of the right of tenancy remains in abeyance. In this view of s. 6, Beng. Act VIII of 1869, it is quite clear that, taking the finding of the lower Court as correct, the defendants cannot be considered to have acquired a right of occupancy. The decisions of the lower Court, therefore, upon this point are not correct. But having regard to the defence raised, we think that this does not wholly dispose of the case. The defendants have relied upon their guzashta right, and under s. 37, Act XI of 1859, an auction-purchaser of a revenue-paying estate has no right to eject any ryot having a right of occupancy at a fixed rent, or at a rent assessable according to fixed rules under the laws in force. The right of occupancy mentioned here is not necessarily the right of occupancy under s. 6, Beng. Act VIII of 1869, and the defendants' claim as guzashtadar rests upon ground [50] quite independent of the right of occupancy under s. 6, Act VIII of 1869. But it appears that the lower Courts have not inquired into this matter. We, therefore, remand the case to the Court of First Instance for re-trial upon the following questions: (1) whether Mr. Solano, at the time of his purchase in the year 1279 (1872), had any guzashtadaree right in the disputed land, (2) whether, if he had such guzashta right, it conferred upon him any right of occupancy, (3) whether that guzashta right was kept up during the years he was in possession of the estate as malik, viz., between 1861 and 1878.

The parties will be allowed to adduce evidence upon all these three points, and with reference to the second issue now laid down the lower Court will allow

evidence of custom to be given, if such evidence be tendered. Costs to abide the result.

Appeal allowed and case remanded.

[10 Cal 50]

APPELLATE CIVIL

The 3rd July, 1883

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND
MR JUSTICE MACPHERSON

Rakhal Churn Mundul Defendant

versus

Watson & Co Plaintiffs

Onus of proof—Obstruction to execution of decree by a claimant—Civil Procedure Code (Act VIII of 1859, s. 229) (Acts X of 1877 and XIV of 1882), s. 34—Settlement of julkur—Right in the soil.

In a suit under s. 229 of Act VIII of 1859 (s. 331 of Acts X of 1877 and XIV of 1882) the onus is on the plaintiff to establish a *prima facie* case of possession, and it is then incumbent on the claimant to answer that case and show, if possible, a better title.

There is no such broad proposition of law, as that the settlement of a julkur implies no right in the soil.

THIS was a suit under s. 229 of Act VIII of 1859.

The land in dispute was situated in mehal Bheel Bharat Gobindpur, and was a ryoti holding formerly owned by one Umakant Mozundar and others, and had been sold by them to Messrs Watson & Co., who after purchase sued Raja Pramatha Nath Roy, Zamindar of Dhulari, a contiguous mehal, for recovery of [61] possession of some land of which he was said to have wrongfully taken possession. In that suit Watson & Co., in 1871, obtained a decree for possession of the land sued for. In being put into possession by the Court, delivery of possession was obstructed by one Radharaman, who claimed a portion of the land as part of his patni taluq, Bheel Julkur Gobindpur. Watson & Co. complained to the Court of the resistance to their possession, stating that it was in point of fact made on behalf of the judgment-debtor. The Court held there was no substantial resistance to the delivery of possession, and directed a fresh warrant to issue for delivery of possession. Radharaman appealed from this order, and the Appellate Court, conceiving the case to be one falling under s. 229 of Act VIII of 1859 remanded it to the lower Court with directions to try it on the merits.

* Appeal from Appellate Decree, No. 684 of 1882 against the decree of A. J. R. Bainbridge, Esq., Judge of Moorsheedabad, dated the 9th December 1881, affirming the decree of Baboo Robi Chunder Gangooly, Munsiff of Azimgunge, dated the 12th January 1881.

At the remand hearing the Court found that Radharaman was the real claimant and not the judgment-debtor, but was of opinion that he had no right or title to the disputed land, and that he had never held possession of it, and finding that the land appertained to Mehal Bheel Bhaat Gobindpur and was comprised in the tenure of Messrs Watson & Co, made a decree in their favour directing possession to be given to them in execution of their decree.

Radharaman appealed, and the Court holding that the first Court had left the real question between the parties untried, remanded the case again for re-trial on the merits. In the meantime, under the order of the Appellate Court, the Civil Court Amoen delivered to the decree-holders actual possession of the undisputed property and nominal possession of the disputed portion of it.

Subsequently to the remand Radharaman's patni taluq, Bheel Julkur Gobindpur, was sold in execution of a decree, and was purchased by one Radhamadhub, who again sold it to Brojolah Mundul. Brojolah Mundul died, leaving a widow Shyama Sundari Das and a minor son Rakhai Churn Mundul, and he was substituted as defendant at the application of his mother who was his guardian.

The Munsiff found that the land claimed by the plaintiffs as part of Mehal Bheel Bhaat Gobindpur was formed more than 30 [52] years back by the drying up of the water, or by the silting up of the bed of the water of Bheel Julkur Gobindpur, and that possession of it was taken first by the plaintiffs' vendors and then by Raja Pramatha Nath Roy against whom the plaintiffs obtained their decree, and also found that Radharaman had no right or title to his land, it never having been proved that he had ever been in possession and that it had not been proved to have been part of his patni taluq, Bheel Julkur Gobindpur.

The defendant appealed to the District Judge who gave the following judgment: "Upon the local surveys and evidence it is clear that the decree under execution includes the entire block of land in dispute. That being so, the claimant has to satisfy the Court that he is entitled to ask it to abstain from delivering the land to the decree-holder. At most, the claimant can only show that he has acquired the julkur right over it, when submerged. The soil is now dry, and with the water the right over it, in other words, the subject of the julkur lease vanishes. *Prima facie* the very fact of the settlement of a julkur as such implies exemption of the sub soil because the soil would carry everything on it. As to the claimants' title by mere possession since the soil dried up, I concur with the Munsiff's finding against the fact. I dismiss the appeal."

The defendant appealed to the High Court.

Baboo Gouri Das Banerjee and Baboo Rash Behary Ghose, for the Appellant, contended that the Judge was wrong in holding that the mere fact of the land being included in the decree under execution was sufficient to throw on the defendant the burden of proving his title to the land, and that in construing the defendant's patni potta the Court ought to have held that the defendant's title was not limited to the julkur of Bheel Gobindpur as distinguished from the bed

Baboo Bhowani Churn Dutt for the Respondents

The **Judgment** of the Court (GARTH, C.J. and MACPHERSON, J.) was delivered by

Garth, C.J. - The suit out of which this proceeding arose was commenced some ten years ago. It was brought by the present plaintiffs against Raja

Pramatha Nath Roy to recover certain [53] land which they had purchased from Umakant Mozumdar and others

The plaintiffs obtained a decree for possession in 1874 and were proceeding to execute it when they were opposed by one Radharaman Munshoe, who claimed it as part of a patni taluq which he held under a potta from Raja Krishna Chund, which was granted in the year 1211 (1834)

Radharaman's claim was at first rejected, but he appealed, and after two remands this case came on to be tried between the plaintiffs and Radharaman under s 229 of the Code of 1859

It has now been tried by the two lower Courts, and comes up to this Court on second appeal but meanwhile, pending the proceedings, Radharaman sold his patni to one Radhamadhub, who again sold it to one Brojolah Mundul, who has since died and his widow Shivama Sundari is the present defendant

The land in dispute is a plot of deora land, which the plaintiffs claim under a darpatri lease as part of a mehal called Bheel Bharat Gobindpur, and the Munsiff finds that it was formed many years ago by the drying up of the water, or the silting up of the bed of Bheel Julkur Gobindpur, the defendant's taluq Bheel Bharat Gobindpur and Bheel Julkur Gobindpur are mehals held under different patnis from the same zamindar

The Munsiff further finds that this silting up occurred more than thirty years ago, and that possession was taken of it first by the plaintiffs' vendors, and then by Raja Pramatha Nath Roy, against whom the plaintiffs brought their suit, and obtained the decree

He also finds that there is no reliable evidence that Radharaman, the claimant, ever had possession of this land, that it has not been proved to form a part of Bheel Julkur Gobindpur

He, therefore, gave the plaintiffs a decree

The District Judge, as we understand, agreed with the Munsiff as to the question of possession, and confirmed his decree

Having now heard the case argued on appeal, we have no reason to believe that the conclusion at which the lower Courts have arrived is otherwise than correct

[54] But it has been contended by the appellant that the Judge has made two mistakes in point of law

(1st)-- That he has thrown the onus of proof on the wrong party, and

(2nd)-- That he has erroneously laid it down as a rule of law that the settlement of a julkur as such implies exemption of the sub-soil or, in other words, that the grant of julkur carries with it *prima facie* no right to the soil

As regards the first of these points we see no sufficient ground for impugning the lower Court's judgment

The Judge says, if we understand him rightly, that upon the question of possession he agreed with the Munsiff, and the Munsiff finds that upwards of thirty years ago the land in question silted up or became dry, and that since that time Radharaman had never held possession of it.

On the other hand, he finds that the persons who had possession of it during that time were first the plaintiffs vendors, and afterwards Raja Pramatha Nath Roy, against whom the plaintiffs brought their suit in 1874, and obtained a decree.

It is argued that under s. 229 the onus of proof is thrown upon the plaintiffs, and no doubt that is so. The onus of proof was thrown upon the plaintiffs in this case. They had to prove, to the satisfaction of the Court, that they, or the judgment-debtor, whose rights they had acquired by the decree, either had or were entitled to have possession as against the claimant. They proved this to the satisfaction of both the lower Courts, and so established a *prima facie* case, and it was then incumbent upon the claimant to answer that *prima facie* case, and show, if he could, a better title.

It does not at all follow that because the Court considers the claim of the claimant under s. 229 to be a *bona fide* one, the claimant is in point of fact in possession of the property. *Bona fide* claims to possession are constantly made by persons who never had possession and who are not entitled to it.

Whether the claimant really had or was entitled to the possession which he claimed under s. 229 was a question to be tried in this suit, and the plaintiffs, as I consider, fulfilled *prima facie* the onus which the law casts upon them, when they proved [55] that the judgment-debtor, whose rights they had acquired, held possession as against the claimant at the time when the latter made his claim.

If this were not so, s. 229 would be productive of the greatest injustice. A man who holds possession of property has a right to retain his possession, until some other person can show a better right to it. But if a man who merely claims possession under s. 229, without in fact being in possession, is to be entitled in law to possession as against the actual possessor, unless the latter proves his title, the consequences would be serious indeed. A claimant under that section, although he had no possession, would then be in a better position than the actual possessor.

The section may often operate unjustly enough against the decree-holder as it is, but the injustice would be far greater if the appellant were right in his contention.

The plaintiffs in this suit, having shown that at the time when the question arose in the execution proceedings they and then judgment-debtor, whose rights they had acquired, had held possession of the land for 30 years, and that the claimant had never been in possession, were *prima facie* entitled to a decree, but then comes the second point, that the Judge was wrong in laying down as law, that the settlement of a julkur implies no right in the soil. We quite agree that the Judge laid this down too broadly, more specially as, in the present case, we find that in the defendant's patni potta, the julkur mehal in question is called a *mouza*.

If, having regard to the acts found by the lower Court, we considered this question to be material to the determination of the suit, we should be disposed to remand the case to the Court below, to ascertain what passed by the patni grant. That question might depend in great measure upon what was the state of the locality at the time when the grant was made.

But as the lower Courts have found that the land in dispute silted up from the julkur more than 30 years ago, and that since that time the only persons in possession of it have been the plaintiffs and the Raja, against whom

they obtained their decree, and that the claimant has never been in possession of it, it seems to us that [56] whatever the rights of the latter may have been under the patni they must long ago have become extinguished by lapse of time (See s. 28 of the Limitation Act of 1877)

The appeal is therefore dismissed with costs.

Appeal dismissed.

NOTES

[1 ONUS IN CLAIM SUITS--

As regards this, see (1896) 22 Bom 967 (1901) 25 Bom 478

II MEANING OF JULKUR--

In *Amriteswar Deb v Secretary of State* (21 I A at 44--24 Cal 504) the Privy Council said, 'Then Lordships are satisfied that the term *julkur* is a general one, signifying 'water-rights' and might therefore aptly include the right to drift and strand timbers, as well as to right to fishing or any other interest of a similar kind in the produce of the river ']

[10 Cal 56]

ORIGINAL CIVIL

June, 1883.

PRESENT

MR JUSTICE PIGOT

Mohendro Nauth Dawn v Ishun Chunder Dawn

Inspection of documents -Practice- Affidavit of Documents--Insufficiency of affidavit--Alteration by letter of notice already served- Civil Procedure Code (Act XIV of 1882), ss 131 and 133

Before the Court will make an order under s. 133 of the Code of Civil Procedure the preliminary steps mentioned in s. 131 must be taken by the party applying for the order

THE plaintiff had filed a suit against the defendant on 1st December 1882, praying for dissolution of partnership, and for an account of the sale of a right to a certain patent medicine. The defendant put in an appearance, and the plaintiff, on the 19th December, obtained the usual order for the inspection of the defendant's documents. In pursuance of this order the defendant filed a verified list of documents with the usual affidavit on the 5th January 1883. The plaintiff objected to the sufficiency of the affidavit of documents filed by the defendant, and one Poomo Chunder Dawn, an uncle of the plaintiff, who was employed as a general assistant in the firm, made an affidavit stating that certain books of account had been kept by the firm, and that these were to his personal knowledge now in possession of the defendant, and had been last seen by him on the 22nd September 1882 when he had been refused further admittance to the shop by the defendant, he further stated that certain of the account books produced by the defendant imperfectly showed the sales of certain articles of the partnership, and that without the production of the books of account, which he alleged to be in the defendant's possession, and which were unproduced, the account could not be fully proceeded with. That the plaintiff's attorney had written to the defendant's attorney as to the production of these [57] books, and had threatened if they were not produced to take out a summons to consider the sufficiency of the affidavit of the defendant

The defendant failed to produce these books, and on the above affidavit of the plaintiff's uncle, the Court granted a summons calling upon the defendant to appear on the hearing of an application on the part of the plaintiff for an order to consider the sufficiency of the affidavit of the defendant filed on the 5th January 1883 as to the possession of documents pursuant to the order dated 19th December 1882

* The hearing of the motion was postponed from time to time, and on the 21st May 1882 the plaintiff's attorney wrote the following letter to the defendant's attorney —

" The summons herein was intended to be for production under s 132 of the Civil Procedure Code, but in accordance with the Registrar's opinion as to the proper form of summons the present summons was issued. But I am advised that the application should have been under ss 130 to 133 of the Code, and I propose to ask the Court to treat it as such, and if you are willing that the motion should be so treated my clients prepared, and hereby offers to pay any costs you may have incurred in consequence of the present form of the summons not sufficiently indicating that the motion is intended to be under ss 130 to 133 "

In answer to this letter the defendant's attorney returned the following answer — " Referring to your letter of date I cannot consent to your treating the application in any other way than that the notice contains. If you wish you can allow the present application to be refused with costs, and then make such fresh application as you may be advised "

The matter came on for hearing on the 11th June

Mr Phillips in support of the summons

Mr Bannerjee contra

Pigot, J.—This application must be refused. The reason why I dismiss it is a short one—the matter comes before me on summons for a better affidavit, and it is sought to alter the application into one under ss. 131, 132 and 133. I think that would [58] involve a power of making an order under s 133 more extensive than the Court has. Without expressing an opinion as to what order the Court would make in a case under s 133, in a case appropriate to it, I do not think that the Court would make any order under that section unless the preliminary steps had been taken by the party such as are set out in section 131, and I think that no notice purporting to be a notice under s 131 having been given, save the letter of the 21st May, and there having been no omission to give notice of the time for inspection and no objection to give inspection having been made, I am disqualified from acting under s 133. I dismiss the application on the simple ground that I am not clothed with authority to act under s 133.

Application refused

Attorney for the Plaintiff Baboo W. L. Bose

Attorney for the Defendant Baboo G. C. Chunder

NOTES.

[See also (1887) 14 Cal. 768. C. P. C. 1908. O. 11, r. 18.]

[10 Cal. 59]

ORIGINAL CIVIL.

The 12th August, 1883.

PRESENT:

MR JUSTICE PIGOT

Peacock and others

versus

Byjnath and others.

Practice—Consolidation of suits on application of plaintiffs.

- Consolidation of suits on application of plaintiffs allowed.

THIS was an application made on behalf of the plaintiffs on notice to the defendants for the consolidation of two suits pending in the High Court, and for an order that the evidence in the one suit be received as evidence in the other

The notice of motion served on the defendants was as follows:—

“Take notice that an application will be made on behalf of the plaintiffs in the suit of *Peacock v. Byjnath* for an order that this suit may be consolidated and heard along with suit No. 557 of 1882 which is now pending in this Honourable Court between the same parties, and that the evidence to be taken in the said suit may be read and filed as evidence in this suit, and that the time for the return of the commission in the said suit No. 557 of 1882 may be extended for three months, and that the plaintiffs and the defendants Byjnath may be at liberty to adduce such further evidence under the said commission as they may deem necessary for the purposes of this suit.”

[59] Mr. Stevenson, a member of the firm of Graham & Company, and the constituted attorney of the plaintiffs on affidavit stated, that the plaintiffs had had business transactions with the defendants, both in England and Calcutta, for the last eight years; the course of business being that the plaintiffs consigned piece goods to the defendants' firm at Calcutta, for sale by them upon special terms as to remittance of the proceeds of sale to the plaintiffs. That on or about the 27th September 1882, one of the partners of the defendants who was in England suspended payment, and on the 3rd October 1882, the firm of Graham & Company in Calcutta received a telegram from the plaintiffs directing them to bring a suit and obtain an injunction for protection of their goods in the hands of the defendants' firm in Calcutta, that such a suit was filed on the 5th October 1882 to recover 226 bales of piece goods, the suit being numbered 557 of 1882, that an agreement was come to between the plaintiffs and defendants, which was recorded in an order of Court, dated 30th October 1882, regarding the custody and future sale of the goods sued for, and the deposit of certain Government securities endorsed in the joint names of the plaintiffs' and defendants' solicitors, with the plaintiffs' attorneys to be held by them until the determination of the said suit and of any other suit or suits, that might, within six months from the date of the said order, be brought for the purpose of determining the rights of the plaintiffs or defendants, or of any persons claiming as consignors or vendors of all goods appearing by the books of the defendants' Calcutta firm to have been consigned from England to them and to have been sold and delivered since 1st January 1882. That the plaintiffs within the aforesaid period of six months filed the present suit on the 28th April 1883, which related to goods which were consigned by the plaintiffs

to the defendants for sale, and which had not been accounted for, and which it was believed had been disposed of by the defendants since January 1882, and asked for an account of the dealings between the plaintiffs and defendants, and for an enquiry as to damages, and that the securities deposited under the order of the 30th October 1882 might be applied towards payment of the amount due, and that that suit might be taken as supplemental to the suit 557 of 1882.

[60] The affidavit further set out that the defendants' written statement filed in the last suit advanced the same claim to the goods the subject of the suit as had been advanced by them to the goods, the subject of the Suit No. 557 of 1882, and repudiated the plaintiffs' claim on the same grounds, and further raised an objection to the later suit on the ground that the relief sought ought to have been claimed in suit No. 557 of 1882. That on the 27th January 1883 an order in suit No. 557 of 1882 was made that a commission should issue to take the evidence of one Evangelo Vasilopulo then in Calcutta, and that the defendant should within three months apply for another commission to England for the further examination of the said witness. That such further commission was issued in April 1883.

The defendants declined to consent to the consolidation of the two suits, and to the admission of the evidence in the one case as evidence in the other.

Mr. *Jackson* for the applicants cited an unreported case of *Khetter Mohun Doss v. Behari Lall Doss*, No. 264 of 1881, *Cecil v. Briggs* (2 Term. Rep., 639), *Amos v. Chadwick* (L. R., 4 Ch. D., 869), *The Melpomene* (L. R., 4 A. and E., 129), as showing that the application may be made by a plaintiff, *Nehal Singh v. Syud Ali Ahmed* (15 W. R., 110). The unreported applications in Suit No. 511 of 1881, and Suit No. 637 of 1881, heard on the 2nd March 1882, and in Suit No. 258 of 1880, viz., *Rumessor Dass v. Surrosuty Dass* were also referred to. The last was an application by defendants for consolidation, plaintiffs opposing, and there the order was made for consolidation, and the cases on consolidation cited in 1 Seton on Decrees, 326, were referred to.

Mr. *Phillips* for the Defendant Byjnath

Pigot, J., ordered the suits to be set down and heard together commission to be varied and to be considered as taken in both suits. Both parties to be at liberty to adduce such witnesses as they may be advised; plaintiffs to furnish defendants, and defendants to furnish plaintiffs in second suit, with list of documents duly verified by the plaintiffs' agents within ten days. Inspection to be given [61] immediately of all documents so set out, and, if necessary, order to be transmitted by plaintiffs, plaintiffs, if requested by defendants, to transmit order by wire to enable inspection of such documents as may have been transmitted to England at all reasonable times and places. Costs reserved, in dealing with which it should be considered whether plaintiffs were in default in not including all causes of action in one suit, or whether their conduct is susceptible of explanation.

Attorneys for the Plaintiffs Messrs *Roberts, Morgan & Co.*

Attorneys for Defendants: Messrs *Sanderson & Co.*

NOTES

[CONSOLIDATION OF SUITS—

See also (1894) 22 Cal. 511 at 517; 21 W. R. 196; 24 W. R. 217, 7 B. L. R. Ap. 42; 15 W. R. 110, 9 Bom. L. R. 1104.]

[10 Cal. 61]
APPELLATE CIVIL.

The 15th July, 1883

PRESENT

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE.

Kali Prosad Banerji. ... Judgment-debtor

versus

Messrs. Gisborne & Co ... Decree-holders.*

Court Fees' Act (VII of 1870), cl 17, s 19—Stamp on memorandum of appeal by judgment-debtor in custody from order refusing application to be declared insolvent.

A judgment-debtor, whilst in custody applied to the Court, under Chapter XX of the Civil Procedure Code, to be declared an insolvent. The application was refused, and the judgment-debtor appealed against the order rejecting his application. No Court-fee was affixed to the memorandum of appeal.

Held, that no Court-fee was leviable, under cl. 17 of s. 19 of the Court Fees' Act

IN this case Messrs. Gisborne & Co, originally sued the appellant for rent of an ijara held under them by him, and obtained a decree, at the request of the appellant, they agreed to take satisfaction by instalments. The appellant failed to pay one instalment, and was on the application of Messrs. Gisborne & Co., arrested in execution of their decree.

Having been so arrested, the appellant, whilst in custody, applied to the District Judge of Bankurah* to be declared an insolvent under the provisions of Chapter XX of the Code of Civil Procedure. The District Judge heard the application, and rejected it with costs on the ground that the applicant had fraudulently transferred his property to friends previous to the application.

The judgment-debtor, whilst still in custody, appealed against the order of the District Judge, but no Court-fee was affixed to the memorandum of appeal.

The Deputy Registrar was of opinion that cl. 17 of s. 19 of Act VII of 1870 applied only (1) to criminal matters, and (2) to petitions by a prisoner personally, and not to petitions presented on his behalf by his vakeel, and that the Court-fee was leviable under art. II sch II of the Court Fees' Act, as an appeal not from an order rejecting a plaint, or from an order having the force of a decree.

The Taxing Officer, on the matter being referred to him, was of opinion that the Court Fees' Act applied to both civil and criminal Courts, and that cl. 17 of s. 19 applied to the case of a person in duress, or under restraint of a Civil Court, and that the contention of the Deputy Registrar was erroneous.

He, therefore, was of opinion that as there was no appeal from an order directing the arrest of a judgment-debtor, and as the only way that a person under duress by order of a Civil Court, can get released from such duress, when the District Judge refuses to declare him an insolvent, was to appeal to the High Court against the District Judge's order as provided by s. 588, cl. 17 of the Code, the appeal was directly connected with the appellant's duress, and

* Reference under s. 5 of the Court Fees' Act VII of 1870

that consequently no Court-fee was required under cl. 17 of s. 19 of the Court Fees' Act.

The Taxing Master, however, referred the following questions to the Chief Justice under s. 5 of the Court Fees' Act:—

(1) Are the provisions of cl. 17 of s. 19 limited to petitions directly connected with the duress?

(2) If so, would the present appeal come within that category?

Garth, C.J.—I think that clause 17, of s. 19, Act VII of 1870 is applicable to a case of this kind, and consequently that no Court-fee is payable on the appeal.

[63] APPELLATE CIVIL.

The 8th June, 1883.

PRESENT

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE,
AND MR. JUSTICE MACPHERSON.

Amirunessa Khatoon and another..... Plaintiffs

versus

The Secretary of State for India in Council and others. . . . Defendants.*

* *Sale for arrears of revenue—Act XI of 1859, s. 33—
Notification of sale—Fraud.*

It is unnecessary to specify in the notification of sale the names of the mouzahs included in the property sought to be sold. All that is necessary is, to specify the estates, or shares of estates, and the number they bear in the Collector's Office.

Section 33 of Act XI of 1859 should not be read as meaning that under *no possible circumstances* can a suit be brought to set aside a sale on the ground of fraud.

For the purposes of the report the facts of the case are sufficiently set out in the **Judgment** of the Court (GARTH, C.J., and MACPHERSON, J.) which was delivered by

Garth, C.J.—In this case, which we heard yesterday, the suit was brought to set aside a revenue sale under Act XI of 1859.

For this purpose the plaintiffs relied upon certain irregularities, which are said to have occurred in carrying out the sale itself: and also, as the plaintiffs alleged, that their tehsildar had colluded with the servants of the defendant

*Appeal from Original Decree No. 152 of 1882, against the decree of Baboo Bani Madhub Mitter, Second Subordinate Judge of Backergunge, dated the 27th March 1882.

No. 1, who was the purchaser, to make default in payment of the revenue so as to bring about the sale of the property, and enable the defendant No. 1 to buy it at a low price.

The lower Court dismissed the suit upon the ground that the alleged irregularities were not (for various reasons) available to the plaintiffs, and with regard to the alleged fraudulent collusion the Court said this:

"It was argued that there was fraud on the part of the purchaser at the sale, inasmuch as he colluded with the servant of the plaintiffs, who made default in the payment of Government revenue; but under s. 33, Act XI of 1859, no sale can be set aside on the ground of fraud, so no issue was raised upon that point. If there was any fraud, on the part of the plaintiffs' [64] servants, or the defendant No. 1, the plaintiffs might sue them for damages if they liked."

On appeal to this Court two points only have been argued with regard to the alleged irregularity, which we think it necessary to notice.

It is said that the notice in the Sudder Cutchery was served on the 1st of March 1880, and the sale was advertised for the 30th of March, and as, therefore, notice was given less than 30 days before the sale, it was contended that the sale was bad. In support of that view a decision was referred to of Justices MITTER and NORRIS in *Bal Mokoond Lal v. Jirjuthun Roy* (I. L. R. 9 Cal. 271).

With this decision we entirely agree. But we find that this point was neither taken in the proceedings before the Commissioner, nor in the plaint in this suit, nor before the lower Court. And when we come to enquire into the facts, it is pretty clear why it was not taken, because it appears that the notice in question was not one of the two principal notices which have to be stuck up, the one in the Collector's Cutchery and the other in the District Court, but the notice which has to be put up in the Sub-divisional Court, under Beng. Act VII of 1868 with regard to which no particular time is mentioned. We think, therefore, that there is nothing in this point.

Another irregularity complained of was, that the names of certain mouzahs, which were included in the property, were not specified in the sale notification.

We think it clear, however, that the Subordinate Judge was quite right in the view which he took of that objection. He says that it is only necessary to specify the estates or shares of estates in the sale notification, and the number which they bear in the Collector's office. It was not necessary to specify the names of the mouzahs which were included in the property.

Then, as regards the allegation of fraud, as that point is of a novel character, and we have been referred to some authorities upon it, we think it right to notice it more particularly.

The lower Court took such strong view upon the subject that it refused to frame any issue, or to receive any evidence with reference to it.

[65] The Subordinate Judge considered that s. 33 of the Act of 1859 prohibited any suit being brought to set aside a sale on the ground of fraud

The section says "No sale for arrears of revenue shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and as the Act says nothing about fraud, it would seem that the Legislature intended that no sale should be set aside on that ground."

It is not necessary for us to go the length of saying that under no possible circumstances (such for instance, as fraud on the part of the Collector or his officers) could such a suit be brought, but when we consider the way in which the alleged fraud is sought to be used in this case, we think it clear that it could be no ground for setting aside the sale.

The sale is one made by the Government, and it is not suggested that the Government or its officers had anything to do with the fraud. The fraud alleged is, that the sale was brought about by the plaintiffs' servant making default in payment of the revenue in collusion with the servants of the defendant No 1.

The appellants' pleader contended that a revenue sale might be set aside on the ground of fraud and in support of that view we were referred to a case of *Joy Dooran Debba v. Gopal Chunder Banerjee* (9 W R 538) decided by Justices JACKSON and MITTER, in which Mr Justice JACKSON says "This suit in point of form was a suit to set aside a sale in the Collector's Court. There is authority for the opinion that a sale by order of a Revenue Court can be set aside by a decree of the Civil Court upon the ground of fraud, this having been directly ruled by a decision of the Full Bench in the case of *Nibman Burnack v. Puddolochun Chuckerbutty* (B L R Sup. Vol, 379, 5 W R. Act X, 20)

But when we refer to that Full Bench case we find that the learned Judge could not quite have apprehended its meaning; because no question arose there as to setting aside a revenue sale. The question was, whether, when a decree in the Collector's Court had been obtained by fraud, a Civil Court could, in a regular suit duly constituted for that purpose, set aside the decree, whether, in fact, a fraudulent decree in the Collector's [66] Court could be set aside by the Civil Court, and the Full Bench decided that it could. But this has nothing to do with setting aside a revenue sale on the ground of fraud. In fact, there is nothing in that decision, as far as we can see, which has the least reference to revenue sales.

The case which more nearly supports the plaintiffs' views in point of law is one of *Bhobun Chunder Sen v. Ram Soonder Swarna Mozoomdar* (I L R, 3 Cal., 300) decided by Justices BIRCH and MITTER. In that case one of several co-sharers had brought about the sale of a revenue paying estate, by not taking steps, as he was bound to do, to prevent the sale. In this he was found to have acted fraudulently to his co-sharers, and in order that he might buy up the whole property himself at a small price. The suit was brought to set aside that sale, and the Court below made a decree to that effect, but when the case came up here on appeal, we find that both learned Judges considered that the sale itself could not be set aside.

Mr. Justice MITTER says. "Although in the plaint there is a prayer for reversal of the auction sale, I do not think that under the circumstances of the case that prayer can be granted," and the decree made by the Judges was to the effect that as between the parties the defendant, who bought the properties in fraud of his co-sharers, should reconvey it to them upon being paid his purchase-money; or, in other words, that the defendant should take nothing by

his purchase, and that the parties should be placed in the same position *inter se* as they were before the sale. Whilst, therefore, this Court refused to set aside the sale, it gave the plaintiffs the relief which they sought, by restoring them to their former position.

It is possible, that in this case, the plaintiffs may have a similar cause of suit, as between them and the defendant No. 1, founded upon the fraud, which they allege in the plaint. But if so, that is not a claim of which they could avail themselves in the present suit, because they here sue *to set aside the sale* on various grounds of irregularity and illegality in the sale itself.

If the plaintiffs wish to avail themselves of the fraud which [67] they allege, they must make it the subject of another suit, and we think we ought to allow them an opportunity of doing so.

We, therefore, give them leave to bring another suit of that nature, though of course we say nothing as to their prospect of success.

This appeal will be dismissed with costs.

Appeal dismissed

NOTES

[I CONTENTS OF NOTIFICATION OF SALE FOR ARREARS OF REVENUE—

See (1886) 13 Cal 208 (217), (1903) 8 C W N. 337 (339).

II SETTING ASIDE REVENUE SALE FOR FRAUD—

As to when this may be done *see* (1901) 32 Cal 111 (115)=8 C W N 757]

[10 Cal 67]

APPELLATE CRIMINAL.

The 4th September. 1883

PRESENT

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Govinda Dass

versus

Dulall Dass and others.

*Magistrate, Powers of—Dismissal of complaint—Discharge of accused—
Code of Criminal Procedure, Act X of 1882, ss 253, 259.*

A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant cases not coming within s. 259 of the Code of Criminal Procedure, except in cases coming within the last clause of s. 253 of the same Code.

In this case a complaint was made before the Magistrate of Rungpore, on the 13th of July 1883, charging a Police constable with extortion. The hearing of the complaint was first fixed for the 23rd July, and afterwards postponed till the 3rd of August. On the latter day, neither the complainant nor his witnesses appeared, and the Magistrate discharged the accused on that ground.

* Criminal Reference No. 117 of 1883 and letter No 417S, from J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 28th August 1883

The case was then referred to the High Court under s. 438 of the Code of Criminal Procedure, by the District Judge of Rungpore, who was of opinion that the course taken by the Magistrate was contrary to the provisions of s. 259 of the Code of Criminal Procedure, the case not being a compoundable one.

No one appeared to argue the case

The **Judgment** of the Court (PRINSEP AND O'KINEALY, JJ) was as follows :—

We think that the Magistrate was not competent in this case—a warrant case not compoundable—to dismiss it because the complainant was absent

It appears that on the day first fixed for the trial the complainant attended with his witnesses, but in consequence of the [68] inability of the accused, a Police officer, to attend, it was postponed, the complainant and witnesses being bound over to attend on the day to which the trial had been postponed. On that day the accused alone appeared, and the Magistrate dismissed the case. Having regard to the terms of s. 259 we are of opinion that in warrant cases not coming within that section, except under the last clause of s. 253, which is not applicable, a Magistrate is not competent to pass an order of dismissal, or discharge in consequence of the absence of the complainant. The Magistrate should, in the case before us, have admitted the accused to bail, and as the complainant and his witnesses had given recognizances for their appearance, he should have enforced their attendance.

The case must, therefore, be tried.

NOTES.

[A Magistrate is not competent to pass an order of dismissal in consequence of the absence of the complainant in a warrant case—10 Cal 67 See also 4 C W. N. 26; 4 C W. N. 46; 1 C W. N. 57]

[10 Cal 68]
APPELLATE CIVIL.

The 21st May, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Modun Mohun Chowdhry and another.....Defendants
versus
Ashad Ally Beparee and others.....Plaintiffs.*

*Limitation Act (IX of 1871), sch. II, arts. 135¹, 145¹—Act XV of 1877,
sch. II, art. 135².—Possession under mortgage.*

Under a mortgage deed, which by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage money, the mortgagee, as absolute owner of the property, has twelve years from the time at which his right to possession commences, in which he may bring his suit for possession.

But where there is no such stipulation in the mortgage, the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace

Baboo Rash Behary Ghose for the Appellant.

Baboo Chunder Madhub Ghose for the Respondent.

* Appeal from Appellate Decree No 420 of 1882, against the decree of Baboo Nobin Chunder Gangooly, Second Subordinate Judge of Dacca, dated 27th December 1881, reversing the decree of Baboo Ravati Churn Banerjee, Second Munsif of Dacca, dated 14th February 1881.

† [Art. 135 :—

Description of suit	Period of limitation	Time from which period begins to run.
Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	Twelve years	When the mortgagee is first entitled to possession.]

‡ [Art. 145 .—

For possession of immoveable property or any interest therein not hereby otherwise specially provided for	Twelve years	When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.]
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§ [Art. 185 :—

Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	Twelve years	When the mortgagor's right to possession determines.]
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The sole question in this case was one of limitation, and the facts sufficient for the purposes of the report will be found set out [69] in the Judgment of the Court (GARTH, C.J., and MACPHERSON, J.), which was delivered by

Garth, C. J.—The plaintiffs in this case sue for possession of certain immoveable property. They claim under a deed executed by the defendant on the 13th Falgoun 1261 (28th February 1855), which is called in the plaint a *kutka-balk*, but which, upon the face of it, appears to be an absolute sale to the plaintiffs, for the sum of Rs 275.

It seems, however, that there was a verbal arrangement between the parties that the transaction should really be a mortgage, and that the money advanced should be paid off with interest at the rate of one per cent. per mensem in Bysakh 1262 (April 1855); the acts and conduct of the parties appear to have been entirely in favour of that view, and both the lower Courts concur in finding that the transaction was a mortgage and not a sale.

That being so, the question comes to be one of limitation, and it arises in this way.

It appears that in the year 1263 (1856), the plaintiffs took the usual proceedings to foreclose the mortgage, and after the year of grace had expired, they brought a suit to recover possession, but they were then defeated on account of some irregularity in the foreclosure proceedings.

They then, on the 27th Pous 1285 (13th January 1879), took fresh foreclosure proceedings, and at the expiration of the year of grace from that date they have again brought this suit for possession.

The first Court held that the plaintiffs were barred by limitation, upon the ground that limitation began to run against them from Bysakh 1273 (April 1866), when the first foreclosure proceedings came to an end.

The Subordinate Judge has reversed that decree, and has given the plaintiffs a decree for possession.*

On appeal to this Court it has been contended that, assuming the transaction to have been a mortgage (about which there is no question), the plaintiffs' right to possession accrued at the time when default was made in payment of the mortgage money, [70] that is to say, in Bysakh 1263 (April 1856), and that if it accrued then, the plaintiffs' right of action was barred in 1275 (1868), and that no subsequent foreclosure proceeding could revive their right

In support of that contention, we were referred to the case of *Denonath Gangooly v. Nursing Proshad Doss* (14 B. L. R., 87, 22 W. R., 90), decided by Justices MARKBY and MITTER..

In that case the mortgage was by conditional sale, and there was a stipulation in the deed, that if default should be made in payment of the mortgage money, the mortgagee should be at once entitled to possession without any foreclosure proceedings.

The mortgagor failed to pay on the day named, and foreclosure proceedings were taken more than twelve years after default. Then, after the expiration of the year of grace, a suit was brought by the mortgagee for possession, and it was held by this Court that the plaintiff was barred, because he ought to have

* Deciding that the case was governed by Article 135 of Schedule II of Act XV of 1877, but that under the Act of 1871 the suit was not barred

brought his suit for possession within twelve years from the time when his right to possession accrued.

Mr. Justice MITTER explains the ground upon which that case was decided in this way. He says, "from the terms of the conditional sale set forth above, it is evident that, on default of payment within the stipulated time, the mortgagee was entitled to take possession of the properties sold, unless restrained by any legislative enactment. It is said that he was so restrained by Regulation XVII of 1806. This argument entirely proceeds from a misapprehension of the provisions of that law. It is quite clear that parties are ordinarily bound by the terms of their contract, unless by legislative interference one or both of them are set at liberty to modify or annul any of its provisions to which they have mutually consented. The kutkabala in question expressly reserved to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time. Regulation XVII of 1806, or any other law, does not render such a stipulation inoperative between the parties. I am, therefore, of opinion that the mortgagee in this case, immediately on default of payment which occurred on the 9th of July 1855, was entitled to take possession of the properties mortgaged."

[71] And Mr. Justice MITTER further goes on to say that, although the mortgagee took proceedings for foreclosure and so became entitled to the property as absolute owner, those proceedings gave him no fresh right to sue for possession.

That case was followed by another to the same effect—*Lall Mohun Gungopadhyaya v. Prosunno Chunder Banerjee* (24 W. R., 433), decided by Mr. Justice JACKSON and Mr. Justice McDONELL, and both decisions were reviewed in a case which occurred in this Bench—*Noonoo Opadhyaya v. Lalla Gouree Churn* (1 Shome, 21), in which we agreed with the law laid down by Mr. Justice MITTER.

It will be observed that, in order to make these decisions applicable in any case, the mortgagee must, by the express terms of the mortgage, have a right to take possession upon default by the mortgagor in payment of the mortgage money, and unless there is that express provision in the deed, it has been held over and over again that the right of the mortgagee to make possession does not accrue until after the expiration of the year of grace.

It has been contended that the Subordinate Judge did not understand those cases, and from the fact of his saying that they have been dissented from by Mr. Justice PONTIFEX and other Judges in two cases—*Ghinaram Dobey v. Ram Monaruth Ram Dobey* (7 C. L. R., 580), and *Bromhomoy Das v. Jugobundhu Ghose* (7 C. L. R., 583), we think it very possible that he did not comprehend their true meaning.

The first of these cases—*Ghinaram Dobey v. Ram Monaruth Ram Dobey* (7 C. L. R., 580), was decided by Justices PONTIFEX and McDONELL; and it will be found not to conflict in any way with the authorities to which I have referred.

In that case no doubt the mortgagee had a right, by the terms of the deed, to take possession upon default of payment by the mortgagor. He did not take possession upon default, but he took proceedings for foreclosure; and the year of grace expired within twelve years from the time of default.

Within twelve years after the expiration of the year of grace he brought his suit for possession, not as mortgagee, but as absolute [72] owner of the property, and it was held that he was entitled to recover.

The case was governed by the Limitation Act of 1871, and as explained by Mr. Justice PONTIFEX, the plaintiff, if he had sued as mortgagee, had twelve years (under Article 35)† from the time when, as mortgagee, his right to possession accrued.

Before this period had expired, he had, by the foreclosure proceedings, clothed himself with a new character, that of absolute owner, and Article 145† gave him twelve years from the time when his title accrued to sue *in that character*.

The other case—*Bromhomoyi Das v. Jugobundhu Ghose* (7 C. L. R. 589), which was heard by Justices McDONELL and BROUGHTON—was decided upon precisely the same principle, so that neither of these cases conflict in any way, as the Subordinate Judge seems to think they do, with the authorities to which we have referred.

But whether he quite understood the distinction between the cases or not he appears to be quite right in his conclusions.

It is clear that limitation did not run, as the Munsif says it did, from Bysakh 1273 (April 1866), because the first foreclosure proceedings were void for irregularity, nor could the cases of *Dinonath Gangooly v. Nursing Proshad Doss* (14 B. L. R., 87; 22 W. R., 90), and *Lall Mohun Gungopadhy v. Prosunno Chunder Banerjee* (24 W. R., 433), apply here, because there was no stipulation in this case that the mortgagee should be entitled to possession on default of payment by the mortgagor.

The only time, therefore, from which limitation could run was the expiration of the year of grace, after the foreclosure proceedings in 1879.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[MORTGAGEE—SUIT FOR POSSESSION—

It has been held that if a mortgagor, who may, under the terms of the mortgage, on default of payment or otherwise, sue for possession as mortgagee, within the time allowed by art 135 of Act XV of 1877, commences foreclosure proceedings under Bengal Reg. 17 of 1806, and thus takes steps to alter his character he will under art. 144 be entitled to another 12 years from the date of such change of character.—7 C. L. R. 550. In 10 Cal. 68 it was held that this change of character into an absolute owner (by the expiry of the year of grace under the regulations) should be within the 12 years allowed by Art. 135, else he could not claim a fresh start of limitation from the date of foreclosure (10 Cal. 68).

As regards England, see *Pugh v. Heath* (6 Q. B. D. 345) 7 A. C. 235

Where art. 135 is applicable and the mortgagee has perfected his title under Reg. 1806, he has twelve years from the year of grace against the mortgagor and those deriving title from him after the application for foreclosure but not against those deriving title before such application.—(1885) 12 Cal. 644, (620) on appeal 16 Cal. 684 P. C. See also (1887) 14 Cal., 730 (736), (1890) 4 C. P. L. R. 99 (100), (1906) 9 O. C. 147 (151).]

[*Art. 35.—

Description of suit.	Period of limitation.	Time when period begins to run.
For specific recovery of moveable property in cases not provided for by this schedule, numbers 48 and 49	Two years	When the property is demanded and refused.]

†[*q. v. supra* X Cal. 68.]

[73] APPELLATE CIVIL.

The 15th August, 1883.

PRESENT .

MR. JUSTICE MITTER AND MR. JUSTICE TOTTENHAM. , .

Raghoo Pandey and another... ..Plaintiffs

versus

Kassy Parey and others. Defendants.†

*Limitation Act (XV of 1877), art. 148—Right to officiate as priest,
Nature of suit to establish*

A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property, and a suit to establish such right therefore falls under art 148 and not under art. 145 of the Limitation Act

Baboo Kashi Kant Sen for the Appellants.

Baboo Kuruu Sundhoo Mookerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and TOTTENHAM, JJ), which was delivered by

Mitter, J.—This is a suit for redemption of a certain share of *Brit Jugmanka*. It is a right to officiate as priest at funeral ceremonies of Hindus. The Munsif awarded a decree in favour of the (plaintiffs) appellants. The lower Appellate Court has reversed that decree, holding that under art. 145† of the present Limitation Act (No. XV of 1877), the claim is barred. It is of opinion that the right claimed is in the nature of moveable property.

It is contended in appeal that the right claimed is in the nature of immoveable property, and therefore the present suit falls under art. 148,† and not under 145.

* Appeal from Appellate Decree No. 1669 of 1882, against the decree of Baboo Dwarka Nath Mitter, Extra Subordinate Judge of Gya, dated the 27th of June 1882, reversing the decree of Baboo Mohendro Lal Ghose, Second Munsif of Gya, dated the 6th of February 1882.

† [Art. 145 —

Description of suit.	Period of limitation	Time from which period begins to run
Against a depository or pawnee to recover moveable property deposited or pawned.	Thirty years	The date of the deposit or pawn.]

[Art. 148.—

Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.

Sixty years

When the right to redeem or to recover possession accrues

Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.]

There is no doubt that the right in question ranks amongst immoveable property according to Hindu law. We need not here refer to the texts of the Hindu law bearing upon this question, as they are all collected in the two judgments of the Bombay High Court cited below, one of which was cited before us in the course of the argument, *Krishnabhat bin Husgange v. Kapabhat bin Mahalbhāt* (6 Bom. H. C., A. C., 137) and *Balvantrav v. Purshotram Sideshwar* (9 Bom. H. C., 99).

In *Futtehsangji, Jaswantsangji v. Desai, Kallian Sangji* [74] *Hukoomut Razi* (L. R., 1 I. A., 34, 13 B. L. R., 254), the Judicial Committee of the Privy Council, after referring to the rule of construction adopted by the Bombay High Court in the two cases cited above, observe (p. 50). "To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature, of immoveable property or of an interest in immoveable property, and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose."

In this case "the nature and quality" of the property in suit can be only determined by Hindu law, because it is not recognized as property in any other system of law.

Adopting this principle of construction, therefore, we must come to the conclusion that the present suit falls under art. 148 and not under 145.

We reverse the decision of the lower Appellate Court, and remand the case to that Court for the determination of the other question arising in it. Costs to abide the result.

Appeal allowed.

NOTES.

[In construing the term 'immoveable property' in Act XIV of 1859 which did not define the same, the Bombay High Court laid down that the term included hereditary offices in a Hindu community when such offices were incapable of being held by any person not a Hindu and the Privy Council approved of the Bombay rulings (21 W. R. 178 P. C.; 5 Bom., 322) where the cases are discussed.]

The term was, however, defined in Act I of 1868.]

[10 Cal. 74]

APPELLATE CIVIL.

The 23rd June, 1883.

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Hurronath Chowdhry.....Defendant

versus

Nistarini Chowdrani and others.....Plaintiffs.*

Appeal—Arbitration—Application to file award, Objections to—Civil Procedure Code (Act XIV of 1882), ss. 525, 520 and 521.

When an application is made to a Court to file an award under s. 525 of the Code of Civil Procedure, and an objection is made to the filing of it upon any of the grounds mentioned in

* Appeal from Appellate Decree No. 281 of 1882, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensingh, dated the 15th December 1881, reversing the decree of Baboo Tara Prosunno Ghose, Second Munsif of Attia, dated the 1st March 1880.

s. 520 or 521, the proper course for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award in which all the objections to its validity may be properly tried and determined.

Where no such ground of objection is made to the filing of the award, [75] and the Court consequently orders it to be filed, no appeal lies against that order.

Baboo Sreenath Das for the Appellant

Baboo Saroda Prosono Roy for the Respondents.

The facts of the case sufficiently appear in the **Judgment** of the Court (GARTH, C. J., and MACPHERSON, J.), which was delivered by

Garth, C. J.—This appeal comes before us under rather peculiar circumstances.

A dispute arose between the parties to the suit with regard to the boundary of their respective properties. The dispute was referred privately (without the intervention of a suit) to three arbitrators.

These arbitrators, having taken evidence and made a local investigation, made an award in favour of the plaintiffs on the 7th of Srabun 1286 (22nd July 1879).

The plaintiffs then petitioned under s. 525 of the Civil Procedure Code that the award should be filed in Court.

To this petition objections were made on the part of the defendant, stating various reasons why the award should not be filed, and, amongst others, that the arbitrators had been guilty of partiality and other misconduct, which would be grounds for impugning the award under ss 520 and 521 of the Code.

Upon these objections being made, the first Court (apparently with the full consent of both parties) fixed an issue for trial in this general form. "Whether the award could be filed and enforced?" Under this issue all the questions raised between the parties with regard to the validity of the award appear to have been fully discussed, and tried. Evidence was called by both sides, and in the result a decree was made, that the suit should be dismissed, and the application disallowed, the Munsif being of opinion that the arbitrators had proceeded to decide the matters in dispute in a manner not warranted by their authority, and that all the arbitrators were not present at the time when the ameen made a measurement of the land. This decision was appealed to the Subordinate Judge, and it appears that he also has again heard the whole case, and has come to the conclusion [76] (for reasons which in point of law appear to be unobjectionable) that the award is good, and that it ought to be enforced.

He, therefore, reversed the decree of the first Court, and ordered the award to be enforced; and he gave the plaintiffs their costs in both Courts with interest at 6 per cent.

The case now comes up to this Court on second appeal, and it has been contended by the appellant that, as the arbitration was a private one, and as the objections to the award, or some of them, were such as are mentioned in s. 520 or 521, the Courts below had no right in a proceeding of this kind to try the question as to the validity of the award, and that the proper course for the Court of First Instance to have pursued was to have dismissed the application, and left the plaintiff to bring a regular suit to enforce the award.

It was further contended that no appeal could in that case have been preferred from the order of the Munsif rejecting the application, and that the lower Appellate Court has acted without jurisdiction in entertaining an appeal at all.

Our attention has been called to a good many authorities, and specially to *Sashti Charan Chatterjee v. Tarak Chunder Chatterjee* (8 B. L. R., 315; 15 W. R., F. B., 9); *Rajchunder Roy Chowdhry v. Brojendro Coomar Roy Chowdhry* (21 W. R., 182); *Mudhusudan Das v. Adasta Charan Das* (8 B. L. R., 316 note; 12 W. R., 85), and *Boonad Mathoor v. Nathoo Shahoo* (I. L. R., 3 Cal., 375).

The result of these decisions is not very clear, but we are disposed to think that when an application is made to the Court to file an award under s. 525, and an objection is made to the filing of it upon any of the grounds mentioned in s. 520 or 521, the proper course for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award, in which all the objections to its validity may be properly tried and decided.

We also think, that where no such ground of objection is made to the filing of the award, and the Court consequently orders it to be filed, no appeal lies against that order.

[77] If either of the parties in this case had taken exception in proper time to the course which was pursued by the Munsif, and had applied to this Court under s. 622, it is probable that we should have stayed the proceedings.

But what has really taken place is this. Instead of dismissing the application, as he ought to have done, the Munsif has proceeded to try the questions at issue between the parties, precisely as if this had been a regular suit brought to enforce the award.

Both parties, so far as we can see, have consented to that course, and have brought forward all the arguments and evidence on both sides which they could have brought forward in a regular suit.

Moreover, the decision of the Munsif has been appealed to the Sub-Judge without any objection on the part of the respondents, and the case has been again heard on appeal before him, with the result that the Munsif's judgment has been reversed, and the award has been ordered to be enforced.

We are now asked on second appeal to say, that both the lower Courts have acted without jurisdiction, and to reverse the lower Appellate Court's judgment on that ground.

Now it appears to us in the first place, that if both Courts have acted without jurisdiction, and if this proceeding is not a suit at all, we have no more right to try the case on second appeal than the lower Courts had to try it. We ought, therefore, in that case to dismiss the appeal for want of jurisdiction to hear it.

But then it is argued that, if we cannot deal with it on second appeal, we ought at any rate to allow the appellant to apply to set the proceedings aside under s. 622 of the Civil Procedure Code. The answer to that is, that we have at present no application before us under s. 622, and if we had, I for one should certainly not be disposed to help the appellant, inasmuch as both parties have consented to try the cause as it has been tried, and I see no reason to believe that any injustice has been done.

But the proper view to take of the matter we consider to be this; it is clear that both parties have treated these proceedings, from first to last, as a regular suit to enforce the award. Both the Judges who have tried the case, and the parties themselves, have all dealt with it upon that footing; and the appellant is [78] wholly unable to suggest that, if these proceedings were set aside and the cause were tried again, it would be tried in any other way, or upon any other materials, than those on which it has been tried.

He has himself brought the case here on second appeal, as he could only have done in a regular suit, and the only difference which we can see from first to last between this proceeding and a regular suit, is that the plaintiff's application to the first Court is called a *petition* instead of a *plaint*, and that the case has been allowed to proceed without the payment of an institution fee.

The revenue is really the only sufferer. The error, if any, is a mere matter of form, which has not affected the trial of the case upon the merits, and which, therefore, (under s. 578 of the Code) we consider ourselves bound to disregard.

We find no reason to suppose that there is any error of law in the lower Court's judgment, except this informality, and we, therefore, think it right to entertain the appeal, and to dismiss it with costs.

Appeal dismissed.

NOTES

[This case was **overruled** by a Full Bench in (1893) 21 Cal., 213, where it was held that it was within the competency* of Courts to enter into the merits of objections to the filing of the award within sections 520, 521 C. P. C. 1882; in (1898) 25 Cal. 757 another Full Bench held likewise as regards objections outside those sections. See also 16 All. 231; 4 Mad., 319; 6 Bom. 663, 10 C. W. N. 601, 28 All., 621, 28 Bom., 237; 29 Bom., 621; (1909) P.L.R. 53

The C.P.C. 1908, sch II para. 21 enacts that where the Court is *satisfied* that the matter has been referred to arbitration, and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 15 is *proved*, the Courts shall order the award to be filed, etc. The italicised words give effect to the rulings in 21 Cal. 213 etc.]

[10 Cal. 78]

APPELLATE CIVIL.

The 2nd October, 1883.

PRESIDENT.

MR. JUSTICE MITTER AND MR. JUSTICE PIGOT.

In the matter of Obhoy Chandra Mookerjee.

Obhoy Chandra Mookerjee v. Mohamed Sabir.

Possession, Order of Criminal Court as to—Dispute likely to cause breach of the peace—Duty of Magistrate—Criminal Procedure Code (Act X of 1882), s. 145.

It is the duty of a Magistrate, before taking proceedings under s. 145 of the Criminal Procedure Code, to satisfy himself whether there is any dispute likely to cause a breach of the peace, and that the suggested apprehension of a breach of the peace is not merely colourable and made to induce him to deal with the matters properly cognizable by the Civil Court.

Mr. Bell for Petitioner.

Mr. Gregory for Opposite Party.

* Criminal Motion No. 248 of 1883, against the order of Baboo Dwarkanath Roy, Deputy Magistrate of Barisal, dated the 16th July 1883.

THE facts of this case sufficiently appear from the **Judgment** delivered by

Mitter, J.—I am of opinion that the basis on which the jurisdiction of Criminal Courts under s. 145 of the Code of Criminal Procedure is founded does not exist in this case.

[79] Section 145 says that, "whenever a Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, &c., &c.," then a proceeding under this section may be instituted.

In this case what happened was this: A police report was submitted to the Magistrate on the 8th November 1882, and in that report the police officer stated as his opinion that there was a dispute between the parties to these proceedings relating to a chur, and that in his opinion there was a likelihood of a breach of the peace. This opinion was based upon this ground. The police officer says that if one of the parties would attempt to collect rent forcibly from the ryots, there was a likelihood of a breach of the peace. Upon that, both the parties to these proceedings were called upon to show cause why they should not be bound down to keep the peace. They appeared and asked the Magistrate to allow them time to settle the matter amicably. For some reason or other this amicable settlement did not take place, and they were directed to enter into recognizances to the amount of Rs. 500 each, not to commit a breach of the peace for four months.

Then on the 15th Pous 1289 (corresponding with the 29th December 1882) an application was made by Mohamed Sabir, the opposite party, alleging that the applicant before us, viz., Obhoy Chandra Mookerjee, was about to commit acts of oppression upon his tenants, and in that application Mohamed Sabir also stated that some of the tenants had complained against the servants of Obhoy Chandra. On that very day his deposition was taken and he confirmed the statements made in his application. The Magistrate, without any further enquiry as to whether all these statements were correct or not, on the 2nd January 1883, upon this petition and the deposition of Mohamed Sabir, ordered the proceeding now before us to be instituted.

It appears to me that it was the duty of the Magistrate to see whether there was any dispute likely to cause a breach of the peace concerning this chur land before instituting these proceedings. He has acted simply on the statement of Mohamed Sabir, that is to say, he has assumed jurisdiction without really satisfying himself as to whether there was a dispute between [80] the parties. It may be that Mohamed Sabir was anxious to have the question of possession decided in a cheap way, but it was the duty of the Magistrate, under s. 145, to satisfy himself that really there was a dispute likely to cause a breach of the peace concerning this chur land.

On the whole, I am of opinion that the foundation upon which the jurisdiction of the Criminal Courts under s. 145 is based was wanting in this case. We therefore set aside the order, dated 16th July 1883, and the rest of the proceedings.

Pigot, J.—I entirely agree. I only wish to add that it seems to me that Magistrates ought to be very careful in acting under s. 145 of the Code of Criminal Procedure, so as to guard themselves from the danger of assuming jurisdiction in cases not really contemplated by the section, and where the suggested apprehension of a breach of the peace is little more than colourable, and made to induce the Magistrates to deal with matters properly cognizable by the Civil Courts.

Order set aside.

NOTES.

[The Magistrate should, before taking proceedings under sec. 145 of the Cr. P. C., 1898, satisfy himself whether there is any dispute likely to cause a breach of the peace; and any evidence taken *in the course of trial* cannot give him jurisdiction which he does not otherwise possess.—10 Cal. 71; 7 Cal., 385; 20 Cal., 513; 20 Cal., 520; 23 Cal., 557.]

[10 Cal. 80]

APPELLATE CIVIL.

The 15th August, 1883.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE TOTTENHAM.

Karoo Singh.....Defendant

versus

Deo Narain Singh.....Plaintiff.*

Review—Grant of application. Notice of—Hearing by successor—Civil Procedure Code (Act XIV of 1882), s. 624.

An application for review of judgment, upon a ground other than those mentioned in s. 624 of the Civil Procedure Code if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor. *Pancham v. Jhinguri* (I. L. R., 4 All., 278) dissented from.

THIS was a suit for possession of land. The Munsif gave the plaintiff a decree. The defendant appealed to the District Judge who reversed the Munsif's decision. The plaintiff then applied for a review, and the District Judge ordered notice to be given to the defendant. Before the hearing of the application the Dis-[81]trict Judge was transferred. His successor, considering that he was not debarred by s. 624 of the Civil Procedure Code from doing so, heard the application and reversed the judgment in appeal, restoring that of the Munsif. The defendant appealed to the High Court.

Baboo Ram Churn Mitter for the appellant.

Mr. C. Gregory and Baboo Jogesh Chunder Dey for the respondent.

The **Judgment** of the Court (MITTER and TOTTENHAM, JJ.) was delivered by

Mitter, J.—The question for decision in this case is, whether an application for review of judgment upon a ground other than those mentioned in s. 624 of the Civil Procedure Code, if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor.

* Appeal from Appellate Decree No. 1627 of 1882, against the decree of H. Beveridge, Esq., District Judge of Patna, dated the 14th of August 1882, affirming the decree of Baboo Kedarnath Roy, Additional Munsif of Patna, dated the 31st of August 1881

The learned pleader for the appellant contends that this question should be answered in the negative, and relies upon the provisions of s. 624 as construed in *Puncham v. Jhinguri* (I. L. R., 4 All., 278). The decision cited fully supports him. But with deference to the opinion of the learned Judges who decided that case we are unable to concur in the view taken by them. The learned Judges have pointed out the inconvenience and hardship which may ensue in certain cases if their interpretation of the section be adopted, but they nevertheless felt themselves bound to adopt it as they could not get over the plain language of the section. It appears to us that if the word "made" be literally construed, it would not ordinarily include a hearing and determination of the application for review. We quite agree with the learned Judges that if the word "made" be construed to include a mere physical presenting of the application, it would be reducing the provision of the section to an absurd and useless one. But s. 626 provides that the Court *shall* reject the application if it appear to it that there is not sufficient ground for review. Therefore, before the notice provided in clause (A) of this section is directed to be issued, the Judge who delivered the judgment [82] is required to consider *judicially* the merits of the application, and unless he is satisfied that there are *prima facie* grounds for review, he would not direct notice to issue.

The position of s. 624 lends some support to the contention that the word "made" does not include the hearing and the determination of the application for review. If it did, it would have been naturally placed after s. 626, which provides for the hearing and determination of an application for review.

We are, therefore, of opinion that the question raised before us should be answered in the affirmative.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[The C. P. C., 1908, sets at rest the previous conflict of cases like 10 Cal., 80; 18 Mad. 178, 16 Bom, 603, 13 Cal, 231, 12 Mad, 509, and those like 4 All 278, by enacting at the end of rule 2, Order 47, that "any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule 2, proviso (a) (Order 47) be disposed of by his successor. As to when the review may be disposed of, *see* also (1912) 17 C. W. N 403.]

[10 Cal. 82]

APPELLATE CIVIL.

The 26th July, 1883.

PRESENT ·

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Korban Ally Mirdha(Plaintiff)

versus

Sharoda Proshad Aich and others.....(Defendants)*

*Registration—Act (III of 1877), s. 17—Bond under Rs. 100—Compulsory
Registration—Priority—Mortgage bond—Duties of Subordinate
Court—Conflict of opinion in High Courts.*

A mortgage bond for Rs. 99, repayable in nine months and eleven days, with interest at the rate of 2 per cent. per mensem, does not require registration, but a registered mortgage bond for Rs. 195, subsequently executed, will have priority over it.

The lower Courts are bound to follow the concurrent decisions of the Court to which they are subordinate, and are not at liberty to adopt a contrary opinion expressed by another High Court.

IN this case the plaintiff alleged that the defendants, on the 19th of Bysack 1278 (May 1, 1871), borrowed from him Rs. 99 on a mortgage of certain property. The mortgage deed, which was not registered, stipulated that the loan should bear interest at 2 per cent. per mensem, and be repaid in Magh 1278 (January-February 1872). The plaintiff instituted the present suit on the 13th December 1881, dating his cause of action from the 1st of Falgun 1278 (12th February 1872). On the 14th of February 1882, one Sharoda Proshad Aich intervened in the suit, and was made a defendant on the allegations that the properties covered [83] by the plaintiff's deed had been mortgaged to him on the 20th of July 1881, to secure the repayment of Rs. 195, that his mortgage had been duly registered; and that, therefore, he was entitled to priority over the plaintiff, assuming the latter's mortgage was genuine, which he denied. The original defendants, the plaintiff's alleged mortgagors, denied the plaintiff's claim, and asserted that his bond was a forgery.

The Munsif fixed four issues, but, the only issues material for the purpose of this report were: (1) "did the plaintiff's bond create any lien on the property, the amount secured up to due date being more than Rs. 100, or is it admissible in evidence, (3) whether the registered kobala of Sharoda Proshad Aich is entitled to precedence. Both these issues [the first on the authority of,

* Appeal from Appellate Decree No. 2557 of 1882, against the decree of the Officiating District Judge of Burdwan, dated the 28th of September 1882, affirming the decree of Baboo Gobind Deb Moorkerjee, Munsif of Bood-Bood, dated the 30th of June 1882.

Himmat Singh v. Sewaram (I. L. R. 3 All., 157)] the Munsif found against the plaintiff, and he dismissed the suit with costs. The plaintiff appealed. On appeal the District Judge said :—

“ In the view I have taken of this case, it will only be necessary to consider the decision on the first issue. The Munsif has held that the bond sued on was a document of which registration was compulsory, and that the plaintiff's case thus wholly fails. He cites the authority of a Full Bench decision of *Himmat Singh v. Sewaram* (I. L. R. 3 All., 157), the facts of which were very closely analogous to the present case. It appears to me that the question is completely settled by the decision referred to, and I must therefore dismiss this appeal with costs. On the other points raised, such as the relative priorities of the plaintiff and the purchaser, Sharoda Proshad Aich, it is unnecessary to offer any opinion.” The plaintiff appealed to the High Court.

Baboo Joygopal Ghose for the Appellant.

Baboo Grija Sunker Mozoomdar for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The plaintiff in this case sues on an unregistered mortgage bond, the consideration of which is Rs. 99. The defendants, stated to be the mortgagors, denied the execution [84] of the mortgage bond. There is another party who appeared and was brought on the record, who claims this property as having been bought under an unregistered conveyance from the other defendants, the admitted owners.

Both the lower Courts, on the authority of the decision of a Full Bench of the Allahabad High Court, in the case of *Himmat Singh v. Sewaram* (I. L. R., 3 All., 157), have dismissed the case, holding that the plaintiff's mortgage bond was one of which registration was compulsory, and, therefore, cannot be made the subject of suit.

In our opinion the judgments of the lower Courts are erroneous, not being in accordance with a series of decisions delivered by this Court. The High Courts of Madras and Bombay, it may be observed, have adopted the same view of the law. The lower Courts are bound to follow the concurrent decisions of the Court to which they are immediately subordinate, and are not at liberty to adopt a contrary opinion expressed by another High Court.

We find, moreover, that the judgment of the Chief Justice of the High Court of Allahabad, in the case on which the lower Courts rely, refers expressly to a decision of this Court on the point in issue, so that the lower Courts had the means of ascertaining, if they did not otherwise know it, what rule they should follow. We would, however, refer the lower Courts to the judgments of this High Court in *Isham Chandra v. Soojan Bibee* ; (7 B. L. R., 14 ; 15 W. R. 331) ; *Rohinee Debia v. Shib Chunder Chatterjee* (15 W. R., 558) ; *Parchi Das v. Ahmedula* (12 C. L. R., 444) ; *Ram Doolary Koer v. Thacoar Roy* (I. L. R., 4 Cal., 61). The judgments of the other High Courts to the same effect are *Vasudev Moreskhar v. Rama Babaji* (11 Bom. H. C., 149) ; *Satra Kumaji v. Visram Hasgauda* (I. L. R. 2 Bom., 97), *Nana Bin Lakshman v. Anant Babaji* (I. L. R., 2 Bom. 353) ; *Narasaya Chetti v. Guruvappa Chetti* (I. L. R., 1 Mad., 378) ; and *Kattarmuri Jagappa v. Padalu Latchappa* (I. L. R., 5 Mad., 119).

But although the grounds upon which the lower Courts have dismissed the plaintiff's case are untenable, it is unnecessary [85] to remand the case for trial on the merits, because on another point we think that the suit must fail.

The plaintiff is opposed by defendant No. 5, whose title depends upon a registered conveyance, and this, it is settled law, must prevail over his unregistered mortgage-deed.

The appeal must, therefore, be dismissed, the orders of the lower Court being affirmed, but on grounds different from those stated in their judgments.

We allow no costs in this Court. The defendants will receive one set of costs in both the lower Courts.

Appeal dismissed.

NOTES.

[The Calcutta High Court excludes interest in ascertaining liability to registration :— 4 Cal. 61 ; 10 Cal. 82 ; 12 C. L. R. 414 ; as regards Madras, see 28 Mad. 105.]

[10 Cal. 85]

APPELLATE CRIMINAL.

The 4th September, 1883.

PRESENT.

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Empress

versus

Paramananda and others.

Jurisdiction—Officer invested with special powers—Sections 30, 34 and 209, Code of Criminal Procedure (Act X of 1882).

An officer invested with special powers under s. 34 of the Criminal Procedure should rarely if ever try a case himself under s. 209 of the Code of Criminal Procedure where it appears from some of the evidence that the accused might have been charged with an offence beyond the jurisdiction of the Magistrate to take cognizance of.

In this case the accused were charged with culpable homicide not amounting to murder, before the Deputy Commissioner of Sibsagar, an officer exercising the special powers conferred upon him under s. 34 of the Code of Criminal Procedure. The accused were convicted and sentenced by the Deputy Commissioner, but when this finding and sentence were submitted to the District Judge of the Assam Valley for confirmation he considered from some portions of the evidence that the accused might properly have been tried on a charge of murder. He therefore, submitted the case to the High Court, recommending that the conviction should be annulled, and that the Deputy Commissioner be directed to commit the case for trial to the Sessions Court.

No one appeared to argue the case.

* Criminal Reference No. 118 of 1883 and letter No. 1083 from C. J. Lyall Esq., Officiating Judge of the Assam Valley District, dated the 21st August 1883.

[86] The Judgment of the Court (PRINSEP AND O'KINEALY, JJ.) was as follows :—

The prisoner has been convicted under s. 304 of the Code of Criminal Procedure by an officer invested with the special powers described in ss. 30 and 34, of the Code of Criminal Procedure.

The Sessions Judge, to whom the sentence has been submitted for confirmation, has referred the case to this Court, as a Court of Revision, to have these proceedings set aside, and the Deputy Commissioner directed to commit the case for trial in this Court.

Section 209 empowers a Magistrate holding an enquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed. This is the course which we understand the Deputy Commissioner has taken, and we cannot, therefore, hold that it is not authorised by law, or that he has acted without jurisdiction merely because there is some evidence which, if believed, would substantiate the charge of murder an offence beyond his jurisdiction. At the same time we think that this course should be very rarely, if ever, taken by any officer invested with special powers under ss. 30 and 34, of the Code of Criminal Procedure, and that in adopting it, any such officer incurs a very grave responsibility. Looking to the evidence on the record, especially the medical evidence, we are not inclined to doubt the correctness of the finding of the Deputy Commissioner, and, therefore, we are unable to set aside the proceedings. The Sessions Judge will, therefore, proceed according to law.

NOTES.

[See also 12 Mad., 54, 24 Mad., 676 ; 8 Bom., 807 ; 13 Bom., 502 ; 25 Bom., 90]

[10 Cal. 86]

APPELLATE CIVIL.

The 15th August, 1883.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE TOTTENHAM.

Deo Prosad Sing.....Plaintiff

versus

Pertab Kairee.....Defendant.

Limitation Act (XV of 1877), s. 14—Deduction of time during prosecution of suit with due diligence—Defect of jurisdiction—Cause of like nature.

On the 2nd of September 1869 a suit was instituted for, among other things, the possession of land claimed under a kobala dated the 31st October 1867. This suit was dismissed on the ground of misjoinder of **[87]** causes of action. On the 14th of April 1881, the plaintiff sued for possession of the land only.

* Appeal from Appellate Decree No. 1863 of 1882, against the decree of the Judge of Shahabad, dated the 27th July 1882, reversing the decree of the First Munsif of Berah, dated 27th December 1881.

Held, that the suit was not barred by limitation as the plaintiff had, within the meaning of s. 14, been prosecuting his claim in a Court which from a cause of "like nature" to defect of jurisdiction, was unable to entertain it—*Ram Sahbag Das v. Gobind Prasad* (1 L. R., 2 All., 622)—not followed

Mr. Twisdale and Baboo Anund Gopal Palit for Appellant

Baboo Mon Mohun Dutt for Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and TOTTENHAM, JJ.) which was delivered by

Mitter, J.—This is a suit for possession of land covered by a kobala, dated the 31st October 1867, executed in favour of the plaintiff. The lower Courts find that the period of limitation in this case must be counted from the date of the kobala. This finding has not been questioned before us.

The suit was brought on the 14th April 1881, i.e. more than twelve years from the date of the kobala, and unless the time during which another suit relating to the subject-matter in dispute was pending be deducted, the claim is clearly barred by limitation.

It appears that the plaintiff, on the 2nd September 1869, brought a suit against the defendant and several other persons, for the recovery of possession of a plot of land, including the land in suit, and obtained a decree in the Court of First Instance. On appeal it was found that the plaintiff had joined together several causes of action. The Appellate Court, on the 30th March 1881, confirmed the decree as regards one of these causes of action, and dismissed the suit as against the present defendant and others on the ground of misjoinder of several causes of action.

The question which we have to decide is whether, under s. 14 of the present Limitation Act, the plaintiff is entitled to have the deduction of the time during which the former suit was pending. The District Judge, disagreeing with the Munsif, is of opinion that the plaintiff is not entitled to the deduction.

So far as the question before us is concerned, the language of the 14th section of the present Limitation Act is similar to the [88] language of the 14th section of Act XIV of 1859, with this exception that, after the words "other cause," the words of a like nature have been added in the former Act. But in the Full Bench decision of *Chander Madhub Chuckerbutty v. Ram Coomarr Chowdry* (B. L. R., Sup. Vol., 553, 6 W. R., 184) Sir BARNES PEACOCK, C. J., held that in s. 14 of Act XIV of 1859 the words "other cause" meant other cause of a like nature. The cases decided under Act XIV of 1859, with reference to this point, will therefore be of help to us in determining the question before us.

The District Judge is of opinion that misjoinder of parties is not a cause "of a like nature" with defect of jurisdiction, because it was in the plaintiff's own power to avoid it. But it is equally in the plaintiff's own power to avoid suing in a Court which, for defective jurisdiction, is unable to entertain it. This is not, therefore, the correct test for determining the question, whether an alleged cause is one of a like nature with defective jurisdiction or not. For this reason we are unable to follow the decision of the Allahabad High Court in *Ram Sahbag Das v. Gobind Prasad* (1 L. R., 2 All., 622) cited by the Judge.

It appears to us that "misjoinder of parties" and "defective jurisdiction" are causes of a similar nature. In *Mohun Chunder Koondo v. Azam Gazer* (12 W. R., 45) Sir BARNES PEACOCK, C.J. held that bringing a suit against a person who had died before the suit was instituted was a cause of a similar nature within the meaning of s. 14 of Act XIV of 1859. In the case under our consideration the similarity is certainly greater than it was in the case just cited. There, in the former suit, the plaintiff obtained a decree in the Court of First Instance. It is therefore reasonable to hold that the first suit was instituted in good faith, and prosecuted with due diligence. The present suit is, therefore not barred by limitation.

We reverse the decision of the lower Appellate Court, and remand the case to that Court for the determination of the other questions arising in it.

The costs will abide the result

Appeal allowed

NOTES

[The Limitation Act of 1908, by explanation III to section 14, has declared that for the purposes of section 14 misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction. As for the previous conflict of case law, compare 10 Cal., 86, 23 Cal., 821 with 35 Cal., 728, 22 All., 248 with 12 All., 207, 13 Mad., 451, 20 Mad., 48, 22 Mad., 494, 24 Mad., 361 with 17 Mad., 299, 19 Mad., 90. See also 32 Cal., 118, 29 Bom., 219.]

[89] APPELLATE CIVIL

The 13th June, 1883

PRESENT

MR JUSTICE O'KINEALY AND MR. JUSTICE BOSE

Ramjankhan . Plaintiff

versus

Ramjan Chamar Defendants.

Second Appeal—Chota Nagpore Landlord and Tenant Procedure Act (Beng. Act I of 1879), ss. 37, 137—Arrears of Rent and Ejectment, Suit for.

In suits instituted under Beng. Act I of 1879, for arrears of rent and ejectment on account of the non-payment of arrears of rent, a Second Appeal lies to the High Court, this class of cases not being within the provision of s. 137 of the same Act.

Effect of a previous decree, as evidence in a subsequent suit stated

* Appeal from Appellate Decree No 710 of 1881, against the decree of the Judicial Commissioner of Chota Nagpore dated 5th February 1881, reversing the decree of the Deputy Collector of Hazaribagh, dated the 30th July 1880.

Baboo Juggut Chandra Banerjee for the Appellant

Baboo Jogesh Chunder Dey for the Respondent.

THE facts of this case are sufficiently set forth in the **Judgment** of the Court (O'KINEALY and BOSE, JJ.), which was delivered by

O'Kinealy, J.—In this suit plaintiff sued for arrears of rent under Beng. Act I of 1879, called the "Chota Nagpore Landlord and Tenant Procedure Act," and for ejectment by reason of non-payment of rent. A preliminary objection has been raised that no appeal lies in such a suit, and in order to see whether an appeal is prevented it is necessary to look at the terms of the Act.

Section 37, cl. 4, describes one class of suits that are triable, under the Act—"all suits for arrears of rent due on account of land either rent-paying or rent-free, or on account of any rights of pasturage, forest rights, fisheries, or the like." Then comes cl. 5, which says "All suits to eject any ryot, or to cancel any lease on account of the non-payment of arrears of rent, or on account of a breach of the conditions of any contracts by which a ryot may be liable to ejectment, or a lease may be liable to be cancelled." When we turn to s. 88 we find, "any person desiring to eject a ryot, or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment or cancelment, and [90] for recovery of the arrear in the same action, or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrears in a suit for such ejectment or cancelment." It is thus clear from a comparison of s. 88 with cls. 4 and 5 of s. 37 that a suit for ejectment or cancelment of a lease is a distinct and separate suit from a suit for arrears of rent, but by the provisions of s. 88 the two may be brought against the same person in the same action. Then turning to s. 137 it is declared "In suits under cls. 2, 4 and 7 of s. 37, tried and decided by a Deputy Commissioner, if the amount sued for or the value of the property claimed does not exceed one hundred rupees, the judgment of the Deputy Commissioner shall be final," but suits under cl. 5 of s. 37 are not referred to, nor is an appeal under that clause barred by s. 137. We are, therefore, of opinion that the language of s. 88 of the Act clearly shows that suits under cl. 5 and cl. 4 are not of the same nature, but of a different kind, and, although s. 137 prevents a suit for arrears of rent being appealed, it certainly does not in any wise prevent an appeal lying from a suit for ejectment. A case has been brought to our notice—*Parbutty Churn Sen v. Shaikh Mundari* (I. L. R. 5 Cal., 594), in which it has, it is urged, been held by a Division Bench of this Court that a suit for ejectment or non-payment of rent does not, under Beng. Act VIII of 1869, give an appeal to this Court, unless the sum in dispute is more than Rs. 100. That is not a decision under the present Act, nor indeed does it support the contention put forward by the respondent. It was not an appeal in an ejectment suit, but from an order passed in execution of decree. With regard to the facts of the case it would appear that some time previous to the present suit plaintiff sued the present defendant for arrears of rent due for the years 1932-1933, and up to Pous 1934. That suit was decreed in favour of the plaintiff, and as it has not been set aside by any competent Court, it is still binding between the parties. In the present suit the defendant, as in the previous litigation, denied that the relation of landlord and tenant existed. He further also said that the land now sued for was not the land then in dispute.

In the first Court the Deputy Collector, taking into consideration [91] that the defendant had admitted that he was partly in possession of the land, compared the proceedings in the former case with those in the present suit, and on this ground held that the lands in dispute were identical in both cases. When the case went up in appeal, the Judicial Commissioner decided that the previous decree was of very little weight, and as there was no independent evidence to show that the lands in dispute were the same in both cases, he dismissed the suit.

We are of opinion that the Judicial Commissioner is wrong in the conclusion he arrived at. If, on a comparison of the papers in the former and in the present suit, it was clear that the lands in dispute were the same, no independent evidence was necessary. Moreover, we think that he has not given sufficient weight to the former decree. As we have already said, so long as it remained undisputed, it was binding between the parties, and showed that the relation of landlord and tenant existed up to Pous 1934. Since that time the defendant has not relinquished the land, nor has he shown that he has been dispossessed by a paramount title. If, therefore, his tenure is not transferable by the title-deeds or custom, he is liable to ejectment for non-payment of such arrears as the lower Court may find to be due from him.

The decree of the lower Appellate Court is set aside, and that of the first Court affirmed, in so far as it declares the defendant is liable to ejectment for arrears with costs in this and in the lower Appellate Court.

Appeal allowed

NOTES

[In 27 Cal 508 a Full Bench held that a Second Appeal did not lie in suits for arrears of rent under Bengal Act I of 1879 approving of (1898) 2 C. W. N. 644 and **overruling** (1882) 10 C. L., 89 and (1896) 24 Cal 249.]

[92] APPELLATE CIVIL.

The 3rd August, 1883.

PRESENT.

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE
MCDONELL AND MR JUSTICE TOTTENHAM.

In the matter of Act I of 1879

and

In the matter of a Reference to the Board of Revenue

Stamp Act (I of 1879), s. 24 - Stamp on sale certificate - Property sold subject to a mortgage - Interest - Transfer of Property Act (IV of 1882), cl. 5 (d), s. 55.

Where property is sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration money for the purchase.

The Stamp duty payable on a document conveying such a property is an *ad valorem* duty on the amount of the money paid as consideration for the sale.

THIS was a reference from the Board of Revenue under s. 46 of Act I of 1879.

The Collector of Stamp Revenue impounded an unstamped certificate of sale, which had been granted in respect of property which had been sold in execution of a decree of the High Court by the Registrar of the Original Side of the High Court, for Rs. 5,000, subject to two mortgages, securing repayment with interest of Rs. 7,000 and Rs. 250.

The Collector considered that *ad valorem* stamp duty as for a conveyance was payable upon the certificate on the purchase money, amounting to Rs. 5,000, as well as on the amount charged on the property, i.e., on Rs. 12,250, and the amount of interest payable by the purchaser on the authority of the case of *Shri Nagindas Jeychand v. Halalkore Nathwa Ghesla* (1. L. R., 5 Bom., 470).

The Board of Revenue, to whom the Collector of Stamps referred the matter, having regard to the above case, and to s. 55, cl. 5 (d) of the Transfer of Property Act, considered the opinion of the Collector of Stamps to be correct, but inasmuch as there was a decision conflicting with this view, viz., *Reference under s. 49 of the Stamp Act* (1. L. R., 5 Mad., 18) the matter was referred to the High Court.

[93] The question referred was as follows -

Whether, with reference to the provisions of s. 24 and art. 16, sch. I of the Stamp Act, *ad valorem* stamp duty as for a conveyance is payable upon the

*Civil Reference from Board of Revenue, Lower Provinces, made by C. E. Buckland Esq., Secretary to the Board of Revenue, dated the 2nd July 1883.

[Art. 16 -

Description of instrument.	Proper stamp duty.
Certificate of sale, granted to the purchaser of any property sold by public auction by a Civil or Revenue Court or Collector or other Revenue Officer	The same duty as a conveyance (No. 41) for a consideration equal to the amount of the purchase money.]

instrument, on the purchase-money only, which amounts to Rs 5,000 or on Rs 12,250, the sum total of the purchase-money and of the mortgage debts payable in respect of the property, or on the latter sum plus the interest which has accrued thereon up to the date of the issue of the certificate ?

The Advocate-General (Mr. *Paul*) appeared for the Board of Revenue.

- No one appeared on behalf of the holder of the certificate.

The **Opinion** of the Court (GARTH, C. J., McDONELL, J., and TOTTENHAM, J) was given by

Garth, C. J.—In this case certain immoveable property was sold by the Sheriff of Calcutta in execution of a decree of this Court for Rs. 5,000. It was sold subject to two mortgages, securing repayment with interest of Rs 7,000 and Rs 250 respectively.

The Board of Revenue have referred to us the question whether the stamp on the sale certificate should be for Rs. 5,000, the purchase-money, or for Rs. 12,250, being the amount of the purchase-money plus the sum secured by the mortgages

- The Collector and the Board of Revenue consider that the stamp should be for Rs. 12,250, and we are referred to two Full Bench authorities, one of the Bombay High Court *Shu Nagindas Juychand v Halalkore Nathua (theesta* (I L. R., 5 Bom. 470), and the other of the Madras High Court—*Reference under s. 49 of the Stamp Act* (I L. R., 5 Mad., 18), which appeared to be in conflict

The Bombay Court decided that where a certificate of sale expressly stated that the sale was made subject to the mortgage right of a third party, the principal sum due upon the mortgage was to be deemed a part of the consideration for the transfer under s 24 of the Stamp Act.

The Madras Court decided that when property is sold under a decree of Court subject to a mortgage, it is not sold "subject [94] to the payment of the mortgage debt" within the meaning of s 24. They held that the section only applies, where it is part of the consideration for the transfer, that the mortgage debt should be paid off

Now s. 24 of the Stamp Act appears to be a re-enactment of a provision of the same effect under the title or article "conveyance" in Part I of the schedule to the English Stamp Act, 55, Geo. III, Cap. 184. This is pointed out in the judgment of the Bombay High Court

The construction which was put upon that enactment by the English Court of Exchequer in the case of *The Marquis of Chandos v The Commissioners of Inland Revenue* (6 Exch., 464) was entirely in accordance with the above decision of the Madras High Court, and it is noteworthy that this decision of the Court of Exchequer was not appealed against, as it might have been. It seems to have been taken for granted that the decision was correct, but the enactment in the Statute of Geo. III was afterwards amended by Parliament in the year 1853 by s. 40 of the Statute 16 and 17 Vict., Cap. 59.

That section, after reciting the concluding portion of the enactment of the Statute of Geo. III, which we have just referred to, and that it had been held and determined that the said *ad valorem* duty was payable in respect of any

such sum or debt, only where the purchaser is personally liable or bound or undertakes or agrees to pay the same, or to indemnify the vendor against the same, and that it was expedient to alter and amend the law in that respect, enacted as follows -

“Where any lands or other property shall be sold and conveyed subject to any mortgage wadset, or bond or other debt, or to any gross or entire sum of money, such sum of money or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty shall be paid, notwithstanding the purchaser shall not be or become personally liable, or shall not undertake or agree to pay the same, anything in any Act or otherwise to the contrary notwithstanding.”

[95] Now it must be borne in mind that s. 24 of the Indian Stamp Act follows the language of the Statute 55, Geo. III, Cap 184, and not that of the amending Act 16 and 17 Vic, Cap 59, and therefore the decision of the Madras High Court is in accordance with English authority

And it seems also in accordance with reason and justice.

Where property is sold subject expressly to the payment or transfer by the purchaser of any money or stock, whether such money or stock be charged upon the property or not, such payment or transfer becomes the consideration for the sale, and as soon as it is paid or transferred, and not till then, the purchaser is entitled to his conveyance. In such a case it is perfectly fair that the *ad valorem* stamp duty should be calculated upon the amount of such money or stock.

But where a property is merely sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration for the purchase. The vendor simply sells, and the purchaser buys an encumbered property, and it is in no way essential to the validity of the sale that the mortgage or charge should be paid off.

Thus, take the case of a property worth Rs 50,000, which is mortgaged for Rs. 45,000. The equity of redemption is sold under a decree for Rs. 5,000. It surely would be unjust to oblige the purchaser to stamp his sale certificate with a duty of Rs 50,000, when the value of the thing which he buys is only Rs. 5,000. It is observable that the Bombay High Court, although it quotes the English authority, and apparently decides in opposition to it, points out the difficulties and injustice to which s. 24 of the Stamp Act may give rise, and considers apparently that, if the fact of an existing charge upon the property sold appeared upon the proclamation only and not upon the certificate of sale, s. 24 would not apply, and yet if a charge exists upon the property, it is of course sold subject to that charge, whether it is mentioned in the sale certificate or not. There seems no doubt that the observations of the Bombay High Court, with reference to the difficulty and injustice to which the section may give rise, are only too well founded.

[96] We observe, however, that the opinion of the Collector of Stamps and also of the Board of Revenue seems influenced, in some measure at least, by a provision in the Transfer of Property Act, which has come into operation since the Madras Full Bench case was decided.

It is considered apparently, that s. 55 of that Act makes it obligatory upon the transferee of immoveable property (in the absence of any contract) to the contrary to pay off any mortgage or charge which may exist upon the property at the time of the transfer.

We believe that this section has not yet received any judicial interpretation; but it would seem to mean nothing more than this, that the transferee, *as between him and the transferor* shall take upon himself the burthen of any charge which may exist upon the property. This would leave the law in the generality of cases as it was before the Act passed. The transferee would, as a matter of course, have taken the property subject to the charge. The only burthen which he would not have taken upon himself would be the personal liability (if any) of the transferor, and it is possible that s. 55 may effect some alteration in the law in that respect.

But even if it does, it would only affect *voluntary sales*, and would not apply to sales effected in execution under decrees of Court. Section 2 of the Act expressly provides that the Act (same as provided in s. 57 and chap IV) is not intended to affect "*any transfer by operation of law or any transfer in execution of a decree or order of a Court*".

We think, therefore, that the judgment of the Madras Court is right, and that consequently in the present case the sale certificate is chargeable only with stamp duty on Rs 5,000.

NOTES

[There was a conflict of decisions between the Madras and the Calcutta High Courts on the one hand and the Bombay High Court on the other --(1882) 5 Mad 18 (1889) 10 Cal, 92, (1884) 7 Mad, 421, (1881) 5 Bom., 470.

The Stamp Act 1899 has set at rest the conflict by adding to sec 24 thereof this *explanation*, "In the case of a sale of property subject to a mortgage or other incumbrance any unpaid mortgage money or money charged together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale, provided that, where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage."

Moreover as regards the duty to be levied in the case of a certificate of sale of property subject to an incumbrance sold by public auction, there was also a conflict of decisions --5 Mad 18, 7 Mau. 421, 10 Cal, 92 15 All, 107 5 Bom 470, 18 Bom., 175.

This was set at rest by Act VI of 1894 sec 5 which enacted that nothing in section 24 shall apply to any such certificate of sale as is mentioned in Art No 16 (18 of the Act of 1899) and added *only* at the end of the second column of that Article. These alterations were retained in the Stamp Act of 1899.]

[97] APPELLATE CIVIL.

The 8th June, 1863.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.

Kirty Chunder Mitter.Plaintiff

versus

Anath Nath Dey.....Defendant.*

*Decree for partition—No return to Commission—Mortgage of share—Purchase by a stranger of portion of the lands included in the decree—
Suit by him for partition.*

A and B were the joint owners in equal shares of certain property. In 1869 B mortgaged his share to A under a mortgage deed drawn up in the English form. Later on, in 1869, A brought a suit against B for partition, and in 1870 obtained a decree appointing a Commissioner of partition and directing the partition. No return was made to this Commission, and no actual partition came to. In 1873, A obtained a decree for an account, and for payment, or in default for sale of the property. In 1878, B's share was put up for sale, and purchased by C, and C was put into possession. In 1881, C brought a suit against A for partition. Held, that the decree obtained by A in 1873 put an end to B's right to redeem unless he paid the amount found due against him, and therefore at the time of the sale to C, B's right to redeem had ceased to exist, and the property was no longer subject to partition under the decree of 1870 and therefore the partition asked for under the suit of 1881 could be granted.

ANATH NATH DEY and Monmotho Nath Dey, the adopted sons of one Promotho Nath Dey, deceased, were the joint owners in equal shares of certain garden land and premises situate in the district of the 24-Purgunnahs. On the 12th March 1869, Monmotho Nath Dey mortgaged to Anath Nath Dey his undivided moiety in the said premises under a deed of mortgage drawn up in accordance with the form of mortgage prevalent in England. Monmotho Nath Dey failed to pay the principal or interest due under the said mortgage, and Anath Nath, in the month of January 1872, instituted a suit in the High Court against him for the recovery of the money due under the mortgage.

On the 7th July 1873 the High Court passed a decree for an account, and directed that, if the said Monmotho Nath Dey should fail to pay what might be found due on such an account, the said mortgaged property should be sold. Monmotho Nath failed [93] to pay what was due on the finding of such account, and the property was therefore put up to sale, and at such sale the plaintiff in this case, one Kirty Chunder Mitter, became the purchaser for Rs. 31,000, and on the 10th March 1881 a regular conveyance was drawn up and entered into by the Registrar of the High Court.

It appeared from the record that in 1869 a suit (subsequently to the mortgage) had been brought by Anath Nath Dey and [against?] Monmotho Nath Dey for partition of certain properties, including the garden land and premises in question in the suit, and that in January 1870 the High Court

* Appeal from Original Decree No 97 of 1882, against the decree of Baboo Kusto Mohun Mookerjee, Second Subordinate Judge of the 24-Purgunnahs, dated the 11th January 1882.

passed a decree appointing Commissioners, and directing them to grant partition. It further appeared that no return was ever made to that commission, so that therefore no actual partition had been come to.

On the 11th July 1881 Kirty Chunder, having previously been put into possession, brought the present suit for partition of the properties.

The present defendant Anath Nath Dey contended that the present suit would not lie, inasmuch as the suit above mentioned brought by him against Monmotho Nath Dey in 1869 was for the partition of the same property, and, moreover, that that suit was still undisposed of, inasmuch as no regular partition had been come to, and therefore the plaintiff purchased *pendente lite*.

The Subordinate Judge found that the property in suit was the subject-matter of partition in the suit still pending before the High Court, and that no final order had been passed in such suit, and therefore under s. 12 of the Civil Procedure Code held that he had no jurisdiction to try it, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. Evans (Baboo Rasbehary Ghose and Baboo Grish Chunder Chowdhry with him) for the appellants contended that s. 12 was only the correlative of s. 13. Section 12 provides, that if an issue be in course of trial in a pending case (the relief sought being the same), the Court shall not entertain another suit to try the same issue, and grant the same relief. Section 13 says, if any issue has been tried, it shall not be heard over again.

[99] Neither of these sections refer to cases like this, where there is no issue between the parties, but only administration of relief on admitted rights.

1st.—This section (12) does not cover the whole ground covered by the doctrine of *lis pendens*. The bar (if any) in this case is not under this section but under the general rule of *lis pendens*, that a purchaser *pendente lite* will be bound by the final decree, and need not be made a party, and the rule as to comity of Courts which prevents one Court taking up a matter which is being dealt with by another competent Court even in the way of administrative relief to partition. But the doctrine of *lis pendens* does not apply here, because there is no active prosecution of the suit—*Kinsman v Kinsman* (1 R. & M., 617), *Fisher on Mortgages* (3rd edn.), Vol I, p. 583, s. 962. *cf.* Transfer of Property Act, s. 52; and there is no want of comity because the High Court is not dealing with the matter and the High Court suit has abated, and is practically at an end.

2nd.—The plaintiff cannot obtain the relief he is admittedly entitled to in the other suit through the fault of the defendant who is plaintiff in that suit.

3rd.—The defendant (plaintiff in the old suit) has himself caused the alienation to be made by a sale by the High Court, which had cognizance of the old suit, and has thus discharged the property from the operation of the old suit with the assent of the High Court through which he sold, he therefore sold it clear of the *lis pendens* by his own act and cannot complain.

4th.—The defendant in the old suit had only the equity of redemption and the plaintiff in the old suit had the legal estate before the old suit commenced. He has transferred this estate to the plaintiff in the suit with the assent of the Court, and therefore cannot say that the plaintiff in this suit is a purchaser from the defendant in the old suit, and therefore to be bound by the proceedings in the old suit.

5th.—There is no *letis contestatio*, and there is nothing that the defendant can complain of.

6th.—There is not any suit pending before the High Court [100] except in name, and no interference with the High Court, and plaintiff cannot get any relief except by this suit

Bahoo Rajendronath Bose for the Respondent

The **Judgment** of the Court (GARTH, C J., and MACPHERSON, J.) was delivered by

Garth, C.J.—This suit was brought by the plaintiff for a partition of a large estate of which he purchased an eight annas share in the year 1878, under the following circumstances —

The estate in question was part of a much larger property situate partly in Calcutta, and partly in the Mofussil, which belonged jointly to the defendant and one Monmotho Nath Dey, in equal shares.

By a mortgage made in the English form, dated the 12th of March 1869, Monmotho Nath Dey mortgaged to the defendant his half share in the estate in question, subject to the usual proviso for redemption.

Default having been made in payment of the mortgage money, a suit was brought in this Court by the present defendant in the year 1873 against the mortgagor for the recovery of the principal sum and interest and for other relief.

On the 7th of July of the same year the High Court made a decree by consent of the parties, by which an account was to be taken in the usual way, to ascertain the amount due for principal and interest, and it was further ordered, that if the mortgagor failed to pay that amount by a certain day, the mortgaged estate should be put up for sale by public auction.

Under this decree the account was taken, and the sum found due to the defendant was not paid by the mortgagor and consequently the estate was put up for sale by auction, and purchased by the present plaintiff on the 24th of June 1878.

The plaintiff has since obtained possession, and he then, on the 11th of July 1881, brought this suit against the defendant for a partition.

The defendant's answer was, that in the year 1869 he brought a suit in this Court, against Monmotho Nath Dey for a partition of all the properties which belonged to them jointly, and amongst others of the estate in question, that a decree was made in that [101] suit for partition on the 21st of January 1870, and that a Commissioner was appointed under that decree, who has commenced, but only partially carried out, the partition.

The defendant, therefore, contends that as the estate in question was purchased by the plaintiff pending the partition proceedings, it is still subject to the former decree, and the plaintiff has no right to bring this suit to obtain a separate partition of it.

The lower Court holds that as the decree in the former suit directed this property to be partitioned, and as it has not been shown that the former suit has come to an end, the plaintiff's suit should be dismissed.

On appeal it has been contended that the lower Court is wrong upon the ground, that as the mortgage of 1869 was made previously to the partition suit in that year, and as by the proceedings in the mortgage suit any interest which Monmotho Nath Dey might have had is at an end, the property in question is no longer the subject of the former suit, and consequently there is no reason why a decree for partition in this suit should not be made.

We think that there is much reason in this contention. We have ascertained by a reference to the records of this Court that the mortgage by

Monmotho Nath Dey to the present defendant in 1869 was made previously to the suit for a partition, and it therefore only remains to consider, whether, at the time when this suit was brought, the property in question, or any interest in it, was liable to be partitioned in the former suit.

The mortgage of 1869 being in the English form, the legal estate in the property passed to the mortgagee, and all that remained to the mortgagor at the time when the partition suit was brought in 1869, was an equity of redemption or the bare right to redeem the property on payment of the mortgage money and interest

It is possible that this right, if it had continued in the mortgagor, might have been made the subject of partition in the former suit, but we consider by the act of the defendant himself that the right has long ceased to exist. The decree which the defendant obtained in the mortgage suit in the year 1873 put an end to Monmotho Nath's right to redeem, unless he paid the amount [102] found to be due on the day named in the decree and therefore at the time when the property was sold to the plaintiff, Monmotho Nath's interest in it had ceased to exist. It follows, therefore, that at the time when this suit was brought, that property was no longer subject to partition under the former suit, and the defence which the defendant has set up to this suit cannot avail him

This result is certainly a fortunate one in the interests of justice, because it clearly appears, from the facts before us, that nothing has been done in the former partition suit for many years past and nothing more is likely to be done. One out of the two Commissioners appointed is dead, Monmotho Nath himself is dead also, and as the latter sold or squandered away all his property before he died, it seems improbable that any one will administer to his estate. So that had this defence been available to the defendant, the plaintiff might have had extreme difficulty in obtaining a partition of the property.

A decree will be made for a partition on the usual terms, and as the defendant has set up a defence which turns out to be unfounded, we think that he should pay the plaintiff's costs in both Courts, but not of course the costs of the partition

Appeal allowed.

NOTES.

[PARTITION DECREE—

“The right to partition being a continuing cause of action, it has been said that, so long as the property is jointly held, the dismissal of, or failure to carry on, the preliminary proceedings cannot bar a fresh suit. The preliminary decree settles the rights of the parties at that date, but not rights acquired since that date”.—*Caspersz* on *Res judicata* (1909) III Edn pp 240-241, citing, 13 All. 309, 14 Bom., 31, 3 Bom. L. R. 94, 10 C. W. N., 839.]

[10 Cal. 102]
APPELLATE CIVIL.

The 6th September, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON

Russick Das Bairagy and another Defendants

versus

Preonath Misree and another . . . Plaintiffs

*Minor, suit by—Permission of Court to guardian to sue—Discretion of
Court—Act XL of 1858—Civil Procedure Code (Act XIV of 1882),
s. 440—Return of plaint.*

A volunteer guardian has no right to sue on behalf of a minor, the accord or refusal of permission to sue is a matter in the discretion of the Court

Where a suit is brought in violation of s. 440 of the Code of Civil Procedure, or of the provisions of Act XL of 1858, the proper course for a Court to pursue is to return the plaint, in order that the error may be rectified

[103] THIS was a suit brought to recover possession of a piece of land measuring 16 cottahs, and for wasilat, on the ground that the land was the lakhiraj property of the plaintiffs who were minors, and that they had been dispossessed therefrom by the defendants

The suit was instituted by one Jagadamba Dabee, an adult sister of the minors, who did not describe herself as next friend of the minor plaintiffs, but brought the suit as their guardian, although she had obtained neither a certificate under Act XL of 1858, nor permission of the Court to bring the suit.

The defendants contended that Preonath, one of the alleged minor plaintiffs, had attained majority. that Jagadamba Dabee had no right to bring the suit, as she had not obtained any certificate under Act XL of 1858, and that the disputed lands were the *mal* lands of one Dinanath Basu, the *pro forma* defendant in the suit

The Munsif found that the evidence disclosed that Preonath was about 17 or 18 years old, and that he, not having attained 21 years, was therefore a minor, and held that under s. 3 of Act XL of 1858, Jagadamba had a right to bring the suit as the property was small, and gave the plaintiffs a decree.

The defendants appealed to the Subordinate Judge, who held that in the case of Preonath, 18 and not 21 was the age of majority, but stated that the evidence of one Juggeshur Roy showed that Preonath had not completed the age of 18 when the suit was brought, and that therefore he was still a minor

The evidence of Juggeshur, however, was that "he was about 17 or 18 years old," and as regards the question of the certificate he found that "the Munsif had acted irregularly in allowing Jagadamba to bring the suit on behalf of the minors without making a formal application for permission to do so, but that the lower Court had given permission in its judgment on one of the grounds

* Appeal from Appellate Decree No. 576 of 1882, against the decree of Baboo Amirto Lal Chatterjee, Subordinate Judge of Nuddea, dated the 16th of January 1882, affirming the decree of Baboo Bhubun Mohun Roy Chowdhry, Second Munsif of Bongong, dated the 27th of December 1879.

given in s. 3 of Act XL of 1858, and therefore he held that the defendants' contention failed, and further finding that the plaintiffs and their ancestors had been in possession for a considerable time without payment of rent to the zamindar, confirmed in this respect the Munsif's decree."

The defendants appealed to the High Court

[104] Baboo *Umbica Churn Bose* for the Appellants.

Baboo *Anund Gopal Palit* for the Respondents

The **Judgment** of the Court (GARTH, C.J., and MACPHERSON, J.), was delivered by

Garth, C.J.—The plaintiff describing herself as "elder sister and guardian of the minors Preonath Misree and Uma Churn Misree," brought this suit to recover possession of certain land, the property of the minors, from which she, while acting as their guardian and in possession on their account, had been dispossessed.

The defendants, apart from the merits of the case, contended that Preonath Misree had attained majority and further, that, even if he and his brother were minors, the plaintiff had no right to sue on their behalf, as she held no certificate under Act XI of 1858, and had no permission from the Court to bring the suit.

It certainly does not appear that any permission, such as that contemplated by s. 3, Act XL of 1858, was asked for or given; but the Munsif, in disposing of the latter objection, says in his judgment "Managers of small properties are competent to bring cases without obtaining a certificate, thus the plaintiff is in no way debarred"

On the other point he held that Preonath's age was 17 or 18, and that as 21 was the age of majority, he was still a minor

The same objections were raised in appeal, and have again been urged before us.

The Subordinate Judge, while rightly holding, that in the case of Preonath 18 and not 21 years was the age of majority, says "The evidence of Juggeshur Roy shows that Preonath did not complete the age of 18 years when the suit was before the lower Court, that being so, the Munsif's final decision that Preonath was still a minor, when the case was before him, is correct."

On the other point he held, that though there was irregularity in allowing the case to be brought without a formal application for permission, still the judgment sufficiently showed that permission was given.

Now the Munsif did not decide that Preonath was a minor, in the sense that he had not completed the age of 18 years. The [105] witness whom the Subordinate Judge quotes, and on whose evidence the Munsif also relies, simply says "Preonath's age is 17 or 18 years." How, therefore, the Subordinate Judge concludes, that Preonath had not completed the age of 18 years, is not clear.

By s. 4* of the Majority Act (IX of 1875) a person completes that age at the beginning of the 18th anniversary of his birthday, when he is, as is commonly understood, 18 years old. So that, even if the plaintiff properly

* [Sec. 4.—In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained

Age of majority how computed. ed majority, if he fall, within the first paragraph of section 3 at the beginning of the twenty first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the eighteenth anniversary of that day]

represented the minors, the defendants' objection, that Preonath was not a minor, has not been properly determined, and the decree, assuming that it is one practically in favour of the minors, is bad.

The suit is also open to objection, on the ground that it is brought in disregard of the provisions of s 440 of the Procedure Code and of s 3, Act XL of 1858, which must be read together. The former section enacts that "every suit by a minor shall be instituted in his name by an adult person, who in such suit shall be called the next friend of the minor" By the latter, persons not holding certificates under the Act can only institute suits connected with a minor's estate with the permission of the Court. As pointed out in the case of *Mrinamoyi Dabia v Jogodishuri Dabia* (I. L. R., 5 Cal., 450), this permission should, if applied for before the suit is brought, and if granted, be formally recorded. The obtaining of permission should either precede or be contemporaneous with the institution of the suit.

A volunteer guardian has not, as the Munsif seems to suppose, any right to sue on behalf of a minor, and the giving or withholding permission is a matter of discretion with the Court. It has been held in several cases, where suits, though really directed against a minor, have been brought against a person described as his relative or guardian, and who has not been properly authorized to act for him, that the decision will not bind the minor, who is not properly on the record as a party.

The same principle would seem to apply in the case of a person suing in his own name, and without authority, as guardian of a minor. If the decision is adverse to the minor's interests, it might not bind the minor in any future litigation.

[106] That being so, it would be very unjust to compel a defendant to proceed with a suit, in which, if he succeeds, the decision would not bind his opponents, and it therefore seems to follow, that if an objection is made in due time by the defendant that the suit has been improperly brought, that objection should be allowed.

In this case we consider that the Munsif was very wrong in not returning the plaint to the plaintiff, in order that the error might be rectified. This is the course which should always be taken in those cases, where the suit is brought in violation of s 110 of the Code, or of the provisions of Act XL of 1858.

We interfere very unwillingly in this case, because it has been tried upon its merits in both the lower Courts, and there seems no reason to suppose that the conclusion at which they have arrived is otherwise than correct.

But as the question whether Preonath was a minor has not been properly tried in either Court, we feel bound to send the case back to the first Court for the trial of that question. If Preonath was a minor, the judgment may be in favour of both the minor plaintiffs. If he is not a minor, the lower Court, if it thinks fit, may dismiss the suit as regards Preonath (in which case he will be at liberty to bring a fresh one), and give a decree in favour of the other plaintiff only. The costs in this Court and in the lower Appellate Court will abide the result.

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Appeal allowed and case remanded.

NOTES.

[SUITS FOR OR ON BEHALF OF MINORS—

Where a suit is brought in violation of s 440 of the Code of Civil Procedure 1882 (C P C, 908, O. 32, r 1) the proper course for the Court is to return the plaint for rectification :— 10 Cal., 102.

The practice is to take the plaint off the file when the defect is apparent on the face of the plaint (13 Cal 189; 13 Bom 7) and when the fact of minority is established only after evidence taken on the point and it is found that the plaintiff knew of the fact of minority and only intended to deceive the Court, the practice according to the Bombay decisions is to make an order directing the plaint to be taken off the file, 13 Bom, 7. According to the Calcutta decisions the Court should pass a decree dismissing the suit, 13 Cal 189. But when the plaintiff is found to have had no such knowledge or intention the Court will stay proceedings and allow sufficient time to enable the minor plaintiff to be represented by a next friend 13 Cal. 189, 13 Bom, 7.

The absence of a certificate is not such an irregularity as to entitle the minor, on coming of age to set aside the proceedings on the ground that he was not properly represented, 17 Cal. 347.—16 L. A. 195, **PC**

It is not necessary to have a certificate under the Act, if in fact he has the permission of the Court to sue, 12 Cal 48, 10 Cal. 134, (*suit by guardian of minor without certificate under Act, XL of 1858*)

The Court should presume under ordinary circumstances that the permission contemplated by the Act had been obtained. A W N (1882) 23, A.W N (1881) 173, A W. N (1881) 175

In 4 C P L R 75 it was held that the words 'any other sufficient reason' enable a relative of the minor to sue without first obtaining a certificate. See also 9 All. 508— A W N 1887 (189) 5 C W. N 781, 31 Cal., 722, 3 C L J, 29 and also 33 Cal, 927.

Upon this aspect of the case Dr *Trevelyan Minors*, (1912, IV Edn. p. 254) observes that the observations in 10 Cal., 102 must be taken in connection with the facts of that case.]

[10 Cal 106]

APPELLATE CIVIL

The 31st August, 1883

PRESENT

SIR RICEARD GARTH, KT., CHIEF JUSTICE, AND MR JUSTICE
MACPHERSON.

Ram Coomar Ghose . . . Judgment-debtor
versus

Prosunno Coomar Sannyal and anotherDecree-holders.

Costs:—Practicer—Costs of printing and translation—Appeal to Privy Council.

Costs of printing and translation, certified by the Deputy Registrar of the High Court, are a necessary part of the costs of an appeal to the Privy Council

The amount of such costs is left to be ascertained by the High Court and is not assessed by the Privy Council Office.

THIS was an appeal from an order rejecting an application, asking that the costs of translation and printing, certified by the [107] Deputy Registrar of the High Court, should be disallowed to the decree-holders, inasmuch as they had not been allowed by the Privy Council when the case was before that Court on appeal

The District Judge rejected the application on the ground that such costs were, according to the practice of the High Court, as shown in the case of *Saroda Prasad Mullick v. Lachmiput Singh* (9 B L R., Ap, 23. 18 W. R., 89), realizable in addition to the sum allowed by the Privy Council

The judgment-debtor appealed to the High Court.

Baboo *Okil Chunder Sen* for the Appellant.

Baboo *Saroda Churn Mitter* for the Respondents.

The **Judgment** of the Court (GARTH, C J, and MACPHERSON, J.) so far as is necessary for the purposes of this report was as follows:—

* Appeal from Original Order No 102 of 1883, against the order of J F Browne, Esq., Judge of 24-Pargunnahs, dated the 3rd of March 1883

Garth, C.J.—We think that the District Judge was right in allowing to the respondents the costs of translation and printing in the High Court. These costs do undoubtedly form a necessary part of the costs of the appeal to the Privy Council, and we find that in practice the Privy Council have been in the habit, when they allow the costs of an appeal, of leaving the amount to be ascertained by the High Court. The only costs which are assessed in the Privy Council Office are those which are incurred in England.

This is explained in the case decided by Mr. Justice MARKBY, *Saroda Prasad Mullick v. Lachmiput Singh* (9 B. L. R., Ap., 23 · 18 W. R., 89), which seems to be a direct authority in favour of the respondents.

The appeal will be dismissed with costs, which we assess at two goldmohurs.

Appeal dismissed.

NOTES.

[PRIYI COUNCIL PRACTICE—COSTS—

See also 15 W. R., 356, 18 W. R., 89, 253, 23 W. R., 463

As regards the disallowance of costs occasioned by the introduction of irrelevant matter, see 11 Cal., 211.]

[108] APPELLATE CIVIL.

The 10th August, 1883

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE
MCDONELL AND MR. JUSTICE TOTTENHAM.

In the matter of the Petition of Hurbuns Sahay and another

Hurbuns Sahay and another

versus

Thakoor Persad

*Appeal—Letters Patent, cl. 15—Difference of opinion between
Judges in review*

Where two Judges of a Division Bench have concurred in a final decree, the fact that there is a difference of opinion as to one point, amongst others, raised in review on the judgment on which such final decree is based, is no ground for an appeal under s. 15 of the Letters Patent.

THE plaintiff brought this suit to recover possession of a fractional share of a temporarily settled estate called Mehal Bonarpur, alleging that he had been dispossessed from it by the defendants, who were the auction-purchasers of the rights and interests of certain other of the defendants in the suit.

The Court of First Instance gave a decision against the plaintiff.

The plaintiff appealed to the High Court, but died before the hearing, and his widow was substituted as appellant on the record. On this appeal the decision of the lower Court was reversed.

The defendants applied for and obtained a review of the judgment of the Appellate Court, on the hearing of the review one of the Judges was inclined to allow the whole case to be re-opened, whilst the Senior Judge thought that it should be limited to one point only, although both Judges agreed that the Court had power either to limit the review to one point, or to re-open the whole case.

* Appeal under cl. 15 of the Letters Patent No. 1 of 1882, against the decree of Mr. Justice MITTER and Mr. Justice MACLEAN, dated the 2nd March 1882, in appeal from Original Decree No. 25 of 1879.

In dealing with one of the questions raised in the review, both Judges were of opinion that the share awarded to the plaintiff by the decree of the 9th May 1881 should be reduced from one-half to one-third; as regards another point raised, Mr Justice MACLEAN differed from Mr. Justice MITTER, and on this point, therefore, the judgment of the Appellate Court remained untouched by the order on review, in accordance with s. 628 of the Civil Procedure Code.

The defendants appealed under s. 15 of the Letters Patent

[109] Mr. Branson and Mr. Twidale for the Appellants

Baboo Mohun Mohun Roy and Baboo Jogesh Chunder Roy for the Respondent.

The **Judgment** of the Court (GARTH, C J., and McDONELL and TOTTENHAM, JJ.) was delivered by

Tottenham, J.—We think this appeal should be dismissed with costs upon the preliminary ground taken by the pleader for the respondent, viz, that the Judges of the Division Bench, having concurred in the final decree, no appeal lies under the Letters Patent

The fact that one of the Judges was inclined to let the whole case be reopened on review, while the senior Judge thought that it should be limited to one point, does not entitle the parties to an appeal from the order so limiting it; and it appears to us that we have no authority to pronounce any opinion as to the correctness or otherwise of that order.

Appeal dismissed.

NOTES.

[See also (1901) 6 Bom L R 230]

[10 Cal 109]

PRIVY COUNCIL

The 13th and 18th July, 1883.

PRESENT

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER,
SIR R. COUCH and SIR A. HOBBHOUSE.

Surendra Nath Banerjee

versus

The Chief Justice and Judges of the High Court
at Fort William in Bengal

[On appeal from the High Court at Fort William in Bengal.]

Contempt of Court—Publication of libel reflecting upon a Judge in his judicial capacity—Offence not included in Penal Code—

Defamation—Criminal Procedure Code (X of 1882), s. 5—Power of Courts of Record under common law—Jurisdiction of High Court to punish summarily.

The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High Courts to punish it, are the same in such Courts as in the superior Courts in England. Those powers, which formed part of the common law, were conferred upon the Supreme Courts, when they were established in the Presidency towns.

The Indian Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting, and neither in chapter XXI

"of Defamation," nor elsewhere [110] provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. Because the publisher can be punished for "defamation" under the Code, it does not follow that he cannot be punished summarily by the High Court for a contempt of Court. He can be so punished with fine, or imprisonment, or both.

The provisions of s. 5 of the Code of Criminal Procedure, 1882, relating to the procedure under which "all offences under the Indian Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court committed by the publication of a libel out of Court, when the Court is not sitting, although such contempt may include defamation. Such a contempt is more than mere defamation, and is of a different character.

The jurisdiction of the High Court to commit for contempt has not been affected by the Code of Criminal Procedure, 1882.

By the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.

THIS was a petition for special leave to appeal from an order of the High Court, dated the 5th May 1883, whereby the petitioner, who was the editor and proprietor of a weekly newspaper published in Calcutta, and called the *Bengalee*, was sentenced to a term of imprisonment for two months in the Presidency Jail, for a contempt of Court.

The alleged contempt of Court was contained in the following article, which appeared in the *Bengalee* on the 28th April 1883 ---

"The Judges of the High Court have hitherto commanded the universal respect of the community. Of course, they have often erred and have often grievously failed in the performance of their duties, but their errors have hardly ever been due to impulsiveness or to the neglect of the commonest considerations of prudence or decency. We have now, however, amongst us a Judge who, if he does not actually recall to mind the days of Jeffreys and Scroggs, has certainly done enough within the short time that he has filled the High Court Bench to show how unworthy he is of his high office, and how by nature he is unfitted to maintain those traditions of dignity, which are inseparable from the office of the Judge of the highest Court in the land. From time to time we have in these columns adverted to the proceedings of [111] Mr Justice NORRIS, but the climax has now been reached, and we venture to call attention to the facts, as they have been reported in the columns of a contemporary. The *Brahmo Public Opinion* is our authority, and the facts stated are as follows:—

"Mr. Justice NORRIS is determined to set the Hughli on fire. The last act of *zubburdasti* on his Lordship's part was the bringing of a Salgram (a stone idol) into Court for identification. There have been very many cases both in the late Supreme Court and the present High Court of Calcutta regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged into Court. Our Calcutta Daniel looked at the idol, and said it could not be a hundred years old. So Mr. Justice NORRIS is not only versed in law and medicine, but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of Calcutta will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of justice."

On the 3rd May the petitioner, (together with one Raincoomar Dey, the printer and publisher of the *Bengalee*), was served with a rule calling upon him to show cause on May 4th why he should not be committed to prison, or otherwise dealt with according to law for contempt of Court, in his having published the above article, containing contemptuous and defamatory matters

concerning Mr. Justice NORRIS. This rule was issued on affidavits, of which the petitioner obtained copies in the afternoon of the same day (May 3rd).

In reply to these affidavits, the affidavits of Ramcoomar Dey and Surendra Nath Banerjee were produced in the High Court. The affidavit of Ramcoomar Dey stated that he had no concern with any matter which appeared in the paper, nor any power to prevent any matter appearing therein, that he was imperfectly acquainted with the English language, and though able to set up works in English, he did not readily understand the sense and meaning of what he composed and set up, that he had no knowledge that the article in question contained [112] any contemptuous or defamatory matter, and so far as he had any hand in its publication, he expressed his regret that any such matter should have appeared in the paper of which he was printer and publisher, and submitted himself to the favourable consideration of the Court.

The affidavit of Surendra Nath Banerjee was as follows —

"I, Surendra Nath Banerjee, of No 33, Neogee Pookur East Lane in the Town of Calcutta, at present residing at Monihampoor in the district of the 24-Pergunnahs, inhabitant solemnly affirm and say as follows —

"1st — That on Thursday, the 3rd day of May instant, I was served with a rule issued by this Honourable Court in this matter on the day previous, calling upon the above-named Ramcoomar Dey, as the printer and publisher, and myself as the editor of the periodical work, the *Bengalee*, to show cause before this Honourable Court on Friday, the 4th day of May instant, at the sitting of the Court, why we should not be committed, or otherwise dealt with according to law, for contempt of Court alleged to have been committed by us in having unlawfully published a certain article in the said periodical work, the *Bengalee*, of the 28th day of April last, containing certain contemptuous and defamatory matters of and concerning the Hon'ble JOHN FREEMAN NORRIS, one of the Judges of this Honourable Court

"2nd — That, upon being served with the said rule, I bespoke and thereafter obtained office copies of the grounds upon which the said rule is based, which grounds I have perused

"3rd. — That I admit that, as is stated in the affidavit of Mr. *Henry Adams Aikm*, Officiating Solicitor to the Government of India, the abovenamed Ramcoomar Dey is the printer and publisher of the said periodical work, the *Bengalee*, and I am the proprietor and editor thereof

"4th — That the said periodical work is made up entirely under my superintendence, and that the said Ramcoomar Dey, who is but indifferently acquainted with the English language has no authority over any editorial matter appearing in the said periodical work, and further he could not, if he wished so to do, prevent any article or paragraph appearing therein.

"5th. — That the issue of the said periodical work of the said [113] 28th day of April 1883 was made up and published entirely on my responsibility, and to the best of my knowledge, information and belief, the said Ramcoomar Dey did not read anything contained therein in the editorial columns before the publication thereof.

"6th — I further say that, except as an honourable and learned Judge of this Honourable Court, I have no knowledge whatsoever of the said Hon'ble JOHN FREEMAN NORRIS, and that in writing and publishing what I did in connexion with his Lordship, I acted entirely *bonâ fide*, and, as I believed, in the interests of the public good

"7th.—That there appeared in the said issue of the 28th day of April 1883 two paragraphs in connection with the said Hon'ble JOHN FREEMAN NORRIS, one at page 194 under the heading of "News and Notes" of Tuesday, the 24th day of April 1883, and the other at page 199 amongst the Editorial notes. The said two paragraphs are as follows. [Here followed the above paragraph, on which the rule was issued, and another paragraph, relating to different matter, but also reflecting upon the conduct of Mr. JUSTICE NORRIS.]

"8th.—That the *Brahmo Public Opinion* referred to in the said paragraph is a periodical work published in Calcutta every Thursday, and is believed by the public, and I believe it, to be under the editorship of a gentleman practising as an attorney of this Honourable Court.

"9th.—That the matter of complaint made in the said first paragraph appeared in the said *Brahmo Public Opinion*, to the best of my knowledge, information, and belief, in its issue of Thursday, the 19th day of April 1883, and no contradiction thereof, nor any explanation thereof, appeared either in the said *Brahmo Public Opinion*, or, to the best of my knowledge, information and belief in any other newspaper

"10th.—That the matter of complaint made in the said second paragraph appeared in the said *Brahmo Public Opinion* in its issue of the 26th day of April 1883, and no explanation or contradiction thereof appeared in that paper, or in any other newspaper, before the publication of the said issue of the said periodical work.

[114] "11th —That I honestly believed the statements in the said *Brahmo Public Opinion* to be true, and the paragraphs aforesaid which were both written by me, were so written under such belief and under a sense of public duty that conduct, such as was imputed to the said Hon'ble JOHN FREEMAN NORRIS, should be brought to the notice of the public and censured

"12th.—That from the affidavits of Mr William Robert Fink, the Assistant Registrar, and the Officiating Chief Clerk of this Honourable Court, and of Baboo Baneynadhuh Mookerjee, one of the Interpreters of this Honourable Court, the truth of which I entirely and unhesitatingly accept, I now find that the statements contained in the said *Brahmo Public Opinion* relating to the production of the said Salgram in Court were inaccurate and misleading, and that the said Hon'ble JOHN FREEMAN NORRIS, instead of acting in a *zabhdusti* manner as alleged, acted under pressure from the parties, who are both Hindus, apparently against his own inclination

"13th.—That I have received contradictory statements with regard to the statements contained in the said first paragraph, some asserting that they are inaccurate and misleading, others maintaining the contrary, and I have not been able to ascertain which of these contradictory statements represent the truth.

"14th. —I say most emphatically, that if I had known, or had any reason to believe, that the statements of the *Brahmo Public Opinion* aforesaid were in any respect inaccurate, I would not have made the observations I have, and I am truly sorry that I was misled into making them, and I withdraw them unreservedly; but I repeat that my observations were made perfectly *bonâ fide*, and without any motive of any description whatsoever other than the motive to promote public good.

"15th.—That the circumstances of British India are such, that this Honourable Court and the other High Courts in the other Presidencies are looked upon, and I believe justly looked upon, as the staunchest, the most upright and the most impartial upholders of the just rights and privileges of all sections

of the community, and any action on the part of any Honourable and learned Judge of these Honourable Courts tending to show the least disregard of such rights and privileges is viewed with [115] great alarm by the community, and I conceive that it is the duty of all journalists to maintain that no such disregard is shown.

"16th.—That I express my deep regret at having unwittingly endeavoured to cast an undeserved slur upon the said Hon'ble JOHN FREEMAN NORRIS, and I place myself unreservedly in the hands of this Honourable Court, being satisfied that the apology which is hereinbefore contained is, under the circumstances, due from me to the said Hon'ble JOHN FREEMAN NORRIS and this Honourable Court, and I further submit myself to the favourable and indulgent consideration of this Honourable Court."

"17th.—That I am advised that this Honourable Court has no jurisdiction to issue the said rule, or to deal with me or the said Rameoomar Dey summarily; but the question, I am also advised, is one of extreme difficulty, and I know it to be one of great public importance, and one which will require much time and attention to be dealt with as, in my judgment, it should be dealt with."

"18th.—That the said rule was served upon me at half-past eleven o'clock, and I received the said grounds at about a quarter after 2 P.M., and though my attorney and I have made our best endeavours to secure the services of counsel learned in the law to appear for me and argue the said question, I have not succeeded in getting one prepared to do so this morning, and I humbly pray that time may be granted to me sufficient to enable me to have the said question argued, and I make this prayer entirely subject to the apology which I have made and without in any way detracting from or weakening the same in any particular whatever." •

On the 4th May the rule came on for hearing before the Chief Justice and four Judges of the High Court (GARTH, C.J., MITTER, J., CUNNINGHAM, J., McDONELL, J., and NORRIS, J.)

Mr. *Banerjee* appeared to show cause, and after reading the portion of the affidavits containing the apology for having inserted the article, stated that he was not prepared to support the prayer for an adjournment contained in the 18th paragraph of the affidavit of the petitioner, that even if that prayer were granted, he would not be in a position to argue the question of the jurisdiction of the Court, and that if he were in a position to argue it, he would not do so.

[116] The Court on the next day (May 5th) delivered the following Judgments on the matter.—

GARTH, C.J. (CUNNINGHAM, McDONELL and NORRIS, JJ., concurring).—Baboo Surendra Nath Banerjee, you have been guilty of a gross contempt of this Court in publishing in the *Bengalee* Newspaper, of which you are the editor, the article which is the subject of this rule.

We understand from your counsel, Mr. *Banerjee*, that whatever your original intention may have been, you now admit that you have been guilty of such contempt, and you have submitted what professes to be an apology to the Court in the affidavit which was read yesterday by your counsel.

You have certainly acted wisely in not attempting to justify an act which you must be well aware is wholly unjustifiable, and your counsel has also exercised a wise discretion in not insisting upon a point which we observe is suggested in your affidavit, that this Court had no power to institute these proceedings.

It is impossible that any reasonable man who is acquainted with the real truth of the matter, can read the article in question which you admit to have been composed and published by yourself, without seeing that it is a most scandalous and wholly indefensible attack upon Mr. JUSTICE NORRIS.

You begin the article by accusing that learned Judge of neglecting in the discharge of his judicial duties the commonest consideration of prudence and decency, you go on to compare him with two of the most notoriously unrighteous Judges that ever disgraced the English Bench, and you denounce him to the Indian public as utterly unworthy of his high office, and unfitted by nature to maintain those traditions of dignity, which are inseparable from the position of a High Court Judge. As a climax to these accusations, you quote the following passage from the *Brahmo Public Opinion*, reflecting upon the learned Judge's conduct in a particular cause, which was then, and is now, pending in this Court: "Mr. JUSTICE NORRIS is determined to set the Hugh on fire. The last act of *zuberidusti* on his Lordship's part was the bringing of a Salgram (a stone idol) into Court for identification. There have been very many cases both in the Supreme Court, and the present High Court of Calcutta, regarding the custody of [117] Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged into Court. Our Calcutta Daniel looked at the idol, and said it could not be a hundred years old. So Mr. JUSTICE NORRIS is not only versed in law and medicine, but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of Calcutta will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of Justice."

Upon the basis of that statement in the *Brahmo Public Opinion*, without informing yourself whether it was true or false, and without ever making enquiry into the circumstances of the case, you proceed recklessly to comment upon the conduct of the Judge and to hold him up to public execration in the following language:—

"What are we to think of a Judge, who is so ignorant of the people, and so disrespectful to their most cherished convictions, as to drag into Court and then to inspect an object of worship, which only Brahmins are allowed to approach, after having purified themselves according to the forms of their religion? Will the Government of India take no notice of such a proceeding? The religious feelings of the people have always been an object of tender care with the Supreme Government. Here, however, we have a Judge who, in the name of Justice, sets those feelings at defiance, and commits what amounts to an act of sacrilege in the estimation of pious Hindus. We venture to call the attention of the Government to the facts here stated, and we have no doubt due notice will be taken of the conduct of the Judge."

"Now so far from there being the least foundation for this tissue of abuse, it appears from the affidavits upon which this rule was issued (which are now admitted by yourself to be perfectly correct) that the account given in the *Brahmo Public Opinion* and your own comments upon it, were wholly without foundation.

The truth of the matter was this. In a case which was tried before the learned Judge, a question arose as to the identity of a certain thakoor or idol. It was necessary for the purpose of determining that question to ascertain whether a particular [118] thakoor, which was then in the custody of one Bluttock Nath Pundit in the Buria Bazaar, was the family thakoor of certain parties to the suit.

For the purpose of determining that question, it was suggested by the counsel on both sides that the thakoor should be brought into Court for the purpose of identification.

Mr. JUSTICE NORRIS hesitated to take that course, until he had enquired from the attorneys on either side, who were Hindus, whether there would be any objection to it. Their answer was that there would be none. His Lordship then further enquired from a person named Gouree Kant Burmun who was in Court, and who was an agent of the plaintiff, whether he saw any objection, and his answer was, that the idol could not be brought into the Court itself, on account of the coir matting with which the floor was covered, but that it might be brought without objection into the corridor.

The learned Judge then, in order to satisfy himself still further, sent for the Court interpreter, Baboo Banimadhub Mookerjee, who is an officer of great experience and a high caste Brahmin, and made the same enquiry of him. He asked whether the thakoor was a Salgram, and finding that it was, made the same answer as Gouree Kant, namely, that it could not be brought into Court on account of the matting, but that it might with perfect propriety be brought into the corridor.

Upon this his Lordship granted the application, and a *subpoena duces tecum* was issued to Bhuttock Nath Pundit to produce the thakoor the same day, and in order to ensure the orders of the Court being properly carried out, it was further ordered that the Interpreter himself should proceed with the officer to Bhuttock Nath Pundit's house, who was himself a Brahmin, and should see to the proper conveyance of the thakoor to the Court.

We have then the affidavit of Banimadhub Mookerjee himself, who, after confirming the above facts, informs us that in obedience to the order of the Court, the thakoor was duly conveyed into the corridor by himself and the Pundit, and the learned Judge, attended by counsel on both sides and the attorneys, left the Court and went into the corridor for the purpose of inspecting it.

It seems, therefore, impossible for any one, however strict his [119] religious views on such subjects may be, to say that Mr. JUSTICE NORRIS did not take the utmost pains, in the first place, to ascertain whether the thakoor ought to be brought to the Court at all, and in the next place to provide that it should be brought there with all due respect and propriety.

It may be perfectly true that European Judges, and more especially Barrister Judges, are often imperfectly acquainted with the religious views and feelings, of the Hindu community, and the utmost they can do, when occasion arises, is to consult those who are best informed upon the subject, and to be guided by their advice.

But we now understand from your own affidavit, as well as from your counsel, Mr. *Banerjee*, that you admit that the learned Judge did everything in his power to ascertain the truth of the matter, and to avoid giving the least offence to the religious feelings of your countrymen.

It therefore, only remains for us to consider what punishment we ought to inflict upon you.

It is, indeed, a very lamentable thing, and I trust that your own countrymen will also be of that opinion, to find a gentleman of your position and attainments, who was once a member of the Covenanted Civil Service, and is now an

Honorary Magistrate of this city, making use of his influence as a newspaper editor to vilify and bring into public contempt, without any justification whatever, a Judge of the High Court.

If the offence had been committed by any young inexperienced man of no education or knowledge of the world, or by a person in the position of Ramcoomar Dey, who stands beside you, we might ascribe it, in some degree at least, to ignorance or want of consideration. But you have had great educational advantages. You know, or should know as well as any one, the duties and responsibilities of gentlemen connected with the Press. You profess in your affidavit to justify your offence by putting forward as the basis of your false charges against Mr. Justice NORRIS, a statement in the *Brahmo Public Opinion* which you say you believed to be true, and upon which you considered yourself at liberty to enlarge and comment with extreme severity.

*[120] Moreover, whilst you profess to admit that your charges were totally false and unfounded, and made without any sort of enquiry on your part, you still maintain that you made them "in perfect good faith, and in the interests of the public good."

Furthermore, you have made mention in your affidavit of another article, extracted from the *Brahmo Public Opinion*, which is also apparently intended to reflect upon Mr. JUSTICE NORRIS, and the subject of which has nothing to do with the present proceeding. Your counsel, though invited to do so, has wholly failed to explain to the satisfaction of the Court why that article was inserted. And you must have known perfectly well that the affidavits, upon which the rule was issued, were not directed to the subject of that article.

These matters in your affidavit, so far from extenuating your offence, appear to the Court to be an aggravation of it.

The Judges are at a loss to understand how a libel so gross could possibly have been inserted in your paper "*in good faith*," and they find great difficulty in believing that a gentleman of your education, and a newspaper editor, could be so utterly ignorant of the law of libel as to suppose that you were at liberty to publish these attacks upon the conduct and character of a High Court Judge, merely because you found them, though in a less virulent form, in another native newspaper.

The Court is quite willing to make some allowance for your affidavit having been drawn, as your counsel informed us was the case, in a hurry, and without consideration. But they cannot look upon it for the reasons which I have just mentioned, as any extenuation of your offence.

We feel that it is absolutely necessary to vindicate and maintain the authority of the Court, and to guard against the repetition of the grave offence which you have committed, by imposing upon you, (not a fine, which in your case would be a mere nominal penalty), but such a substantial punishment as may serve as a wholesome warning to yourself and others.

The Court's order is, that you be imprisoned on the civil side of the Presidency Jail for the space of two months.

[121] The majority of the Court regret, that in determining the award of punishment, my brother MITTER'S views should not be in accordance with theirs. We are, of course, fully aware of the precedents to which that learned Judge refers, but in the first place, we think the facts of those cases are very different from the present, and in the next place we find ample precedent in England in cases of gross libel, where a more severe punishment has been awarded.

We fail to see, why persons charged with contempt of Court for libel in a proceeding of this nature, should be subjected to a less severe punishment,

than if the proceeding had been by criminal information, or by the more ordinary process at the criminal sessions.

Had your affidavit disclosed a more honest and candid avowal of your guilt, without making mention of those matters, which the Court cannot find to have been introduced for any useful purpose, or from any proper motive, they might have considered it sufficient for the ends of justice to have visited you with a more lenient punishment.

Ramcoomar Dey, you have also been guilty of a contempt of this Court for having been the means, as the printer and publisher of the *Bangalee* newspaper, of circulating the article in question.

We are, of course, by no means prepared to say that as a rule the printer and publisher of a newspaper is not fully responsible, both civilly and criminally, for everything that is inserted in that paper. But we find in this instance, not only from your own affidavit, but from that of Baboo Surendra Nath Banerjee, who has very properly done his best to protect you, that you know the English language very imperfectly, and that you have evidently been the mere instrument of the editor, under whose orders you acted.

We, therefore, think that you may with propriety be discharged.

Mitter, J.—I concur in the finding that both Ramcoomar Dey and Surendra Nath Banerjee are guilty of contempt of Court. But after giving my best consideration to the question of the punishment that should be inflicted, I am unable to agree in the view of the majority of the Court. There have been in this [122] Court two cases of a similar nature since its establishment. One is *In the matter of Piffard* (1 Hyde, 79). The other case is not reported in any authorized report, but is well known as *Taylor's case*. In both these cases at the first hearing the persons charged with contempt did not admit their guilt. The matter was discussed fully, and after the Court had pronounced its decision that they were guilty, suitable apologies were made.

In the case before us, the persons charged with contempt have at once admitted their guilt, and have expressed their deep regret at having unwittingly cast an undeserved slur upon a learned Judge of this Court.

In the first-mentioned case, Sir BARNES PEACOCK, C J, in delivering the judgment said: "Although the majority of the Judges were of opinion that both these gentlemen," *etc.*, the persons charged with contempt, "have acted in contempt of Court, they did not wish to visit the offence with any punishment, the Court would be content with an apology, nor need the apology be an abject one, but simply such as would convey the expression of their sorrow at having committed that which the Court considered to be contempt." In accordance with this expression of opinion a suitable apology was made, and no punishment was inflicted.

In the other case the sentence of the Court was that Mr. Taylor should stand committed for one month to the civil side of the Presidency Jail, and that he should pay a fine of Rs. 500, and that he should be further imprisoned till the fine was paid.

There Sir BARNES PEACOCK, C J, referring to an apology which had been published by Mr. Taylor before this sentence was passed, said:

"If you think fit to add to the apology which you have already published, (and it is for you to decide whether you can conscientiously do so or not), the Court is willing to mitigate the sentence. If after what you have heard, you state that, upon reflection you find that the charges which you made against Mr. Justice DWARKANATH MITTER were unwarranted and wholly without foundation, and that you are sorry for having made them, you may do so, and you may add, if you wish it, either that you did not intend to cast any reflection upon any of the other Judges, or that the reflection

cast was unfounded, and if you publish that apology in the *Englishman* you may apply on Monday, the 3rd of May next, for your discharge on payment of the fine."

This sentence was passed on Saturday, the 24th April 1869, and on the 27th April following Mr. Tayler, having made a suitable apology, was released, the remaining term of his imprisonment having been remitted.

I have gone into these details, because it seems to me that in determining the amount of punishment to be inflicted on Surendra Nath Banerjee, we should take these cases as our guide. The complexion of guilt in the case of Mr. Tayler is certainly not of a lighter character than that of Surendra Nath Banerjee.

On the question of punishment, therefore, I should have been inclined to adopt the course which was adopted in these cases.

From this sentence Surendra Nath Banerjee preferred a petition to Her Majesty in Council for special leave to appeal.

The petition, after setting out the facts, and the articles complained of, and referring to the matters stated in his affidavit as above set out, continued —

"That your petitioner immediately on learning from the affidavits the facts therein stated, determined to express fully and unreservedly his sincere regret at having through ignorance of the said facts written the article in the *Bengalee*, and in accordance with such determination, the affidavit filed by him in answer to the said rule, a copy whereof is appended to the memorial herein-after referred to, and hereto annexed, after setting forth the facts and circumstances stated, and exonerating Ramcoomar Dev from all responsibility for the article, which your petitioner admitted was composed by himself, and published on his own and sole responsibility, stated, that he found from the affidavits, the truth of which he entirely and unhesitatingly accepted, that the statements contained in the *Brahmo Public Opinion* were inaccurate and misleading, and that the said Mr Justice NORRIS, instead of acting in a *zuberdist* (violent) manner, as alleged, had acted under pressure from the parties to the said proceeding, who were both Hindus, and that had he known, or had he had any reason to believe that the statements of the *Brahmo Public Opinion* respecting the said Mr Justice NORRIS were in any respect inaccurate, he would not have made or published the observations respecting that learned Judge which he did, and that he was truly sorry he had been misled into making them." The petition, after setting forth matters to show that there had been no waiver on his part of the point of jurisdiction, inasmuch as his advocate had said what he did, "not under your petitioner's instructions or by his authority" further stated that "your petitioner is advised that, even if there had been any waiver by his counsel of your petitioner's right to question the jurisdiction of the High Court to proceed against him in a summary way, as for contempt of Court, by reason of his publication of the aforesaid article, such waiver does not, nor can affect your petitioner, or confer a jurisdiction upon the said Court, which it did not by law possess."

After setting forth the facts of the judgment and sentence upon him, and that he was advised that such sentence was passed without jurisdiction, he went on to state —

"That your petitioner upon being so sentenced and imprisoned prepared and presented to His Excellency the Viceroy a memorial" (a copy of which was annexed to the petition) "praying His Excellency in Council to forward the same to your most Gracious Majesty in order that your Majesty might, if graciously pleased so to do, refer the said memorial to the Judicial Committee of your Majesty's Privy Council under the provisions of the 3 and 4 Will.

IV. c. 41, s. 4 for hearing and consideration, and that your Majesty might also be graciously pleased to suspend the operation of the sentence passed upon your petitioner pending the hearing and consideration of the said memorial by their Lordships of the Judicial Committee, should your Majesty be pleased to refer the matter of the memorial to them "

This memorial had (the petition stated) been forwarded to the Secretary of State for India in Council

On the hearing of this petition, -

Mr. T. H. Cowie, Q C, (with whom was Mr J T. Woodroffe) appeared for the petitioner --The publication of this article did not tend directly to obstruct the course of justice in the determination of the then pending suit, nor was it a contempt committed in view of the Court. Although it affected the administration of [123] justice generally, it was not aimed at interference with the decision in a suit, but was a libel on a Judge in his judicial capacity in reference to his conduct at a trial. The question of jurisdiction might be thus stated. (a) whether in an Indian Court, which was a Court of Record, summary proceedings for contempt were the authorized course in the case of a libel, out of Court, on a Judge in his judicial capacity in reference to his conduct at a trial, (b) whether such proceedings were now authorized, regard being had to the terms of the Indian Codes, viz, the Indian Penal Code and the Code of Criminal Procedure.

Whatever might have been the powers of the Supreme Court to punish for a contempt in or out of Court, the only legal mode in which the High Court could punish such an act as that of the petitioner was by enforcing an appropriate section of the Indian Penal Code, upon proceedings taken according to the Code of Criminal Procedure, 1882. Viewed as a contempt this act was of the class of criminal contempts which, as explained in *Wellesley's case* (2 R. and M., 639), and *In re Pollard* (L. R., 2 P C, 106), were in the nature of offences. That there were provisions in chapters X and XI of the Indian Penal Code directed against contempts of the lawful authority of public servants, and against offences against public justice, affected the question whether the summary powers exercised at common law for the protection of Courts had remained in force, although insults and interruptions to a public servant sitting in any stage of a judicial proceeding, provided for in s. 228, Indian Penal Code, were restricted to such acts done in Court. Other provisions of the Indian Penal Code, viz, those of chapter XXI (of Defamation) would meet this case viewed as a libel. To these considerations must be added the apparent intention of the Code of Criminal Procedure, 1882.

The Statute 13, Geo. III., c. 63, which authorized the issue of the Letters Patent of 1774, in s. 13, empowered the Court of which it authorized the establishment, "to do all such things as shall be found necessary for the administration of justice, and the due execution of all or any of the powers which by the said Charter may be granted and committed to the said Court." The same section enacted that "the Court shall, at all times, be a [126] Court of Record." The Letters Patent of 1774 declared, in s. 4, that "the Chief Justice and Puisne Justices of the Supreme Court should have such jurisdiction and authority as the Justices of the Court of King's Bench had, and might lawfully exercise in that part of Great Britain called England by the common law thereof" This conferred the ordinary jurisdiction, which alike on the Plea, Equity, and Crown sides, as well as the Admiralty and Ecclesiastical jurisdictions, were separately conferred. But neither in the Statute, nor in the Charter, was there any general clause declaring the general powers of the English Courts to belong to the Supreme Court [Srn

R. COUCH observed that the practice of issuing the writ of *habeas corpus* had been referred to this authority.] The exercise of that power was within the words to do all such things as might be necessary. And it might be noticed that Act X of 1882 provided for the issue of the *habeas corpus*. The summary process for contempt could hardly be put on the same ground after the legislation that had taken place.

The powers of the Supreme Court had not been quite co-extensive with those of the superior Courts in England. The learned counsel referred to the issue of the writ of *mandamus* from the Queen's Bench also to the judgment of COCKBURN, L., C. J., in *The Queen v Lefroy* (L. R., 8 Q. B., 134), who said that the superior Courts at Westminster were originally all divisions of the *aula regia*. There had been no office in the Supreme Court directly corresponding to that of the Master of the Crown Office, and it had been doubted how far the *ex-officio* powers of the Advocate-General extended in obtaining leave to file criminal informations.

He did not allege, having regard to *Macdermott v. The Justices of British Guiana* (5 Moore's P. C. N. S., 466), and other cases, that no Courts of Record other than the High Courts of Justice in England could exercise power to commit for contempt. But if these powers belonged to the Supreme Court, the question still remained whether they had been transmitted to the High Court. By s. 9 of the Charter of 1861, issued under the authority of the Statute 24 and 25 Vic., c. 104, the High Court was to exercise jurisdiction, and every power and authority, in any manner vested in the Courts then abolished, with the reservation, important to the [127] argument, that "this was to be subject, and without prejudice, to the legislative powers of the Governor-General in Council." The legislative power had been exercised. The Indian Penal Code had come into force as XLV of 1860, enacting in s. 2 that no person should be liable to punishment for any offence otherwise than under that Code or "under any special or local law." In both the Charters of 1862 and of 1865 (in s. 29 in the former and s. 30 of the latter), it was declared that all persons brought for trial before the High Court charged with any offence for which provision was made by the Indian Penal Code should be liable to punishment under such Code, and not otherwise. Reference was made to chapters X and XI of the Indian Penal Code; also to chapter XXI, and it was argued that the contemplation of law, as shown in the legislation referred to, was that all offences capable of being dealt with under the Indian Penal Code should be so dealt with.

The introduction of the Code of Criminal Procedure within the local limits of the original jurisdiction of the High Court had followed. By Act X of 1882, s. 1, it extended to all British India, although, in the absence of any specific provision to the contrary, nothing therein contained was to affect any "special or local law in force," or any "special jurisdiction," or "power conferred," by any other law in force.

These terms "special law" and "local law," also used in the Indian Penal Code, to which, for their explanation, the last clause of s. 4 of Act X of 1882 referred, meant, the one, a law applicable to a particular subject, and the other, a law applicable to a particular part of British India. It was further enacted in s. 5, that all offences under the Indian Penal Code should be inquired into and tried according to the procedure enacted in this Code, and that all offences under any other law should be inquired into and tried according to the same provisions, but subject to any enactment, for the time being in force regulating the manner, or place, of inquiring into or trying such offences. The conclusion was that the summary process for contempt was not a special or

local law, within the meaning of the above, nor in force under any enactment regulating it. The Code of Criminal [128] Procedure was, therefore, applicable to this offence, not being excluded by its own provisions.

To this might be added an argument derived from s. 480 of Act X of 1882, which enacted that, when certain offences within ss. 175, 178, 179, 180 or s. 228 of the Indian Penal Code had been committed in the view of a Court, it might cause the offender to be detained in custody and punished with fine, itself taking cognizance of the offence. Part of the reasoning of the judgment in *The Queen v. Lefroy* (L. R., 8 Q. B., 134), was, that because special provision had been made in the Statute 9 and 10 Vic, c. 95, enabling County Courts to punish summarily contempts committed in their view, it was, therefore, not the intention of the Legislature that such Courts should possess the general powers exercised by the superior Courts to punish contempts committed out of their view. By analogy, the giving express power in s. 480 to punish in a certain class of contempts, excluded the inference that the Legislature intended that other powers of a similar sort should remain.

The general result was, that the provisions in the Indian Penal Code and the Code of Criminal Procedure, 1882, effected this; that an act, such as that of the petitioner, in the nature of a libel on a Judge in his judicial office, and in reference to his mode of conducting a trial, was remitted to the general head of defamation to be punished under chapter XXI of the Indian Penal Code.

[Sir B. PEACOCK referred to Lord HARDWICKE'S division of contempts in his judgment in *The Champion* (Atkyn's Rep., 469).]

Mr Cowie, Q.C., said that his contention was, that unless the libel had a direct tendency to interfere with the course of justice in a pending case, the proper mode of proceeding was not to deal with it as a contempt. What constituted contempt was fully explained in the judgment of the Irish M. R. in *Birch v. Walsh* [10 Ir Eq Rep, (1847-48), 93]. Reference was also made to *In re Pollard* (L. R., 2 P. C., 106), *In re Ramsay* (L. R., 3 P. C., 427); *R. v. Creevey* (1 M. and S., 273), *McDermott v. The Justices of British Guiana* (5 Moore's P. C. C. N. S., 466), *Smith v. The Justices of Sierra Leone* (3 Moore's P. C. C., 361), [129] *Rainy v. The Justices of Sierra Leone* (8 Moore's P. C. C., 47). Reference was made to the opinion expressed in *Morgan v. Leech* (3 Moore's P. C. C., 368) in regard to the reservations contained in the Statute 3 and 4 William IV, c. 4, as covering a grant of leave to appeal in the case of matters not strictly an appealable grievance. Also to *In re Skinner* (L. R., 3 P. C., 451), in which it had been held that leave to appeal under the general powers of s. 4 of that statute might be granted, although the alleged grievance might not be appealable under the Letters Patent of the High Court. Also in connection with this, *In re Ramsay* (L. R., 3 P. C., 427) was referred to.

On a subsequent day, July 18th, their Lordships' Judgment was delivered by

Sir B. Peacock.—The only question to be determined is, whether the High Court had jurisdiction to commit the petitioner for a contempt of Court in publishing the libel set out in the petition.

Their Lordships took time to consider, in order that they might carefully examine the provisions of the Code of Criminal Procedure, 1882, which came into force in January 1883. Having done so, they are clearly of opinion that, notwithstanding that Code, the High Court had jurisdiction.

The Penal Code for British India was referred to by the learned counsel for the petitioner, and in particular chapter XI, s. 228, and chapter XXI, "Of Defamation." But that Code merely defines the several offences thereby

created, and provides the punishments to which offenders are to be liable. It does not at all affect the procedure by which offenders are to be brought to punishment. It is only by the Code of Criminal Procedure, read in conjunction with the Penal Code, that the jurisdiction of the High Court to commit for contempt was, if at all, affected.

Section 228 of the Penal Code, which was referred to in the argument, does not apply to the present case; it relates merely to insult or interruption to a public servant while sitting in a stage of judicial proceedings. It does not provide against a contempt of Court committed by the publication of a libel out of Court when the Court is not sitting.

[130] The chapter XXI, "Of Defamation," does not define "contempt of Court," or make any provision for the punishment of a contempt of Court by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. The offence, as a case of defamation, might doubtless have been punished under that chapter with simple imprisonment, not exceeding two years, or with fine, or with both. If the procedure of the Criminal Procedure Code had been adopted, and the petitioner had been convicted of simple defamation under chapter XXI of the Penal Code, and after his apology, had been sentenced by the Court to two months' imprisonment, there would have been no pretence for an application for special leave to appeal against the conviction.

But it is not because the publisher might have been punished for defamation, that he could not be punished summarily as for a contempt of Court.

Lord HARDWICKE, in the case of *The Champion* (2 Atkyn's Rep, 469), says. "To be sure, Mr Solicitor-General has put it upon the right footing that, notwithstanding this should be a libel, yet, unless it is a contempt of Court, I have no cognizance of it, for whether it is a libel against public or private persons, the only method is to proceed at law."

The libel in the present case was clearly a contempt of Court. It is contended, however, on the part of the petitioner that, by reason of the Code of Criminal Procedure, 1882, the Court could not deal with it as a contempt of Court or punish the offender by commitment in a summary manner.

Several sections of that Code were referred to.

Section 198 enacts, amongst other things, that no Court shall take cognizance of an offence under chapter XXI of the Indian Penal Code, *i.e.*, the chapter "Of Defamation," except upon a complaint made by some person aggrieved by such offence.

Complaint is defined in section 4a to mean "the allegation made orally or in writing to a magistrate with a view to his taking action," &c.

Section 195 enacts that "no Court shall take cognizance of an offence under section 228 of the Indian Penal Code," (*i.e.*, [131] the offering insult to a public servant whilst sitting in any stage of a judicial proceeding), "when such offence is committed in or in relation to any proceeding in any Court, except with the previous sanction or on the complaint of such Court, or of some other Court to which it is subordinate."

It is scarcely possible to suppose that the procedure above pointed out was intended to apply to the case of an insult to, or a libel upon, the High Court, or a libel upon one of the Judges thereof, imputing corruption or misconduct or incapacity in the discharge of his public duties, or a libel such as that set out in the petition.

Section 480 and the two following sections of the Code of Criminal Procedure were referred to in the argument in support of the petition, but they do not apply to a case of libel or defamation out of Court whilst the Court is not sitting, and have no direct bearing on the present case.

Section 5 was also referred to, and it was contended on the part of the petitioner that, according to the provisions of that section, the procedure provided by the Code of 1882 was the only one which could be adopted.

That section is in the words following—

“All offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences”

Their Lordships are of opinion that a contempt of the High Court by a libel such as the present, published out of Court when the Court is not sitting, is not included in the words “offences under the Indian Penal Code,” although the contempt may include defamation. Such an offence is something more than mere defamation, and is of a different character. It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of England was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of [132] Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it, are the same there as in this country, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England (5 Moore's P. C. C., N. S., 497). The words “all offences under any other law” in s. 5 cannot be intended to include a contempt like the present, for which no provision is made by the Code. It is unnecessary, therefore, to consider what is the true construction of the words “any special jurisdiction or power conferred by any other law now in force” in s. 1.

Their Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty.

In the case of *Dainy v. The Justices of Sierra Leone* (8 Moore's P. C. C., 47, at p. 54) upon an application for leave to appeal to enable the petitioner to get rid of certain fines imposed upon him by the Court of Sierra Leone for contempts of Court, it was said “It is the opinion not only of the members of the Committee who heard the petition, but also of the other members who usually attend here to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.” That case was referred to as an authority by the Judicial Committee in the case of *McDermot v. The Justices of British Guiana* (5 Moore's P. C. C., N. S., 466).

In the latter case an application was made *ex parte* for leave to appeal from an order of the Supreme Court of Civil Justice in British Guiana, by which the petitioner was, for a contempt of Court in publishing certain libels commenting on the administration of justice, and upon one of the Judges of the Court, committed to jail for a period of six months or until further orders. See S. C., p. 490, and 4 Moore's P. C. C., N. S., 110, [133] 120. Leave to appeal was granted, without prejudice to the question of

the competency of Her Majesty in Council to entertain an appeal from an order of a Court of Record inflicting punishment by fine or imprisonment for a contempt of Court, which question was to be open to argument on the hearing of the appeal. The case came on for argument, and it was contended by the Solicitor-General, that the leave to appeal ought not to have been granted, as a Court of Record is the sole judge of what constitutes a contempt. He stated, however, that he was prepared to support the order upon the merits, but he was not called upon to do so.

In delivering the opinion of the Judicial Committee, Lord CHELMSFORD, after stating that the leave to appeal was conditionally granted, said the respondents might have come in to discharge the order upon the very ground which had been taken, namely, that there could be no appeal against an order of a Court of Record committing a person for contempt, and that, in order to support the propriety of the leave to appeal, the appellant must show either that the Court was not a Court of Record, or that, if it was a Court of Record, yet that there was something in the order committing the appellant which rendered it improper, and therefore the subject of appeal. Then after deciding that the Court at Sierra Leone was a Court of Record, his Lordship says (498) "Not a single case is to be found where there has been a committal by one of the colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description." Again, after referring to the authorities, and amongst others to *Rainy's case*, his Lordship concluded by saying "Under these circumstances their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted, that the Supreme Court of Justice was a Court of Record, and that, as a Court of Record, it had power to commit for the particular contempt. As their Lordships do not enter into the merits of the case, they will say [134] nothing as to the character of the libel upon which the Court thought it proper to commit the publisher for contempt."

Acting upon these authorities, and holding that the High Court had jurisdiction to commit the publisher of the libel in question for contempt, their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise Her Majesty to dismiss the petition.

Solicitor for the Petitioners Mr T L Wilson

Petition dismissed.

NOTES.

[I. CONTEMPT OF COURT—

In (1911) 21 M L J 832 10 M L T 209 12 I C 293, the Madras High Court held that the High Courts had inherent jurisdiction to deal with contempt of an inferior Court, but not under sec. 15 of the Charter Act

But this view has been controverted in *The Governor of Bengal in Council v Motil Lal Ghosh* (1913) 17 C. W. N. 1253 18 C L J, 452 20 I C 81. To get rid of the effect of this decision, a Bill is now (June 1914) pending in the Imperial Legislative Council

The competency of the High Court to deal with a Barrister enrolled as an advocate therein, in exercise of their disciplinary jurisdiction, on his publication of a libel amounting to a contempt of Court, and the procedure that might be followed were discussed in (1906) 11 C. W. N. 273 P. C.

II. INHERENT POWERS OF THE HIGH COURT—

See the elaborate judgment of WOODROFFE and MOOKERJEE, JJ in (1905) 33 Cal. 927 ; also, 3 C. L. J. 29, (1908) 33 Bom. 469 10 Bom. L. R. 1141, (1909) 33 Bom. 630 (633) : 11 Bom. L. R. 360 ; (1884) 8 Bom. 380, (1910) 6 I. C. 120 Cal.]

[10 Cal. 134]

APPELLATE CIVIL.

The 6th September, 1883

• PRESENT :

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR JUSTICE
MACPHERSON

Durga Churn Shaha and another.Two of the principal Defendants
versus

Nilmoney Dass and others...Plaintiffs.

*Minor, suit by—Civil Procedure Code, Act XIV of 1882, s. 440—Suit by
next friend on behalf of minor—Act XL of 1858, s. 3—Certificate.*

The effect of s. 3 of Act XL of 1858 read with s. 440 of the Code of Civil Procedure is, that a minor plaintiff must not only always sue by his next friend, but when the suit relates to the minor's estate, the person representing the minor must either hold a certificate under the Act, or must obtain the sanction of the Court for the suit to proceed

The mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded.

Baboo *Rash Behary Ghose* for the Appellants.

Baboo *Srinath Dass* for the Respondents

THE facts sufficiently appear from the **Judgment** of the Court (GARTH, C.J. and MACPHERSON J.), which was delivered by

Garth, C.J.—We have great doubt whether we ought not to reverse the judgments of both Courts, and to dismiss the plaintiff's suit upon the ground that it is not properly brought.

[135] It is in form a suit by "Gour Monce Dasse, widow of Sumbho Nath Dass, deceased, and manager on behalf of her minor son Nilmoney Dass" But the real claimant is Nilmoney Dass, the minor, and the suit has been dealt with from first to last by the lower Courts upon that footing.

The suit, therefore, in point of form, is brought in the name of the wrong person.

We have had other cases before us, in which the same mistake has been made, and Courts of First Instance are very much to blame for not obliging plaintiffs to put their claims in proper shape, before they allow such suits to proceed.

* Appeal from Appellate Decree No 226 of 1882 against the decree of Baboo Jagaddurlabh Mozumdar, Officiating Subordinate Judge of Zillah Furrupore, dated the 20th February 1882, affirming the decree of Moulvi Mohabbat Ali, First Munsif of Goalundo, dated the 27th January 1881

The fact of the Munsiff having omitted to do this in the present case has been the means of causing the parties great delay and expense, and very nearly of defeating the plaintiff's claim altogether, although he has succeeded in both Courts upon the merits.

Under s. 440 of the Code, a minor plaintiff must always now sue *by his next friend*; and under s. 443 a minor defendant must defend by a guardian appointed by the Court. The effect of s. 3, Act XL, 1858, read with s. 440 of the Code is, that a minor plaintiff must not only always sue by his next friend, but when the suit relates to the minor's estate, the person representing the minor must either hold a certificate under the Act, or must obtain the sanction of the Court for the suit to proceed.

The form in which the plaintiff should have sued in this case is, "Nilmoney Dass, the minor son of Sumbho Nath Dass, deceased, by his mother and next friend Gour Monee Dassee, etc." The Courts of First Instance should always see that suits by minors are brought in this form.

We have had great doubt whether we ought not to dismiss the case on this ground; but we find that the Court of First Instance has construed the heading of the plaint as if it were a suit by the minor by his next friend, and both Courts have dealt with the case, and tried the merits of it, as if it had been brought in that form.

We think, therefore, that we are justified, under s. 578, as the objection is one which has not affected the determination of the suit on the merits, in confirming the judgments of the Courts below.

[136] It must be thoroughly understood, however, with reference to the final decree, that it is made *in favour of the minor as plaintiff and not of his mother Gour Monee Dassee*. As regards the contention that the suit is bad, because the Court never gave the sanction necessary under s. 3, Act XL, 1858, it seems that the Munsiff, on the defendant's objection, put in issue the question whether a certificate under the Act was necessary, and deciding, rightly enough, that the permission of the Court was sufficient, proceeded to hold that the mere admission of the plaint sufficiently indicated that sanction was accorded. In this we think he was wrong, but we may reasonably hold that the effect of the decision on the issue was in this instance to give permission. The appellants further urge that the Court was wrong in allowing the name of another minor plaintiff to be added at a very late stage. It is sufficient, however, to say that the objection was deliberately not pressed in the lower Appellate Court. Section 32 of the Code, moreover, gives a wide discretion to the Court.

The appeal will be dismissed with costs

Appeal dismissed.

NOTES.

[See 12 Cal 48; 14 Cal. 754; and the notes to 10 Cal 102 *supra*.]

* [Sec. 443.—Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be

Guardian *ad litem* to be appointed by Court. guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case

A guardian for the suit is not a guardian of person or property within the meaning of the Indian Majority Act, 1875, section 3.]

[40 Cal. 136]

APPELLATE CIVIL

The 10th September, 1883.

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE TOTTENHAM.

Beer Chunder ManikyaPlaintiff

versus

Ishan Chunder Burdhan and othersDefendants.*

Civil Procedure Code (Act XIV of 1882), s. 432—Suit by independent Prince in British India—Recognized agent for institution of suit.

Section 432 of the Civil Procedure Code does not prevent the institution by an independent prince of a suit in a Court in British India in his own name, and through a recognized agent other than one appointed under that section

THIS was a suit for rent and road cess instituted by the Maharajah of Hill Tipperah, an Independent State, in his own name, describing himself as " zamindar of Chakla Roshanabad, having a tahsil cutcherry at Comilla." The plaint was verified by the tahsil mohurr of the Maharajah. On the plaint being presented the Sub-Judge made the following order " The [137] plaintiff is the independent Rajah of Hill Tipperah. In a regular appeal in a case between him and Nobodip Chundra Bahadur it was held by the High Court that he is a Rajah of the description mentioned in s. 432 † of the Civil Procedure Code. Hence a suit instituted in the name of the Maharajah himself and not by an agent appointed under a special order of Government at the instance of the Maharajah cannot be maintained in a British Court. This plaint, therefore, cannot be accepted, being contrary to the provisions of the law. It is therefore ordered that the plaint be returned."

The plaintiff appealed to the High Court.

Baboo Kali Mohun Dutt for the Appellant

No one appeared for the Respondents

The **Judgment** of the Court (McDONELL and TOTTENHAM, JJ.) was delivered by

McDonell, J—We think that the Court below is wrong in holding that s. 432 of the Code of Civil Procedure prevents the institution of a suit by the Maharajah in his own name, and through a recognized agent other than one appointed under that section. In the present suit the Maharajah has not sued

* Appeal from Original Order No. 175 of 1883 against the order of Baboo Kali Dutt Das, First Subordinate Judge of Zillah Tipperah, dated the 17th of May 1883.

† [Sec. 432.—Persons specially appointed by order of Government at the request of any Sovereign Prince or ruling Chief, whether in subordinate

alliance with the British Government or otherwise, and whether residing within or without British India, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.]

as the independent Rajah of Hill Tipperah, but as Zamindar of Chakla Boshanabad, etc. The judgment to which the Subordinate Judge refers was a suit which was brought against the Maharajah *qua* Maharajah of Independent Tipperah, in respect of a subject of which our Courts could not take cognizance. The order of the lower Court is therefore reversed, and the suit will be tried by the Subordinate Judge.

Appeal allowed.

NOTES

[Sec. 432 of the Civil Procedure Code (Sec. 85 of the Code of 1908) is only an enabling section. It does not prevent the institution of a suit by a sovereign prince in his own name or through a recognized agent appointed under order 3 rule 2—10 Cal 136; 19 All. 510; 165 P. E. 1889; 41. P. R. 1902.]

[138] APPELLATE CIVIL.

The 29th June, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Hurry Churn Dass and others.....Defendants

versus

Nimai Chand Keyal.....Plaintiff.*

*Hindu law—Marriage—Custom—Sagai and Shunga marriages—
Widow re-marriage.*

A became a childless widow in the lifetime of her father. She afterwards contracted a *Shunga* marriage, and by this marriage she had two sons. On the death of her father A's claim to succeed to his property as his heir was disputed. It having been proved that the remarriage of widows was customary amongst the *Nomosudras*, the caste to which the parties belonged, *Held*, that such a custom was valid, and that A was entitled to succeed as heir to her father under the Hindu law.

THIS was a suit for possession of lands and mesne profits. The facts are thus stated in the judgment of the Court of First Instance—

"The lands in dispute belonged to one Radha Mohun Dass who died in 1284 (1877-78) leaving his brother, Sodanund Dass and a widow daughter, the first defendant, Doyamoye. Sodanund, representing himself as the only heir of his deceased brother, the said Radha Mohun, sold these lands to the plaintiff under a *kobala*, dated the 24th of March 1880. The plaintiff says that in taking possession of his purchase on the 5th of April 1880, he was resisted by the defendants. He, therefore, seeks to recover possession and mesne profits after a declaration of his title."

"It is alleged that Doyamoye became a widow during the lifetime of her father, and that Chandra Mohun and Tara Chand are her natural sons, and that they are therefore not entitled to succeed.

"Doyamoye admits that she became a childless widow during her father's lifetime, but she asserts that among her caste people widow marriage is in

*Appeal from Appellate Decree No. 2074 of 1882, against the decree of Baboo Kedar Nauth Mozoomdar, Sub-Judge of Midnapore, dated the 26th July 1882, affirming the decree of Baboo Madhub Chunder Chuckerbutty, Munsiff of Tumlook, dated 28th November 1881.

vogue from time immemorial, and that she was given in marriage a second time by her father, and that Chandra Mohun and Tara Chand are children of her re-marriage. She contends, therefore, that she is a widow daughter having sons of her own, and is therefore the only heir of her father."

[139] The Munsif fixed the following issue and other issues not material to this report. "Whether widow marriage is sanctioned by custom among the *Nomosudras*, and if so is it a valid marriage." He found that the custom relied on was in vogue amongst the *Nomosudras*, but he came to the conclusion that the marriage was not a valid one as its recognition depended upon payments of money to the zamindar, the barber, the brahmin and the village headman. He therefore gave the plaintiff a decree. On appeal the Subordinate Judge came to the same conclusion as the Munsiff, and on the same ground. The defendants appealed to the High Court on the ground (amongst others) that the lower Appellate Court should have held from the evidence of both sides that *Shunga* marriage is prevalent among the *Nomosudra* caste, and the issue of such marriage are legitimate, and entitled to succeed according to Hindu law

Baboo *Jadub Chunder Seal* for the Appellants.

Baboo *Bhoirub Chunder Bonnerjee* for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—We think that this appeal should be decreed.

The question in this case is whether a marriage in the *Sagar* form is valid among the class to which the parties to this suit belong. The Munsiff says. "It is in vogue among them." The Subordinate Judge comes to the same conclusion. It appears therefore that the existence of the custom is proved. The only question then for decision is whether a marriage in pursuance of it is legal. The Subordinate Judge has found that "such a marriage is invalid on the ground that certain fines are paid to the zamindar, and no ceremonies of marriage are performed at *Shunga*, no priest officiates at it, and no rites take place as are necessary in marriage." In page 79 of Mr Mayne's Treatise on Hindu Law it is laid down that a marriage according to the custom of a particular caste or of a particular place is sufficient.

Here the Subordinate Judge is of opinion that no such marriage would be valid unless priests officiate, and the usual marriage rites were performed. In the case of *Bissuam Kooree v. The* [140] *Empress* (3 C. L. R., 410), this very form of marriage was recognized as existing among the lower castes of Hindus residing in Behar. In *Kally Churn Shaw v. Dukhee Bibee* (I. L. R. 5 Cal., 692) this form of marriage was considered to be valid among the *Hulwais*.

It seems to us that the reasons given by the Subordinate Judge are not valid reasons for considering that the custom contended for is not legal.

The very same objections that are taken by him were taken before WILSON, J., in the case of *Kally Churn Shaw*, to which we have referred and were overruled.

In this view of the case we decree the appeal with all costs.

Appeal allowed.

NOTES.

[I. REMARRIAGE OF HINDU WIDOWS BY CUSTOM—

When remarriage of widows is customary among the members of a particular caste no such re-marriage would be invalid by reason of the absence of ceremonies, 5 Cal., 692 ; 10 Cal., 138 ; 19 Cal. 627, 8 Mad., 440. See also 6 M. L. T. 183 ; 20 M. L. J. 49 ; 14 B. L. R. 298 ; 1 Ind Jur. O. S. 24

II. SECOND APPEAL—CUSTOM—

In second appeal, the evidence bearing on the question of custom may be gone into :— (1905) 29 Ind. 24 (27)=16 M. L. J. 8.]

[10 Cal. 140]

APPELLATE CRIMINAL.

The 22nd August, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE TOTTENHAM.

Hurry Churn Chuckerbutty and another

versus

The Empress •

Right of reply—Witnesses not called for defence—Reply by Prosecutor—Reference to books on trial—Examination of prisoner by Judge—Nature of questions permissible—Questioning jury as to verdict—Criminal Procedure Code (Act X of 1882), ss. 289, 290, 303, 307, 342.

At the close of the evidence for the prosecution, the attorney for the defence, in answer to the Judge, stated that he meant to call witnesses. The Court then adjourned, and on the following day the attorney stated that, on re-consideration, he did not intend to call witnesses. The Judge allowed the prosecutor to reply.

Held, that though the strict interpretation of ss. 289 and 292 of the Criminal Procedure Code would warrant this course, it was never meant by the Legislature that the prosecutor should have a reply when no witnesses are called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor in such a case as the present •

A well-known treatise, such as Taylor's Medical Jurisprudence, may be referred to in the course of trial. *Hatun v. The Empress* (12 C. L. R., 86) followed.

[141] It is improper on the part of a Judge when examining a prisoner under s. 342 of the Criminal Procedure Code to cross examine him. The only questions which are permissible are such as will enable the prisoner to explain any circumstances appearing in the evidence against him.

Although s. 303 of the Criminal Procedure Code empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous the Judge should make minute enquiries to learn the nature of the majority and its opinion so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as to ask the jury what is the exact majority, and what is the opinion of the majority, he ought to receive that verdict without hesitation, and if he differs from it, he should proceed as directed by s. 307.

A prisoner, or his Counsel, is at liberty to offer evidence or not, as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another.

Mr. *Amir Ali* and *Baboo Taruck Nath Sen* for the Appellants

The Officiating Deputy Legal Remembrancer (Mr. *White*) for the Crown.

THE facts of this case sufficiently appear from the **Judgment** of the Court (PRINSEP and TOTTENHAM, JJ.) which was delivered by

Prinsep, J.—The two appellants before us, *Hurry Churn Chuckerbutty* and *Gopal Chunder Chuckerbutty*, gomasthas of two co-sharer zamindars, have

* Criminal Appeal No. 399 of 1883, against the order of J. P. Grant, Esqr., Sessions Judge of Hooghly, dated the 31st May 1883.

been tried on charges of culpable homicide not amounting to murder under section 304 of the Indian Penal Code, voluntarily causing grievous hurt under s. 325, and voluntarily causing hurt under s. 323. The jury unanimously acquitted them of the offence of culpable homicide not amounting to murder, and by a majority of three to two convicted them on the second charge. The Judge, in accepting this verdict, expressed his disapproval of the acquittal on the first charge, but in view of the unanimity of the jury in respect of that acquittal accepted the verdict under both heads, and accordingly sentenced the prisoners to the extreme sentence of imprisonment allowed by the law, and also inflicted a fine.

There are many objections which have been taken to, and are indeed patent in, the Judge's proceedings, both as regards those during the trial and his summing up to the jury.

It appears that at the close of the evidence for the prosecution, [142] and before rising for the day, the Sessions Judge inquired and learnt from the attorney for the accused that he meant to adduce evidence for the defence. When the trial was resumed on the following day, the attorney intimated that, upon re-consideration, he did not intend to adduce any evidence. On this the Sessions Judge apparently informed him that the prosecutor would nevertheless have the right of reply, and on its being claimed, in spite of an objection raised, he conceded it.

Now, no doubt the strict interpretation of the terms of ss. 289 and 292 would warrant this, but we think that this was never contemplated by the Legislature, and certainly should not have been allowed by the Judge, when in fact no evidence was produced for the defence. The object of the law evidently is to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor simply because the pleaders for a prisoner may, after consultation during an adjournment, have had an opportunity of considering what was best for the interests of their client. The incautious reply of the attorney at the end of the day should not have prejudiced his client on the resumption of the trial, and can properly be regarded only as the expression of an intention then entertained subject to further consideration.

Then, again, we think that when the attorney for the defence wished to read such a well-known book as Taylor on Medical Jurisprudence on a point so obscurely and unsatisfactorily determined by the medical evidence in this case, the Sessions Judge would have exercised a wise discretion if he had allowed a reference to that book to be laid before the Court. The case relied upon by the attorney of *Hatim v. The Empress* (12 C. L. R., 86) is an authority for referring to such a treatise, and although it may be that in an unreported case a single Judge sitting on the Original Side of the Court may have held an opinion to the contrary, we think that in accordance with the usual practice the Judge should have followed rather the reported case, especially as it had been decided by a bench of two Judges.

Next we regret extremely to find that, in spite of repeated judgments of this Court on appeal against orders passed by the [143] Sessions Judge, he should still persist in the practice of conducting what is nothing else than a cross-examination of the prisoners. Section 342 of the Code of 1882 requires a Sessions Judge to put such questions to an accused generally on the case as he considers necessary after the witnesses for the prosecution have been examined, but that is to be done only for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. Now, in

the present case, we find a very long cross-examination of the prisoner Hurry Churn Chuckerbutty. The questions are so put as to extend over the entire transaction relating to the present case, and, more than that, they are so directed as to obtain from him answers on matters really irrelevant to the matters in issue, but calculated seriously to prejudice him before the Jury, and also to incriminate the co-accused, Gopal Chunder, by connecting him with the execution of the decree which forms the foundation of the present case. Many of the questions are certainly what we should expect to find from a Counsel cross-examining an adverse witness. For instance, the accused was asked "how was Jadub hurt?" *Answer*: "How can I say." *Question*: "Are you of opinion then that Behary got Jadub hurt?" *Answer*: "No." *Question*: "If neither you nor Behary was instrumental in getting him hurt, while the Doctor maintains that Jadub was wounded severely, how then came he to be hurt?" *Answer*: "That I do not know." *Question*: "Why does the pleader say that he saw you, the Peadah, and Jadub go to his lodgings?" *Answer*: "He is Behary Sen's pleader; at the instance of Behary he says so." Then, again, the Judge asks many questions which are extremely irrelevant. *Question*: "After the deceased was brought to the Court did you pay his diet money, or was the amount of decree realised?" *Answer*: "He was neither sent to the jail nor was the amount realised." *Question*: "If he was not sent to the jail, and at the same time the amount of the decree was not realised, then tell me what followed?" Such questions are not, in our opinion, questions which are contemplated by the law for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. The tenor of the questions is clearly to entangle the accused, and so to prejudice him with the Jury.

Lastly, the manner in which the verdict was taken is, in our [144] opinion, objectionable. The summing of the Judge, to which reference will presently be made, clearly contemplates a conviction for culpable homicide, and it was so understood by all the members of the Jury except the Foreman, for they informed the Judge that they thought that they had only to consider this charge. This necessitated a further explanation from the Sessions Judge. The Jury then, after a short retirement, came back and said that they were unanimous on the first charge, but not on others, their verdict on the first charge being one of acquittal. The Judge thereupon asked: "How are you divided on the charge of grievous hurt?" *Answer*: "We are three to two on both the remaining charges." *Question*: "What is the verdict of the majority on the charge of grievous hurt?" *Answer*: "Guilty." *Judge*:—"I need not, therefore, take your verdict on the remaining charge." Now s 301 declares that when the Jury have considered their verdict, the Foreman shall inform the Judge what is their verdict, or what is the verdict of a majority. Section 302 says: "If the Jury are not unanimous, the Judge may require them to retire for further consideration." After such a period as the Judge considers reasonable the Jury may deliver their verdict, although they are not unanimous. Section 303, no doubt, empowers the Judge to ask the Jury such questions as are necessary to ascertain what their verdict is, but it was never, in our opinion, contemplated that on ascertaining that the Jury were not unanimous, the Judge should make minute enquiries to learn the nature of the majority, and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. The manner in which the Judge has acted on the present occasion raises much doubt in our minds whether that was not the motive for the course he took, and inclines us to think that, if he had been told that the verdict of the majority was for acquittal on those charges, he would have

accepted it. If we are wrong in concluding this, we think that we are at least bound to express our opinion on the matter so as to prevent any misconception regarding what we consider to be the proper practice. Whatever may have been the individual opinion of the Judge in this matter, if he went so far as to ask the Jury what was the exact majority [145] and what was the opinion of the majority, we think that he ought to have received that verdict without hesitation; and if he differed from it, he should have proceeded as directed by s. 307. If the Jury, in the present instance, had been required to retire without having informed the Judge as to the exact result of their deliberations, it is quite possible that on further discussion what was the majority might have become the minority, and we think that in all fairness to the prisoners the course indicated by us should be followed.

It next becomes necessary to consider the nature of the charge made by the Judge to the Jury. The general impression left by such a charge cannot be other than a painful impression that it is rather an address of the Counsel for the prosecution than a fair and impartial summing up of the evidence for and against the prisoner. None of the weak points in the evidence for the prosecution have been mentioned to the Jury, and many important considerations and inconsistencies have been entirely overlooked. One point in the case and a most material point, seems to have been altogether misapprehended by the Judge, and this notwithstanding that it was prominently brought to his notice by the attorney for the defence when the case had closed. The point in question is the exact time at which the deceased was found by his relative, Adari, and taken to her house, and the time of his death. This is an extremely important point, because from the unusual character of the injuries from which the deceased is said to have died it would seem doubtful on the medical evidence as recorded whether the ribs were broken before or after death. Although the medical officer states his opinion that these injuries were caused during life, he also intimates that they were recent, and if it had been pointed out to him (as it ought to have been) that it was alleged that these injuries were inflicted eight days before death, it is not improbable that he would have modified his opinion both as to the time at which they had been inflicted, and as to whether they caused the death of the deceased. The woman Adari is very positive in stating that she found the deceased lying under the *Tal* tree on Monday, the 4th Bysack. We find that this date was also stated in her [146] examination in the Magistrate's Court given within about ten days from the death, so that at that time at least, whatever may have happened in the interval before the Sessions trial, her memory was probably clear. In the Sessions Court, too, she not only repeats that statement but gives reasons for fixing the date. It is quite possible, as the Sessions Judge remarks in his charge to the Jury, that she has made a mistake, and that when she says the 4th of Bysack or 16th April she must have meant the 18th of April, the medical evidence showing that the deceased must have died on the 19th, but this discrepancy was never properly laid before the Jury. It is a most important allegation for the defence that the ribs were broken after death, for the interval between the assault and death would go very far to weaken the medical evidence given without knowledge of the fact that the beating was administered some eight days before the death. Then, again, supposing, as the Judge intimated to the Jury, that the woman did make a mistake, and that she really meant 18th when she said 16th of April, there was a previous interval certainly of two, if not more, days during which the movements of the deceased are altogether unexplained. The Judge has cursorily endeavoured to explain this away by referring to the evidence of Adari, that during this time the deceased

was at Jehanabad, but even supposing that the deceased had stated to her that he had been kept at Jehanabad, it was the duty of the Judge to put it more prominently to the Jury so as to enable them to determine what weight was due to it. There are other very important points in the medical evidence to which reference might be made, which have been similarly overlooked or misapprehended by the Sessions Judge in his charge to the Jury. At all events, with such evidence before him, given by a comparatively inexperienced medical officer, it is much to be regretted that the Sessions Judge having present in his Court the Civil Surgeon, did not think fit to examine him as an expert regarding the value of the testimony of his subordinate. But not only are the details of the Judge's charge to the Jury, and the manner in which he has presented the evidence to them objectionable, but the manner in which he has presented the entire case in its different parts is, in our opinion, one which [147] cannot but have seriously prejudiced the prisoner under trial. Before laying the evidence before the Jury in detail, he asks the Jury to consider whether, having regard to the previous relations between the deceased and the prisoner arising out of previous litigation, the accused were not likely to have committed the offence charged. This was certainly reversing the order in which such matters are usually laid before a Jury. It is the practice of our Courts first of all to lay before the Jury the direct evidence against the prisoners, and then to tell them that in determining the value of that evidence they should consider the evidence of the motive which is attributed as the cause of the offence. In presenting the case in the manner in which he has done, the Sessions Judge cannot but have seriously prejudiced the accused, because they are represented as decidedly inimical to the deceased, and, therefore, as *prima facie* guilty. As the Judge puts it, "This is important as supplying a possible motive for the subsequent treatment of the deceased, as deposed to in the evidence." There are also several parts of the evidence which materially affect the appellants now before us which have not been laid before the Jury, for instance the evidence, of the pleader describing what the deceased said when he was being brought under arrest to the Civil Court. In explaining to the pleader the treatment he had received, the deceased nowhere mentioned the prisoner Gopal as one of those who had been concerned in the assault. The Sessions Judge, however, has altogether overlooked this point, which was of very great importance to the prisoner Gopal. Next, in dealing with the evidence of Bhooth Nath Adhicari and Kedar Bagdi, the Sessions Judge pointed out that "Bhooth Nath Adhicari speaks from the point of the beating of the deceased under the eaves of his house, and Kedar from the point of deceased being brought to the bank of his own tank." The Sessions Judge adds, "I need not refer to the evidence of these witnesses at length." Now if we refer to the evidence of these two witnesses, it is to be found that the one man Bhooth Nath says that when he arrived he saw the deceased lying under the eaves of his house, and that neither then nor at any other time did he see the deceased beaten, although he saw him removed thence to the tank and on to the Chowkeydar's house in the village. Kedar, on the [148] other hand, speaks to beating on the bank of the tank and also to the further carrying off the deceased. Kedar's evidence, therefore, so far as regards the beating at the tank, is inconsistent with that of Bhooth Nath.

As regards the taking of the deceased in a *dooly* to the Civil Court, the case of the prosecution is that that was necessary in consequence of the severe beating that he had received; while for the defence it is alleged that the infirm state of health of the deceased prevented his walking to Jehanabad, a distance of five *cos*. The Judge, in reference to this point, says: "The next stage of the case is the acknowledged hiring of a *dooly* to take the deceased to Jehanabad

as he could not walk. This is acknowledged even by the defence." This was hardly a fair way of putting this part of the case to the Jury. Then the return that the peon made of the arrest of the deceased on the 14th of April mentions the fact that he was taken in a *dooly*. The Judge in referring to this matter states: "It is to be observed that the return itself mentions that the man had to be brought in a *dooly*," but at the same time he omits to suggest to the Jury and leaves it for their consideration, as he should have done, whether it was likely, if a severe beating had been administered as stated by the prosecution, that the peon would have mentioned the fact of the deceased being carried in a *dooly* to corroborate, as it were, any complaint that might be made of such ill-treatment by himself.

Another very important part of the case seems to have escaped proper attention. The deceased was brought under arrest to the Civil Court at Jehanabad on the 13th or 14th April. The prisoner, Hurry Churn Chuckerbutty, in his first examination before the Magistrate, stated that the deceased had compromised the decree against him by executing a *kabuliat* in his favour, which was registered on the same date. No enquiry was made in the Registration Office regarding what took place on this occasion. The Judge seems to have thought it sufficient to comment on the position of the men who were witnesses to the registration, and to have made the Registrar's endorsement on the document a means of explaining the movements of the deceased between the 14th of April, the date of the presentation of the document for registration, and the 16th, when the registra-[149]tion being completed the document was returned. The Judge has assumed merely from these proceedings that the deceased remained all this time at Jehanabad with the prisoners. It is quite possible that this may have been the case, but in the absence of evidence on this point it was not a fair presumption, for it is quite as likely that if the *gomashita* desired to obtain the *kabuliat* after its registration, he should have attained this end by getting from Jadub, the executant of the deed, what is called the ticket or receipt of the registration office, a good return of which would entitle the holder to obtain the document after its registration.

Mr. *Amir Ali*, who appeared for the Appellants, next objects, and we think, with good reason, that in laying the evidence in this case before the Jury, if the defence did not have an opportunity to cross-examine his witnesses who had been examined in the Magistrate's Court, and had deposed in favour of the prisoners, it was the duty of the Sessions Judge at least to notice this matter for consideration by the Jury. We would next remind the Sessions Judge that in the case of *Dhunno Kazi* (I. L. R. 8 Cal., 121), which was an appeal from his own decision, as well as in a more recent appeal, two Division Benches of this Court have pointed out to him that the prisoner or his counsel is at liberty to offer evidence or not as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another. Notwithstanding this instruction the Sessions Judge has taken to task the accused, or those who conducted the case for them, for having at one time stated that they meant to adduce evidence, and having on a subsequent occasion stated that they had changed their minds and intended to offer no evidence. The Judge says on this part of the case that the accused not having called such witnesses, "you," that is the jury, are entitled to presume that they could not contradict the prosecution as to this." It was, however, entirely open to the defence to adduce no evidence at all, but to rely upon the evidence of the witnesses for the prosecution, and certainly in this case there was room for forming two opinions. The Judge next states: "The only parts of the prosecution story which are denied are what incriminate the accused, the

trespass into the house, the [150] dragging out and beating, the carrying off, the meeting with the pleader," but all these "if not true are capable of contradiction, and the accused had witnesses in attendance for some such purpose, yet they did not call a single one." He also comments on the fact that amongst these witnesses were present the Civil Surgeon and the Deputy Magistrate himself, who were not examined. Our regret has already been expressed that the Sessions Judge, in the exercise of his discretion in this case, did not for the ends of justice examine the Civil Surgeon. His evidence would have been important as an expert to test the evidence of the Assistant Surgeon. The reason for which, the Deputy Magistrate was called is not apparent. However that may be, the Judge was not at liberty to draw a presumption adverse to the accused from the circumstance that these witnesses were not examined. For these reasons we think that there have been serious misdirections in this case by the Judge to the jury which have caused a failure of justice, and that the prisoners must be retried on the charge on which they have been convicted. The proceedings in the Sessions Court of Hooghly are accordingly hereby set aside, and the appellants may be at large on bail pending retrial. Lastly, having regard to the very strong opinion which the Sessions Judge of Hooghly entertains in this case, we think it desirable that a new trial should be held by some other officer, and we accordingly direct that the case be tried by the Sessions Judge of the 24-Pergunnahs.

Conviction set aside and re-trial ordered.

NOTES

[It was not meant by the Legislature that the prosecutor should have the reply when no witnesses are called for the defence, 10 Cal., 140. Followed in 30 Bom 421--8 Bom. L.R. 421==4 Cr. L.J. 1.

As to what would amount to adducing evidence by the accused see 31 Cal. 1050; 17 Cal. 930, *contra*, 4 L B R 5; 11 Mad 339, 14 All 212, and 16 All. 88 See also 6 C W. N. CCCIII; 8 C W N. CCLIX

The prosecutor will have a right of reply for the whole case even though only one of the accused calls witnesses, 18 Bom 364.

Limit to the power of questioning the jury by the Court —Where the verdict is not ambiguous it is the duty of the Judge to record it without further question. 9 Cal 53, 2 A L J 475; 32 Cal. 759 at 765.

See also 15 Bom. 452, 14 Bom., 115, 20 Bom , 215, 8 Cal , 754 , 6 Bom. L R., 258, 361; 19 Bom., 735, 28 Bom. 412.

Object of the examination of the accused is only to enable the accused to explain any circumstances appearing against him and not to supplement the case for the prosecution and to show that he is guilty, 10 Mad 295. See also 6 Bom L. R , 94 . 13 All. 345; 5 C. W. N. 864.]

**[10 Cal. 150]
FULL BENCH.**

The 13th September, 1883.

PRESENT :

**SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP AND
MR. JUSTICE TOTTENHAM.**

Shib Kristo Shaha Choydhry and others.Defendants

versus

A. B. Miller, Official Assignee of Bengal and of the estate of Kishen Chand Golecha. Plaintiff.

*Insolvency—Attachment before judgment—Vesting order—Priority
of claim of Official Assignee.*

A creditor attached before judgment certain of his debtor's property. Between the date of attachment and the date of the decree subsequently [181] obtained by the creditor, the property of the debtor became vested in the Official Assignee under a vesting order. The Official Assignee brought a suit to remove the attachment, and for an injunction restraining the sale of the property. The Court of First Instance decreed the suit in favour of the Official Assignee. On the case coming up before a Full Bench, *held*

Per McDONELL, TOTTENHAM, AND PRINSEP, JJ, that, where there has been an attachment prior to decree and the property of a judgment-debtor subsequently becomes vested in the Official Assignee in insolvency previous to the decree, the vesting order will prevent such an attaching creditor from executing his decree against the property.

Per GARTH, C J, and MITTER, J, *contra*, that, under the 34th chapter of Act XIV of 1882, the Court had no power to remove the attachment before judgment, or stay the sale at the instance of the Official Assignee.

In this case Shib Kristo Shaha Chowdhry and others on 2nd March 1880 brought a suit against one Kishen Chand Golecha to recover a large sum of money, and applied under s. 483 of the Code of Civil Procedure for attachment before judgment, which application was granted. On the 9th April 1880, they obtained a decree against Kishen Chand Golecha, and on the 10th May 1880, applied for execution and sale of the attached property. On the 22nd May 1880, the Court fixed the sale for the following 1st July. On the 4th June the Official Assignee put in a claim to the property, on the ground that Kishen Chand Golecha, on the 22nd March 1880, before the judgment-creditors obtained their decree, had been adjudicated an insolvent under s. 9 of the Indian Insolvent Act, upon which the usual vesting order had been made; the insolvent had, however, not filed his schedule.

On the 28th July 1880 the Subordinate Judge of Berhampur rejected the claim of the Official Assignee.

The Official Assignee then applied to the High Court under s. 622 of the Civil Procedure Code to have the order of the Subordinate Judge set aside. At the hearing of the rule, objection was taken that the case did not fall under s. 622, that the Official Assignee had mistaken his remedy, and should have brought a regular suit, as indicated by s. 283 of the Code, and it was also

* Regular Appeal No. 244 of 1881, against the decree of the Subordinate Judge of Moorshedabad dated 18th January 1881.

contended that the claim of the Official Assignee could not prevail against the judgment-creditor who had attached the property in a suit in which he afterwards obtained a decree.

[152] Mr. Justice WHITE and Mr. Justice FIELD, before whom the rule was argued, both agreed in deciding that the Official Assignee had failed to show that the Subordinate Judge had (1) exercised a jurisdiction not vested in him by law, or (2) failed to exercise a jurisdiction vested, or (3) acted in the exercise of his jurisdiction illegally or with material irregularity.

Mr. Justice WHITE was further of opinion that the application could not be brought under any section of the Civil Procedure Code, and that it was unnecessary to decide whether it could be made under s 49 of the Insolvent Act, and whether the application should be taken as made under that section, inasmuch as the section only applied after an insolvent's schedule had been filed, and in respect of a debt or demand admitted in the schedule. Mr. Justice FIELD based his order on the preliminary objection alone.

The Official Assignee then, on the 15th December 1880, brought a regular suit to remove the attachment, and for a perpetual injunction restraining the defendant from selling the properties of the insolvent. In this suit the Subordinate Judge held that the attachment before judgment could not have effect as against the Official Assignee, and that the vesting order had priority over the attachment before judgment. He, therefore, decreed the suit in favour of the Official Assignee.

The judgment-creditor appealed to the High Court. Mr. Justice CUNNINGHAM and Mr. Justice MACLEAN thought it desirable to refer the question to a Full Bench, and the following was the order of reference.—

"In this case the point raised is as to the relative priority of the Official Assignee who has obtained a vesting order in insolvency, and a creditor who has attached before decree, the vesting order having been made between the date of attachment and the date of decree. The point being one of considerable importance, and differences of opinion having been entertained by several Judges of this Court on the point, we think it desirable that it should be referred for consideration to a Full Bench. The question accordingly which we refer is, 'where there has been an attachment prior to decree and the property of the judgment-debtor has subsequently become vested in the Official Assignee in insolvency [153] previous to the decree, does the vesting order prevent the attaching-creditor from executing his decree against the property?' The question was considered by Mr. Justice WHITE and Mr. Justice FIELD on a hearing under s. 622 on the 22nd November 1880, when different views were entertained by the learned Judges. The question was again raised before Mr. Justice MORRIS and Mr. Justice TOTTENHAM in *Miller v Mon Mohun Roy* (I. L. R., 7 Cal, 213), where the learned Judges considered that an attachment prior to a vesting order did not enable the judgment-creditor to execute his decree irrespective of the insolvency."

Mr. Evans (with him Baboo Mohun Mohun Roy and Baboo Grish Chunder Chowdhry) for the Appellants.

The case of *Anand Chundra Pal v. Panchulal Sarma* (5 B. L. R., 691) decides that where once a creditor has attached he has acquired a right to follow on to sale, and that a claim made by the Official Assignee before sale could not prevail; the Official Assignee being in no higher position than a gratuitous alienee, and being only created at the moment of insolvency. *Anand Chandra Pal's case* lays down the rights of the Official Assignee as regards a vesting

order obtained after judgment. Section 489 of the Civil Code of Procedure has a limitation, reserving rights existing prior to attachment, and this section destroys the *ratio decidendi* of the Bombay case, *Gamble v. Bholaqir* (2 Bom. H. C., 150). [MITTER, J.—In *Anand Chandra Pal's case*, the question was whether the sale of the attaching creditor prevailed against the sale of the Official Assignee] In s. 489, the word "rights" refers clearly to the rights in the attached property. If the attachment had taken place after decree, under the decision in *Anand Chandra Pal's case*, the creditor would have had a right to satisfaction.

The case of *Sruam Manik v. Tincowri Bai* (4 B. L. R. F.B. 63, 13 W. R. F. B., 9) shows that there is a difference between attachments before and after decree, but this question has been set at rest by the new Code of Civil Procedure which lays down that it is not necessary to re-attach.

[154] The word "existing" in the section means "accrued," the phrase in this section must mean a right "previously existing against the attached property." The case is really on all fours with the case of *Doe d. O'Hanlon v. Palologus* (Morton's Dec. 323). A suit of sequestration under the Charter would have exactly the same effect as an attachment before judgment. Although the property may be in the Official Assignee, yet it is subject to the rights of the attaching creditor. The Official Assignee did not come in under s. 49 of the Insolvent Act, but he did so on his legal right as owner. The question in *Doe d. O'Hanlon v. Palologus* was whether the assignment to the Assignee overrode the sequestration. The Sub-Judge has based his judgment on cases prior to *Anand Chandra Pal's case*, and on a note to s. 489 given in Mr. Broughton's Code of Civil Procedure. The words of the new Code having cut away the ground from *Gamble v. Bholaqir*, and *Anand Chandra Pal's case* having cut away the ground from all older cases, I submit that an attachment before judgment is in the same position as an attachment after judgment.

Mr. Phillips (with him Baboo Nil Madhub Bose and Baboo Sahgram Singh) for the Respondents.

The suit was brought to determine whether or no the judgment-creditors had a right to proceed, and it would be idle to stop at the point as to whether they may realize the proceeds, they ought to be allowed to go on to the point as to who would be entitled to the proceeds. There are no conflicting decisions on this matter, none of the old cases to be found have been overruled by the Bombay case as regards attachments before judgment, whatever may have been its effect as to attachments after judgment. If there is anything to decide on the reference at all, the Court ought to decide the point as to who would be entitled to receive the proceeds of sale. We were entitled to stop the creditors from having the benefit of the property, because at the time the insolvency took place the appellants had no more right to the property than any other creditors. Before decree, a creditor has no right, and the Official Assignee has a right to restrain any creditor from getting a preference. As to the point, whether an [155] attachment before judgment is in the same position as an attachment after judgment, I submit that an attachment before judgment amounts at the highest to holding the property for the purpose of having it forthcoming to answer any decree that may be made. An attachment is called into play under s. 489, for the purpose of withdrawing the property out of the power of the Courts. In order to sustain the argument of the other side, it must be that the plaintiff has some right in the property which would prevent it passing to the Official Assignee.

The word "rights" in s. 489 is taken by Mr. JUSTICE WHITE to be "rights in the proceedings," and this is the view of the Full Bench case. I contend (1) that a security given by a defendant is on a different footing from an attachment of his property; (2) that the object of giving security is, that there should be no alienation of the property, and not to give plaintiff a lien upon it.

The view of the English law on the subject has no application, but we must look to the provisions of the Civil Procedure Code

The Official Assignee, who represents all creditors, ought to be in the same position as other decree-holders, and under the Insolvent Act he ought to be able to share in the rateable distribution. Section 489 only refers to property attached and not to securities.

Under s. 344 of the Code any persons arrested or imprisoned under a decree may apply for a declaration of insolvency, and under s. 351 a Receiver may be appointed to the property, and under s. 356 distribution may be ordered. So the policy of the law is, that in the event of insolvency, the assets should be rateably distributed. From the fact that the law puts it out of the defendant's power to touch the property, you are not enabled to infer that the law gives any lien on the particular property

As to the case of *O'Hanlon v Paliologus* (Morton's Dec 323), there is a great difference between the sequestration referred to there and an attachment before judgment, because at pages 327 and 328 of the Report the nature of sequestration is described. The process is entirely confined to the English Court.

As to the case of *Gamble v Bholagur* (2 Bom H. C. 150), which does not agree with the case of *O'Hanlon v. Paliologus*, whatever the effect may [186] be, WESTROPP, J., says: "It is difficult to regard the writ of sequestration in a suit, as the inception of an execution, before there is, in that suit, any judgment in existence to be executed." Can it be contended that Mr JUSTICE WESTROPP thought that in the absence of a declaration that an attachment before judgment was to create a preferential right in a plaintiff, the rights of persons not parties to the suit should be affected? The view I take is supported by old cases which I submit have not been overruled, see the case of *Petumber Mundle v. Cochrane* (1 Ind. Jur., N S. 11).

Mr. Evans in reply.

The **Opinions** of the Full Bench were as follows —

Prinsep, J.—The question before us is whether a creditor, whose rights depend upon an attachment before judgment, is entitled to execute a decree subsequently obtained, in spite of a vesting order in favour of the Official Assignee of the insolvent debtor's estate passed after the attachment, but before the decree.

I am of opinion that, having regard to the terms of the present Code, he cannot execute such a decree. An attachment before judgment is obtained when a Court is satisfied that the defendant intends to obstruct or delay the execution of any decree that may be passed against him, by disposing of or removing his property from the jurisdiction of the Court, or quitting such jurisdiction and is unable to furnish proper security. The attachment is to be removed if at any time the security is furnished or the suit is dismissed. It does not affect the rights of third parties already existing, nor does it prevent any decree-holder from applying for the sale of the property in satisfaction of his decree. It is further provided that on a decree subsequently obtained, the

attaching creditor may proceed in execution without any re-attachment. The rights so conferred are clearly to prevent any alienation by the debtor, such as I may say amount to any fraudulent preference, if he were about to become insolvent. As I understand the argument, the only persons who can intervene are persons having rights prior to the attachment, or any decree-holder who may apply for execution, whether that decree may have been obtained before or after the attachment. If such decree-holder obtains a sale [157] and that sale is confirmed before the creditor who has an attachment before judgment gets a decree, he can obtain the whole sale proceeds, and the attachment before judgment affords no security. No doubt, this is an extreme case, but still it is a case that may happen. Then, again, what is the effect if in execution of such a decree, or if in execution of a decree obtained by the attaching plaintiff, the judgment-debtor applies under s 344 to become an insolvent? Execution is suspended until determination of that application. If he is declared an insolvent under s 351, a Receiver is appointed, the entire property of the insolvent is vested in that Receiver, and the attaching creditor gets merely the costs incurred in the execution proceedings, mortgagees are next paid, and then the assets are distributed among all other creditors. These are the rules prescribed by the present Code, and in my opinion they apply with equal force to all Courts, whether the debtor has been made an insolvent on the Original Side of this Court under the English Insolvency Statute or under Chapter XX of the Code. That chapter has been extended to proceedings on the Original Side of this Court. A vesting order under the statute is, as I understand its effect, of the same nature and force as the appointment of a Receiver under s. 351.

Then, again, if we consider the object of an attachment before judgment, and the position of the attaching plaintiff with respect to the Official Assignee or Receiver appointed under s. 351 of the Code, it seems clear that the former can have obtained no absolute right over the property attached before judgment such as to supersede the effect of a vesting order. The object of an attachment before judgment is to prevent any alienation or removal by a dishonest debtor (*see* s. 483), but when by the action of a Court, by means of the appointment of a Receiver under s. 351, or the passing of a vesting order in favour of the Official Assignee, that object is attained, there can be no possible reason why one who obtains an attachment before judgment, should, merely by force of that attachment, acquire a more favourable position than any other creditor. The attachment must be removed on security being given, and so far as the payment of the debt, which on decree subsequently passed may [158] be found to be due, that security is given by the appointment of a Receiver under s 351, or a vesting order under the Insolvency Statute. The security thus given may, no doubt, sometimes not be to the full amount—that would depend on the state of the insolvent's estate, but it would be a sufficient security having due regard to the claims of other creditors. This would be the result of proceedings taken under the Code of Civil Procedure, and I cannot suppose that it was ever intended by the Legislature that, under precisely similar circumstances, there should be any difference when a vesting order is passed under the Insolvency Statute by this Court in its Original Jurisdiction, especially when Chapter XX of the Code applies to that jurisdiction.

I would answer this reference accordingly.

Tottenham, J.—I would answer the question submitted to the Full Bench in the affirmative.

I consider that the provisions of Chapter XXXIV of the Code can have no operation in favour of a single creditor to the exclusion of others, when the

debtor has, during the pendency of the suit, been declared an insolvent, and a vesting order has been passed by the High Court in favour of the Official Assignee.

Upon the occurrence of this event, it seems to me that the property of the insolvent, in whosoever custody it may be, becomes available for rateable distribution amongst the whole body of his creditors; and that the attachment before judgment obtained by one of them, but which has not yet been followed up by a decree, does not entitle him to any preference over the others. Section 7 of the Insolvent Debtor's Act provides that the vesting order "shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects and debts as aforesaid in the said Official Assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in the manner hereinafter mentioned."

It is true that the Official Assignee's right or possession is subject to any lien held by any other person in respect of any of the property, and that the Official Assignee acquires no right beyond what the insolvent himself had; but in my view the creditor, who has procured an attachment before judgment, does [159] not thereby acquire any lien entitling him to have his demand satisfied to the prejudice of other creditors. It is perhaps a different thing if the attaching creditor has obtained his decree and has applied for execution by the sale of the property attached before the insolvency has been declared, for in that case he has a complete lien upon the attached property for the satisfaction of his decree.

I cannot concur in the view that the alteration from the terms of s. 89 of Act VIII of 1859, by the addition of the words "existing prior to the attachment" in s. 489 of the new Code, must have been intended to alter the law laid down in the Bombay case of *Gamble v. Bholagir*, or to defeat the Official Assignee's right on behalf of the whole body of creditors in cases where the attaching creditor has obtained no decree at the time when the vesting order is made. For, if by so doing, the Legislature would correct one apparent inconsistency, it would create one still more glaring, by placing the creditor, who obtained an attachment before judgment, in a position of advantage over all the other creditors, which a creditor who has obtained a decree could not have either under the Insolvent Debtor's Act or under the insolvency provisions of the Code of Civil Procedure.

I am, therefore, disposed to concur with Mr. Justice PRINSEP in holding that the vesting order prevents the attaching creditor from executing his decree against the property attached.

As to its being incumbent on the Court to proceed to execution upon application, it seems to me that the fact of the vesting order having been passed prior to the decree, would authorise the Court under s. 250 to withhold its warrant for execution of the decree subsequently obtained.

McDonell, J.—I would answer the question submitted to the Full Court in the affirmative, and generally for the reasons given by PRINSEP and TOTTENHAM, JJ. It is certainly difficult to say why the words "existing prior to the attachment" have been inserted in s. 489 of the present Code, unless, as suggested by FIELD, J., when this very case came before him on a hearing under s. 622, they were put in merely to make it clear that alienations after an attachment before judgment and *pendente lite* are void, and that really there was no intention to interfere with, or alter [160] the law relating to, the priority of the Official Assignee as settled by a number of decisions upon the old Code. The policy of the new Code of Civil Procedure, as shown in Chapter

XX, and elsewhere, is that all creditors should share, and that no particular creditor should have a preference when there is a deficiency of assets, merely because he happened to obtain a decree first, and it would certainly be opposed to this policy to take away the priority given to the Official Assignee by the law as settled before the passing of the present Code.

Mitter, J.—I would answer the question referred to us in the negative.

It seems to me that if the Official Assignee, after the vesting order was made in his favour, was not entitled to have the attachment of the insolvent's property, made before judgment, removed, he cannot resist the right of the plaintiff, who has obtained a decree after the vesting order, to have his decree satisfied by the sale of the attached property. The first question that demands consideration is, therefore, whether the attachment before judgment in this case, under the 34th Chapter of the Code of Civil Procedure, was liable to be removed on the application of the Official Assignee, the defendant in the suit having been adjudged an insolvent before the decree was passed against him.

Under Act VIII of 1859 a similar question came under consideration in several cases, and, under the provisions of that Code, it was uniformly decided in favour of the Official Assignee. Of these cases, the question was exhaustively discussed in *Sava Ramji v. Jadavji Nathu* (2 Bom. H. C., 165) and *Gamble v. Bholagir* (2 Bom. H. C., 150). If we examine the reasons given in these two decisions in support of the conclusion to which the learned Judges came, and compare the provisions of Act VIII of 1859 regarding attachment before judgment with those of the present Code on the same subject, it would appear that the Legislature has altered the law as laid down in these cases with reference to the construction to be put upon the sections of the Code bearing upon this subject.

The main ground upon which these decisions rest is, that the provisions regarding attachment before judgment, laid down [161] in Act VIII of 1859, left it entirely at the discretion of the Court to remove the attachment whenever it appeared equitable and just to do so. And as in these cases it appeared to the Court more equitable that a debtor's property should be available equally to all his creditors, than that it should be applied solely for the advantage of one, the attachment was ordered to be removed at the instance of the Official Assignee.

But that under the present Code, this unfettered discretion has been taken away, will appear clear if we compare ss. 83, 84 and 89 of Act VIII of 1859 with the corresponding sections of the new Code, viz., 484, 485 and 489.

Both under ss. 83 and 84, the Court would direct the attachment of the debtor's property "until further order." The words "until further order" left to the Court ample discretion to deal with the question of the removal of the attachment on equitable grounds.

But in s. 485 of the new Code, which corresponds with s. 84 of the old Code, the words "until further order" have been omitted; and in the second paragraph of s. 484 of the new Code, instead of the words of the corresponding s. 83 of the old Code, the word "conditional" has been substituted. The condition referred to is evidently the success or non-success of the defendant to show satisfactory cause under s. 485, i.e., if the case falls under paragraph 1 of 485, the attachment is to be confirmed, but if it falls under the second paragraph, the attachment is to be withdrawn.

The language of s. 89 of the old Code was quite in unison with the provisions of ss. 83 and 84, which, as already shown, conferred ample latitude to the Court for exercising its discretion on equitable grounds. In s. 489 of

the new Code, which corresponds with s. 89 of the old Code, between the phrases "attachment before judgment shall not affect the rights" and "of persons not parties to the suit," the words "existing prior to the attachment" have been introduced. The introduction of these words shows that the discretionary power of the Court has been curtailed. It seems to me that the ample discretion which the Court, under the old Code, had for [162] directing the removal of an attachment before judgment upon equitable grounds, is now cut down to cases falling under ss 488 and 489 of the new Code. The present case does not fall under either of those sections. Section 488 has evidently nothing to do with it, and s. 489 is not applicable, because the right of the Official Assignee came into existence *after* the attachment.

Therefore, under the 34th Chapter of the Code, the Execution Court had no power in this case to direct the removal of the attachment at the instance of the Official Assignee. Then, with the exception of s. 250 I do not find any other provision in the Code under which the Court, in the exercise of its discretionary power, could refuse to allow the defendant to proceed with the execution of his decree. But before the Official Assignee appeared in the Execution Court, it had directed the warrant for the execution of the decree to issue. The attachment before judgment in this case was made in accordance with the order, dated the 2nd March 1880. On the 22nd March following, the defendant in the suit was declared insolvent and the vesting order was passed. The suit was decreed on the 9th of April 1880, and the application for execution was made on the 10th of May 1880, and on the 22nd May 1880 the order for the sale of the attached property was made. Then on the 4th of June 1880 the Official Assignee made his application to stay the sale. These dates clearly show that the Official Assignee, in support of his application, could not rely upon the provisions of s. 250, because the warrant for the execution of the decree had been then already issued.

That being so under the provisions of the new Code the Execution Court had no power in this case to direct the removal of the attachment or stay the sale upon the application of the Official Assignee. In coming to this conclusion I have not at all taken into consideration the provisions of the chapter on Insolvency of the Code itself, because the present case does not fall under them.

Therefore there is no provision of the Civil Procedure Code, under which the Execution Court could grant the application of the Official Assignee. Nor do I find any provision in the [163] Indian Insolvent Act under which he could succeed in his application. The only section under which the execution proceedings could be stayed is s 49. But it only applies after the insolvent's schedule has been filed, and in respect of a debt or demand admitted in the schedule.

In this case it is admitted that the insolvent's schedule has not yet been filed. It being thus clear that in this case the Execution Court in the exercise of its discretion had no power, at the instance of the Official Assignee, either to remove the attachment or to stay the sale, it seems to me that the reasons upon which the Full Bench decision in *Anand Chandra Pal v. Panchi Lal Sarma* (5 B. L. R. 691) is based, would warrant us in holding that the defendant in this case has the right to have the attached property sold and the money realized by sale paid to him. Sir RICHARD COUCH, C. J., in delivering the judgment of the majority of the Judges of the Full Bench, holding upon the authority of decided cases of English Courts, that an Official

Assignee "has not a greater interest in the property than the insolvent had," says: "But, as I have said the question must be answered by a reference to the Code of Civil Procedure."

He then thus refers to these provisions:—

"By s. 15 of Act XXIII of 1861, substituted for s. 215 of Act VIII of 1859, it is enacted that 'if the application for execution of a decree be admitted, the Court shall order execution of the decree according to the nature of the application' Section 221 of Act VIII of 1859, says. 'When all necessary preliminary measures have been taken, where any such are required, the Court, unless it sees cause to the contrary, shall issue the proper warrants for the execution of the decree.' .

"Section 232 is 'If the decree be for money, and the amount thereof is to be levied from the property of the person against whom the same may have been pronounced, the Court shall cause the property to be attached in the manner following,' and thereafter the different modes of attachment are given. Section 242 says 'In all cases of attachment under the preceding sections, it shall be competent to the Court, at any time during the attachment, to direct that any part of the property so attached as shall [164] consist of money or bank notes or a sufficient part thereof, shall be paid over to the party applying for execution of the decree, or that any part of the property so attached as may not consist of money or bank notes, so far as may be necessary for the satisfaction of the decree, shall be sold, and that the money which may be realized by such sale, or a sufficient part thereof, shall be paid to such party'

"Now, it is a rule, that when a statute confers an authority to do a judicial act in a certain case it is imperative on those so authorised, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application This has been often decided and it is sufficient to quote the cases of *Macdougall v. Paterson* (11 C B 755), *Crake v. Powell* (2 E and B 210), and *Bowes v. Hope Life Insurance Company* (11 II L C., 389) In those cases the word used in the statute was 'may' According to this rule, the words 'it shall be competent to the Court' in s. 242 must not be construed as giving to the Court a power which it may exercise or not as it thinks fit, but is obligatory and conferring on the attaching creditor a right to have the attached property sold, and the money realized by the sale paid to him "

Now, if we refer to the corresponding sections of the new Code of Civil Procedure, we find that the same process of reasoning leads us to the conclusion that the defendant in this case has the right to have the attached property sold, and the money realized by the sale, paid to him.

For facility of reference and comparison, the corresponding sections of the new Code are noted below Section 15 of Act XXIII of 1861, corresponds with paragraph 2 of s. 245 of the new Code; s. 221 of the old Code with s. 250 of the new Code, s. 232* of the old Code, and 273* of the new Code; and s. 242 of the old Code with s. 284 of the new Code

In s. 284, the word "may" has been substituted in the place of the words "it shall be competent to the Court." But as pointed [165] out by Sir RICHARD COUCH, C.J., according to a well-known rule of construction either of those expressions must not be considered as giving to

* These sections need not be considered, as the property has been attached, and under s. 490 of the new Code re-attachment is not necessary. Note per MITTER, J.

the Court a power which it may exercise or not as it thinks fit, but as obligatory and conferring on the attaching creditor a right to have the attached property sold, and the money, realized by the sale, paid to him.

For these reasons, I am of opinion that the question referred to us should be answered in the negative.

Garth, C.J.—I think that, having regard to the language of the present Code, my brother MITTER's view of the law is right

Had the wording of s. 489 of the new Code been the same as that of s. 89 of the old Code, I should have agreed with the view of the Bombay Court in the case of *Gamble v. Bholagiri* (2 Bom. H. C. 150).

But the language of s. 89, upon which the learned Chief Justice in that case founds his opinion, has been materially altered in s. 489 of the present Code.

The words of the old Code were "attachments before judgment shall not affect the rights of persons not parties to the suit" The words of the present Code are "attachments before judgment shall not affect the rights, *existing prior to the attachment*, of persons not parties to the suit"

It seems to me that the words "existing prior to the attachment" must surely have been introduced with some object, and I cannot help thinking that they were introduced for the express purpose of altering the law, as laid down in the judgment of the Bombay case

At the same time I am quite of opinion that the law ought to be as the majority of my learned brothers have held that it is, and I am very glad that they have seen their way to arrive at that conclusion

The result will be that the question referred to us is answered in the affirmative, and the plaintiff will have his costs in this Court. •

NOTES.

[EFFECT OF VESTING ORDER ON ATTACHMENT —

Whether the attachment be one before judgment (10 Cal 150 8 Mad 554, 20 Bom 403; 26 Mad. 673) or in execution of a decree (29 Cal 428 (F. B.) overruling 28 Cal 419, 5 C L J 80 11 C.W.N. 163) the attaching creditor has no priority over the Official Assignee. These decisions are based on the ground that an attaching creditor does not obtain a charge or lien on the attached property. See 15 Cal 202 25 Cal 179 P C 24 I A 170 and 26 Mad. 673]

[166] FULL BENCH.

The 13th September, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP AND
MR JUSTICE TOTTENHAM.

Moothora Kant Shaw and others.... Plaintiffs
versus

The India General Steam Navigation Co.... Defendants.' .

Carriers, liability of—Common carriers—English law—Contract Act (IX of 1872), ss. 151, 152—Carriers Act (III of 1865)—Railways Act (IV of 1879), s. 101—Statement of objects and reasons of the Contract Act.

The common law of England regulating the responsibility of common carriers, was at the time of the passing of the Carriers Act, 1865, and is still, in force in this country, and is unaffected by the provisions of the Indian Contract Act *Kuerji Tulsidas v. G. I. P. Ry. Co.* (I. L. R., 3 Bom., 109) dissented from.

The plaintiffs entrusted to the defendants, who were common carriers under the Carriers Act III of 1865, certain goods which were lost in the course of their carriage on one of the defendants' steamers. On the facts it was found that the defendants took as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed; and that the loss was not occasioned by the act of God or the Queen's enemies. There was no special contract of the nature provided for by s. 6, Act III of 1865. *Held*, that ss. 151, 152 of the Contract Act did not apply, and that the defendants were liable for the loss of the goods.

THIS was a case stated for the opinion of the High Court under s. 55 of Act IX of 1850, and s. 617 of Act XIV of 1882.

The following is the case as referred by the Fourth Judge of the Calcutta Small Cause Court :—

"This suit was instituted on 26th June under Act IX of 1850. It was heard on 3rd, 4th, 5th and 10th July, after the present Small Cause Court Act had come into force.

"The plaintiffs sue the defendants for Rs. 296, being the value of 72 drums of jute out of 98 shipped on board the defendants' flat *Delta* at Kaligunge, on the 19th September last, under the bill of lading which accompanies this reference. The defendants are common carriers by inland navigation under the Indian Carriers Act III of 1865, and their liabilities are

* On a case referred by G. C. Sconce, Fourth Judge of the Calcutta Court of Small Causes.

† [Sec. 10.—Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, sections 151 and 152, in the case of loss, destruction or deterioration of, or damage to, property shall, in so far as it purports to limit such obligation or responsibility be void unless—
Special contract limiting liability.
(a) it is in writing signed by, or on behalf of, the person sending or delivering such property, and
(b) it is otherwise in a form approved by the Governor-General in Council.]

[167] governed by s. 6 of that Act. The plaintiffs recovered from the defendants at Calcutta 26 drums out of the 98 shipped at Kaligunge; the remaining 72 were lost in transit under the circumstances hereafter stated. There is no dispute as to the value of the lost jute, and the defendants had not limited their liability to pay for the jute by any "special contract signed by the owner of the jute delivered to them to be carried, or by any person duly authorized in that behalf by the owner." (See s. 6, Act III of 1865).

"The steamer *Mirzapore* left Debrooghur on the 10th September 1881, with the flat *Delta* in tow, containing a general cargo. After arriving at Kaligunge the plaintiffs' jute and a large quantity of jute belonging to other persons, was stowed on board the *Delta*. The steamer, and *Delta*, the flat being lashed to the portside of the steamer, proceeded on to Serajgunge, where another flat, the *Lebong*, was taken in tow and fastened to the starboard side of the steamer. They then proceeded on their voyage. All went well till the evening of Monday, the 26th September, when they arrived at a narrow part of the river, called the Atharah Bend or 18th Reach. Here at about quarter to 6 o'clock P.M. a severe shock was felt; the *Delta* trembled and was forced up against the side of the steamer, the engines were stopped, and it was found that the *Delta* had struck against some obstruction in the river, which had caused a great rent in the bottom of the flat *Delta* 'about the turn of the build reaching from the forepart of No. 1 hold to the after bulkhead of No. 2 hold, a distance of nearly 30 feet, rivets and plates were started, and the rent was about four to six inches wide, or about as wide as the palm of one's hand. Through this the water came in with great force and rapidity. Pumps were set going at once, and the Captain of the steamer went on again easy, in the hopes of being able to reach a nullah about two miles off, with which he was acquainted, intending to beach the flat in shallow water. He could not do this, because he found another steamer, the *Dacca*, anchored ahead of him, with a flat, and the river was too narrow to enable him to pass her. The steam of the *Dacca* was down, and could not have been got up for three hours. Haley, the Captain of the *Mirzapore*, then determined [168] to place the flat *Delta* close to the shore. This was done, and she was fastened up to the surrounding trees on the bank with chains and ropes. The banks here were precipitous and deep water close up to them. There were about two fathoms of water under the flat, where she was fastened up. There were no inhabitants of the country from whom they could get assistance. The crew of the *Dacca* came to their assistance with the pumps from that vessel. There were also pumps on board the *Mirzapore* and the *Delta* which had been vigorously employed from the first. Jute was crammed into the leak, the awnings from the steamer were taken down, and drawn under the hull of the flat in the hope of stopping the flow of water, and all the men that could be spared from pumping were employed in saving the cargo by putting it on shore and on board the steamer alongside. It was impossible to stop the leak, and finally the flat, heavy with the water in her, sank about 9 A.M. on the 27th September in five fathoms of water, breaking away from the chains and ropes which had sustained her. At the place where the accident took place the river was about 150 feet wide. The portside of the *Delta* was about eight or ten feet from the shore on her left hand, the *Mirzapore* was sixty feet wide, and each flat thirty feet wide, and there would, therefore, be fifteen or twenty feet between the starboard side of the *Lebong* and the bank on her side. It was then low water, and the river narrower than it would be at high water. The *Mirzapore*, with her flats, was going along with the last part of the ebb, and with such tide as there was to help them was going over the ground at about three miles per hour, leads going on both sides. The soundings at the time when the accident

happened were 1½ fathoms on the portside of the *Delta*, and 2 fathoms on the starboard side of the *Lebang*. The *Delta* was drawing four feet three forward and four feet six after. The *Dacca*, which had preceded the *Mirzapore* with only one flat in tow a very few hours before, up this narrow reach, at a higher state of the tide, might very well have safely passed over, or on one side of the obstruction which caused the wreck of the *Delta*. A good look-out had been kept, but nothing could be seen above water which should have caused the *Mirzapore* to hesitate about proceeding on her journey. After the *Delta* had been sunk, and all the [169] cargo which could be saved had been saved out of her, Captain Haley went back to the place where the accident had happened, and with bamboos and ropes dragged the bottom of the river in the hope of finding out upon what object the vessel had struck, he could find nothing. The probability is that the *Delta* had struck upon a "snag" and the point of the snag sticking in the rent made in the vessel's bottom the "snag" itself had been carried on for a short distance by the impetus of the vessel till it sank again in deeper water. Captain Haley had never heard of such an accident happening in that part of the river before. A "snagboat" is kept up by Government for the purpose of clearing away such obstructions, towards the maintenance of which a high toll is said to be paid by the Company. I do not think it would serve any good purpose to quote the evidence at any length. The trial occupied four full afternoons. The examination-in-chief was minute, and the cross-examination searching. The plaintiffs undertook to prove that after the goods, which had been saved from the wreck, were brought to Calcutta, the defendants had given jute bearing the plaintiffs' mark to other persons instead of to themselves; in this they failed.

"After a careful consideration of the whole evidence, I find, as a fact in the terms of s 151 of the Indian Contract Act, that the defendants did 'take as much care of the goods bailed to them as a man of ordinary prudence would under, similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.'"

"Mr. Sale on behalf of the Company contended,—

"1st —On the authority of *Kuweri Tulsi Das v. G. I. P. Railway Company* (1 L. R., 3 Bom., 109), that the defendants were not liable, and that they were entitled to the protection of ss 151, 152 of the Indian Contract Act

"2nd —That the damages arose from an 'act of God,' and the carriers were not liable, because they had done 'all that was reasonably and practically possible to ensure the safety of the goods.' He cited *Nugent v. Smith* (L. R., 1 C. P. D. 423), per COCKBURN, C. J., p. 437. Agreeing with Mr. Sale as to the latter part of his proposition, I think the accident, though inevitable and a peril of [170] navigation, was not of that class which can be called an 'act of God.'

"3rd.—That under the Carriers Act III of 1865, s. 6, no 'special contract signed by the owner of the goods, &c.,' was necessary, unless it was sought thereby to limit the carriers' liability for his own negligence. Having regard to the preamble and to s. 8 of the Indian Carriers' Act, I consider this argument to be altogether unsustainable.

"4th.—He referred me to Act IV of 1879, s. 10, where no doubt the Legislature accepts the proposition that so far as Railways are concerned, the carriers' liability is to be measured by ss. 151 and 152 of the Indian Contract Act. But nothing in the Carriers' Act, 1865, now applies to carriers by Railway.

"On the first point, as to whether ss. 151 and 152 apply, notwithstanding the great authority of Sir MICHAEL WESTROPP, I entertain respectful doubts

whether *Kuvern Tulsidas v. G.I.P. Railway Company* (I. L. R., 3 Bom., 109), was correctly decided, and I desire therefore to state my reasons for those doubts. The High Court, Calcutta, has never, so far as I am aware, been called upon to consider the question with reference to persons who are common carriers under the Carriers' Act III of 1865. Act III of 1865 is intitled 'an Act relating to the rights and liabilities of common carriers,' and in its preamble 'recites that it is expedient not only to enable common carriers to limit their liability for loss of, or damage to, property delivered to them to be carried, but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants, or agents.' The preamble recognises the fact that the law as it then existed, *i.e.*, the common law imposed such a burden of liability upon common carriers that it was expedient to enable them to limit it. 'The preamble,' as WESTROPP, C. J., says (see page 116) 'betrays no intention on the part of the Legislature to fix on the common carrier the character of an insurer against all risks, except the act of God or the Queen's enemies.' Precisely so—that was the liability which the common law imposed upon the common [171] carrier, and the first object of the Carriers' Act was *not* to fix such a liability upon the carrier, but to enable him to free himself from the liability which the common law had already fixed upon him. Section 6 of the Act points out the mode by which the common carrier to whom that section applies (the defendants in the present case), may limit his liability, *viz.*, he 'may, by special contract, signed by the owner of such property so delivered as aforesaid, or by some person duly authorized on behalf of such owner limit his liability in respect of the same.' If the carrier neglects, or does not choose, to adopt the means pointed out by the Legislature, by which he may limit his liability, then by necessary implication the liability which the common law imposes on him shall continue unlimited. I apprehend that the maxim '*Expressio unius est exclusio alterius*' would apply. By this way, and no other, may the common carrier limit the liability which the common law imposes on him. The defendants in the present case have neglected, or have not chosen, to follow the course pointed out by the Carriers' Act, and are, therefore, unless their position is altered or amended by the Indian Contract Act, insurers against all risks, except the acts of God or the Queen's enemies.

"At page 117 of the Report, WESTROPP, C. J., remarks 'The 6th section does not lay down what shall be the extent of the common carrier's liability if he do not limit it by special contract, but leaves that question to be dealt with by the common law.' If that liability has been varied by the Indian Contract Act, it is the common law and not the 6th section of Act III of 1865 which has been interfered with.' It is at this point I am unable to follow his Lordship's reasoning. I cannot help thinking he has stopped short at the very point where, if he had pursued the argument a little further, he would have been led to a different conclusion.

"At page 113 of the Report, WESTROPP, C. J., points out that the Indian Contract Act (IX of 1872) is, and purports to be, only a partial measure. Its preamble recites that 'it is expedient to define and amend certain parts of the law relating to contracts. Its first section repeals certain enactments specified in the schedule'—(of which Act III of 1865 is not one) but provides [172] that nothing contained in the Act 'shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed.' I think it unnecessary to go further or quote the subsequent words of the section. If it can be shown that ss. 151 and 152 of the Contract Act 'affect' the unrepealed Act III of 1865 or any part of it, they are inapplicable to the present case.

"WESTROPP, C. J., (see page 117) admits that in the absence of a special contract limiting the carrier's liability, s. 6 of Act III of 1865 'leaves that question to be dealt with by the common law.' In defining the word 'bailment' it would be impossible to use other than general terms. Accordingly the definition of the word 'bailment' in the Contract Act is wide enough to cover a 'bailment' to a common carrier. The words 'in all cases of bailment' in s. 151 are also very wide. I apprehend, however, that those general terms must be read as qualified by the preamble and s. 1 of the Act, and 'all cases of bailment' mean all cases to which the Act applies. A general definition of the word bailment is one thing, liability in respect of a bailment is another and very different thing; and I can hardly think that a merely general definition of the word 'bailment' affords any ground for saying that the Legislature intended to substitute the Contract Act for the common law or to 'amend' that particular part of the law relating to contracts which, as regulating the liability of a special class of bailees, viz., common carriers for hire, in respect of a bailment, had already seven years before been made the subject of an Act, then (in 1872) and still in force. If it had been intended in the slightest degree to alter or amend the position in which the unrepealed Act III of 1865 had left the common carrier, the Legislature would, I believe, have expressly said so, and Act III of 1865 or some portion of it would, I should think, have been expressly repealed.

"I am confirmed in this view by the consideration that carriers are expressly referred to in s. 158 of the Contract Act, but these are gratuitous carriers. It must not be forgotten, however, that there may be carriers for reward, who are nevertheless not common carriers. To carriers for reward, who [173] are not common carriers, ss. 151 and 152 of the Contract Act have been held by the High Court, Calcutta, to apply, *Mackillican, v. The Compagnie des Messageries Maritimes de France* (I. L. R., 6 Cal., 227). But Act III of 1865 deals only with common carriers. All questions touching the liability of common carriers, such as are the defendants, have been, as it seems to me, purposely left outside the scope of the Indian Contract Act. Sections 151 and 152 of the Indian Contract Act, if they apply in a case like the present, reduce the common carriers' liability from that of an insurer against all risks except the acts of God or the Queen's enemies to what is no liability at all if he can only prove that he has taken 'as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed.' They do this without reference to any special contract signed by the owner of the goods' practically, as it seems to me, dispense with such a contract; practically, therefore, repeal so much of s. 6, Act III of 1865 as makes such a contract essential to reduce the common carriers' liability below that which the common law imposed on him, viz., that of an insurer against all risks, except the acts of God or the Queen's enemies. Under these circumstances I feel it, speaking for myself, impossible to say that ss. 151 and 152 of the Contract Act do not "affect" s. 6 of Act III of 1865. I cannot see how ss. 151 and 152 of the Contract Act can "interfere with" the common law without, the same time, "interfering with" or affecting the unrepealed enactment, s. 6 of the Carriers Act III of 1865. I cannot help thinking that in giving the defendants the benefit of protection under ss. 151 and 152 of the Contract Act, I become a law unto myself; I practically disobey one Act and practically repeal another.

*[Sec. 158:—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.]

Repayment by bailor of necessary expenses.

"Mr. Sale contented himself with very little more than a reference to the judgment in *Kuverji Tussidas v. G. I. P. Railway Company* (I. L. R., 3 Bom., 109). He made no attempt to dispel my doubts with regard to that decision. The one argument he did put before me with reference to a "special contract signed by the owner of the goods" afforded to my mind even stronger grounds than any I have yet [174] given, for saying that ss. 151 and 152 affect the unrepealed Indian Carriers Act, and are therefore inapplicable.

"He argued, and appeared to be serious in doing so, that no special contract was necessary unless it was sought thereby to limit the carriers' liability for his own or his servants' negligence. Mr. Sale must have felt it to be necessary at least to try in some way to reconcile ss. 151 and 152 of the Contract Act with s. 6 of the Carriers Act, or he would never have suggested such an argument. He must have felt that the one Act (if it applies) reduces the common carriers' common law liability to nothing at all (if his evidence is up to the mark) without requiring any special contract, while the other Act makes a special contract absolutely essential for that purpose. It would, as it seems to me, be impossible to give effect to Mr. Sale's argument without absolutely defeating another and perhaps the principal purpose of the Indian Carriers Act. That purpose is to declare their liability for loss of, or damage to, property occasioned by the negligence or criminal acts of themselves, their servants, or agents. Section 3 of the Indian Carriers Act enacts: 'Notwithstanding anything hereinbefore contained every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier, or any of his agents or servants.' Any special contract containing a clause, exempting the carrier from liability for his own or his servant's negligence, would be to that extent absolutely void.

"The reason why the special contract signed by the owner of the goods was considered essential was probably this. It was thought right that owners of goods, before parting with their goods and their control over them, should have an opportunity of seeing, considering, and approving or rejecting the clauses by which a carrier might propose to exempt himself from any or all liability. The mere insertion of such clauses into a bill of lading to be handed to the owner after he had parted with his goods was to be no longer sufficient, but a contract exempting the carrier from liability for his own negligence would, as contrary to public policy, be absolutely void, and it is made so by the Indian [175] Carriers Act, s. 9 of which expressly relieves the plaintiff from the burden of showing that the carrier was negligent, and throws the burden of proof on the carrier to show he was not negligent.

"The next question is as to whether the accident from which the parties to this suit have both suffered can be said to have been an 'act of God.' It was a 'peril of navigation,' but not an 'act of God.' The defendants might, if they had chosen to do so, have freed themselves from liability by a special contract signed by the owners of the goods, as it is, they remain insurers against such an accident, notwithstanding they have done all they could reasonably have been expected to do to avert the consequences of the accident.

"In *Nugent v. Smith* (L. R., 1 C. P. D., 423), to which Mr. Sale referred, the damage arose from a storm at sea which was clearly an 'act of God.' COCKBURN, C.J., goes very fully into the question as to what amount of diligence is sufficient under such circumstances to free a carrier from liability, but I see nothing in the judgment to show that an accident, such as occurred in the present case, can be treated as an 'act of God.' The carrier cannot plead an 'act of God,' without showing that he has done his own duty to the

utmost. I do not think that I need quote at any great length from the authorities. In story on Bailments (7th edition, 1863) s. 511 (page 458 of the edition before me), it is pointed out that striking on an unknown snag in the usual channel of a river has sometimes been thought an 'act of God'; and to excuse the carrier, although this doctrine has not always been received with satisfaction. See the long and learned note 6. See also Parsons on Contracts, 3rd edition, vol 1, pp. 634, 635, 636, note on pages 635 and 636 and the case of *Smith v. Shepherd*, referred to in Parson's note. Also MacLachlan on Shipping, 1st edition, p. 456, 2nd edition, 1875, p. 499, Abbott on Shipping, 11th edition, by Shee, 1867, pp. 337 and 338.

"It is impossible to say in the present case what the obstruction was which caused the accident, or how it got into the river. It may have been caused by a wood-cutter cutting down a tree and letting it fall into the stream, or it may have been caused by the stream undermining a tree and so bringing it [176] into the water. As MacLachlan points out if the operation of the spontaneous forces of nature or natural objects (such as a tree or a rock), has disposed them so that damage afterwards is occasioned thereby, yet, such damage is too remote to be excused by law as within the meaning of the phrase 'act of God'. Then he refers to *Smith v. Shepherd*, and the judgment of HEATH, J. The weight of authority shows that the 'act of God' which excuses a carrier must be a direct and violent act of nature. One can only guess at the cause of the accident in the present case, it is impossible to say that it was an 'act of God'.

"For the reasons I have given, my own opinion is that the plaintiffs are entitled to judgment in this case, but out of deference for the opinion of the Bombay High Court in *Kuvery Tulsiidas v. G. I. P. Railway Company* (I L. R., 3 Bom., 109) as to the applicability of ss 151 and 152 of the Indian Contract Act, I give judgment for the defendant. This judgment is contingent on the opinion of the High Court as to whether or not, upon the facts of the case as they are found and stated, the judgment is correct in law."

The case then came up to the High Court before GARTH, C.J., and WILSON J., and the Court, considering the matter to be of great importance and considerable difficulty, referred the case to a Full Bench. The question referred was, whether the English or what other law relating to carriers prevailed in this country at the time of the passing of the Carriers Act (Act III of 1865), and whether the Bombay High Court were right [in the case of *Kuvery Tulsiidas v. G. I. P. Railway Company* (I L. R. 3 Bom., 109)] in deciding that whatever the law which prevailed in India was, that law is now contained and defined in the provisions regarding bailments in the Contract Act.

The Advocate-General (Mr Paul) for the plaintiffs submitted that the India General Company are common carriers. The case of *E. I. Railway Company v. Jordan* (4 B. L. R. O. C., 98) decided in 1869 that s. 11 of Act XVIII of 1854 was no sufficient cause for saying that the E. I. R. Company were not common carriers.

The preamble of Act III of 1865 shows that a class of persons known as common carriers were in existence at the time of the [177] passing of the Act. It is true the Bombay High Court have decided that the Contract Act repeals or controls Act III of 1865, but I submit that this is directly in contradiction to the preamble of the Contract Act. If the English law was not in force in the mofussil, the law of equity and good conscience applies. [GARTH, C.J.—Then comes the question whether, when we are administering the law of equity and good conscience, we are justified in importing any partial

or special law, English or, otherwise, into India.] Where there is no other law, the *lex fori* must be applied. [GARTH, C.J.—Can you show us any authority for saying that before Act III of 1865 came into force the English law applied?] No. I cannot, but there must have been many cases unreported. Act III of 1865 would not have been called for, unless for the purpose of giving relief to the common carrier, and to give relief to the public, if the law of equity and good conscience were in force before the Act it would not have been necessary to have passed this remedial Act of 1865, except to prevent their liability, and if it had been intended to confine the Act to Calcutta, the Act would have said so.

In the Bombay case, one view of the law has been lost sight of, *viz.*, that every Act stands by itself, unless it has been repealed, or the repeal can be implied. If two Acts are so opposed to each other, that one cannot stand; if the two can be read, so that the one does not necessarily repeal the other, the two may be read separately. The Contract Act does not necessarily apply to carriers at all, the sections relating to bailments are very wide. And also, where there is a special Act, Act 1865 which can apply, can it be said that the Contract Act repeals it?

A contract to carry goods from one place to another does not strictly come within s. 148 of the Contract Act, the word bailment can cover a case of conveying by land or water. If the Bombay case is right, a merchant and a shipowner occupy the position of bailor and bailee. A contract of affreightment cannot be said to be a bailment. The words of s. 148 are not sufficiently extensive to include a fifth class of bailments.

Section 158 has not been sufficiently prominently brought forward in the Chief Justice's judgment in the Bombay case. As regards s. 10 of Act IV of 1879, the Legislature evidently were [178] misled, and made the sections there mentioned applicable to a certain subject. Section 10 assumes that some sort of liability attaches to a carrier by rail. I say the Legislature have simply passed the section on the Bombay case, without waiting to see whether the decision would be questioned.

The case of *Mollwo March & Co. v. The Court of Wards* (L. R. 1 A. Sup. Vol. 86, 10 B. L. R., 312) lays down that in the absence of any law or established custom existing in India, in certain cases the law of England is to be resorted to for principles and rules to guide the Court. *Pooley v. Driver* (L. R., 5 Ch. D., 460, 484) is an authority for showing, that where an existing law is different from what the Legislature supposes it to be, implication arising from Statutes cannot be followed.

Mr. Phillips for the Defendants.—As regards the question, whether the Contract Act applies to carriers and to carriers for hire there can be no doubt all the early sections deal with both, and it is not necessary that the different classes should be mentioned in the previous sections, and perhaps not necessary to mention them in s. 158. [GARTH, C.J.—I think we ought to see, whether carriers were not bound in India by common law duty before the Contract Act.] Custom or duty would not, I think, apply in any other place than Calcutta, if there, the custom of the realm did not extend to India, there is no reason to suppose that it has been extended, there is no authority for saying that the duty of common carriers in India is based on the custom of the realm.

As regards the case of *The E. I. Railway Co. v. Jordan* (4 B. L. R. O. C., 98) there is no reference to the Carriers Act in it, the argument is not reported, and there is nothing to show what was their liability, and nothing to show that the Chief Justice was referring to the ordinary English liability of common carriers.

In the Bombay case, the Chief Justice assumes that the common law liability was in force before the Act, and that the carrier had an insurance liability, but he does not say it was a Statutory liability. The Contract Act, I submit, does apply to carriers and to carriers for hire. It speaks of "goods to be carried" under the words bailment, s. 148. Contracts of carriage would include [179] hired carriers rather than gratuitous carriers, and s. 151 puts gratuitous and hired carriers on the same footing.

The case of *Mackillican v. Compagnie des Messageries Maritimes de France* (I. L. R., 6 Cal., 227) shows that the Contract Act applies to hired carriers; there is nothing on the face of the section to show that common carriers are not also included. At p. 230 of the report, PONTIFEX, J., treats the case as falling within s. 151 of the Contract Act. I submit the Bombay case is correct. Gratuitous carriers are included in s. 158, and in s. 168 "a finder of goods is a gratuitous bailee," *a fortiori* is the hired carrier also included.

It seems clear, therefore, that both sorts of carriers are included in the Act, nor are they excluded by the saving section.

The Bombay case is correct, every Act of the Legislature presupposes the common law, and the Carriers Act presupposes the common law with regard to carriers, and to alter the common law does not affect any Statute.

Before the plaintiffs can succeed, they must make out that the Carriers Act has introduced this liability. Whatever the liability of carriers might have been, the Legislature was content to leave them with that liability; and in making that Act there is no intention to fix upon the common carrier any liability. There is nothing in the Act which declares the liability of a common carrier.

• Inasmuch as the liability existed before the Act, the repeal of the Act would not alter the general liability. It is therefore absurd to say that the provisions of the Contract Act affect the Act.

My contention therefore is (1) that liability not being declared, defined or imposed by the Act, it is not affected by the repeal of the Act, (2) that the section which makes the carrier liable for negligence does not define his liability.

The Carriers Act limits the liability of a common carrier, and by ss. 3 and 8 he is liable for the scheduled goods only in cases of negligence or criminal acts. By s. 6 he cannot limit his liability for other goods by notice, but he may by a special contract. The Contract Act, if it applies, merely renders such special contract, which he may insist upon, unnecessary. A common carrier could by agreement limit his liability, and he formerly sought to do so by notice, which in certain cases was held to [180] constitute such an agreement. The Carriers Act forbade such limitation by notice, and the Contract Act substituted the law for a special contract, and thus amends and assimilates to the general law, the law relating to common carriers. So far as this, however, affects Act III of 1865, it cannot operate under s. 1 of the Contract Act; does it then "affect" the provisions of Act III of 1865 to apply ss. 151 and 152 of the Contract Act to the Carriers Act? No express provision of the Carriers Act is repealed by ss. 151 and 152, for the Carriers Act in its only positive provision, s. 8, renders the common carriers liable notwithstanding any limitation for negligence. Then is it a "provision" of the Act (s. 1,

* [Sec. 8 :—Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.]

Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.

Contract Act) that carriers shall be liable for more? On the contrary, the object of the Act is to enable them to fix their liability as a liability for negligence and criminal acts only.

That is the only liability fixed upon them by the provisions of the Act. So also by the Contract Act. If ss. 151 and 152 affected any of "the provisions" of Act III of 1865, so far as they affect such provisions, the provisions of the Carriers Act prevail. There is, however, no "provision" of the Act which cannot stand, and have the operation it was intended to have, along with ss. 151 and 152. This is obviously true of s. 3 taken with s. 8. These sections say, a common carrier shall be liable only for negligence and criminal acts as regards the scheduled goods; the Contract Act says the same, the Contract Act gives effect to ss. 3 and 8.

By giving effect to ss. 3 and 8, it renders them unnecessary, but it does not do this by "affecting," but by "effecting" their provisions. Section 6 (cl. 1) cannot be affected unless effect were given to a notice, and then such "effect" would be precluded by s. 1 of the Contract Act. Clause 2 of s. 6 says, when taken with s. 8, that a common carrier may reduce his liability, whatever it is, to that for negligence or criminal acts by a special contract. Does the Contract Act affect this? And how? Not by interfering with the carrier's powers of reducing his liability by contract, but by fixing his liability at that to which the carrier was enabled to reduce it. The intention of the Act was that every common carrier, who desired, should be liable only for negligence, since he was not obliged to carry the goods on any other terms.

[181] The Contract Act does not impose a loss liability, but only assumes that every common carrier would so desire (all other bailees being also assumed so to desire), and gives effect to the desire. But it does not force the parties to adopt only this liability, for by s. 152 the bailee may, by special contract, be made liable for more. In fact, the Contract Act renders a special contract necessary to impose instead of to avoid liability for more than negligence.

Section 7 of the Carriers Act is rendered unnecessary, but it is not otherwise affected. Does "affect" mean that any provision of the Contract Act giving effect and extension to the provisions of the Carriers Act is not to operate?

I submit that as the Contract Act does not lower the liability under the Carriers Act, we can only be liable as insurers, and to decide against me, the Court must find that there is a common law liability imposed on carriers in this country.

The Advocate-General (Mr. Paul) in reply.

The **Opinions** of the Full Bench were as follow. --

Garth, C.J.— Whatever doubts may have arisen upon the subject of this reference in consequence of recent legislation, it is at least satisfactory that we are all now agreed upon one very material point, namely, that at the time of the passing of the Indian Carriers Act in 1865, the English law relating to common carriers was in force in this country. My brother WILSON and myself, when we referred this case, had some doubt about that point, but, so far as I am concerned, I am glad to say that my doubts have been entirely removed.

It is obvious that the Carriers Act itself assumes two things. first, that there were a class of persons here at that time, who were recognized as common carriers; and, secondly, that there was some special law, which regulated the duties and responsibilities of those persons. It is difficult to imagine what that law could have been, unless it were the English common law; and it

seems only reasonable to suppose that, as common carriers were introduced into India by the English, and under English rule, the law by which their duties were regulated was the English law applicable to that class of persons

[182] That being so, the Carriers Act of 1865 merely introduced certain modifications of that law, and in some respects of the law which had been previously enacted in England by the Statute 11, Geo. 4th and 1, Wm. 4th, c. 68

The plaintiffs, therefore, in this case are entitled to succeed, if the law of common carriers has not been changed by the Indian Contract Act.

It is contended by the defendants that this change has taken place, and in support of their contention they rely upon the judgment of the Bombay High Court in the case of *Kuterp Tulsudas v. The G. I. P. Railway Company* (I. L. R., 3 Bom., 109)

Now, in order to come to a proper understanding of this question, we must first consider what the duties and responsibilities of common carriers were by the law of England. We are dealing now with common carriers of goods. A carrier of goods was bound by the English law to receive all goods brought to him for carriage, provided he had conveniences to carry them, and the employer was ready to pay any reasonable reward for the conveyance—see *Pickford v. The Grand Junction Railway Company* (8 M. & W., 373), *Johnson v. The Midland Railway Company* (4 Ex., 367). He was also bound to carry the goods within a reasonable time, and to insure their safety during the carriage, and until delivery to the consignee, the act of God and the Queen's enemies only excepted. And it is important to note, that this duty was imposed upon him irrespective of any contract. It was imposed upon him by the custom of the realm, for the benefit of the public by reason of the important trust which he undertook. [See the observations of Lord HOLT in *Coggs v. Bernard* (1 Smith's L. C., 189, 6th edn., 199, 8th edn.)]

Common carriers are largely intrusted with the property of the public. They are intrusted with it under circumstances which make a breach of the trust a very easy matter, and the detection of the breach by the owner of the goods often extremely difficult. They are paid a fair compensation for the carriage proportionate to the risks which they run, and the liability which they incur.

[183] The policy of the law, therefore, is no more than just which makes common carriers under ordinary circumstances insurers of the goods they carry.

But then it is said that the Indian Contract Act has changed this rule of the common law, and has reduced the liability of a common carrier to that of a mere gratuitous bailee; and, moreover, if the defendants are right, the law, as it stands at present, renders it practically impossible, in the great majority of cases, to fix a common carrier with liability. It is true, that by s. 9 of the Carriers Act, and by s. 13 of the Railways Act of 1879, a plaintiff, who sues a carrier for the loss of goods, is not bound, in the first instance, to prove how their loss was caused, but nothing is more easy than for the carrier to call his servants as witnesses, and to prove *prima facie* that the goods were stowed and protected in the usual way, and so to throw upon the plaintiff the onus of proving some negligence or criminality on the part of the carrier or his servants.

Take the ordinary case of goods sent from Calcutta to Bombay, or from Delhi to Calcutta, and consider how almost impossible it would be, in the

generality of cases, for the plaintiff to bring negligence or criminality home to the carrier, although the goods sent may not be forthcoming, and no explanation may be offered as to how the loss occurred

It therefore seems, to say the least of it, unreasonable that the liability of common carriers should have been reduced as against the public from a maximum to a minimum, without any proportionate reduction being made in the rates which they charge, or any other corresponding advantage to the public whose goods they carry

It is also a remarkable fact, which it seems to me impossible to disregard, that, although the Indian Contract Act has now been in force upwards of ten years, the public and the Courts of law in this province, have, so far as I am aware, always acted on the supposition that the law in this respect has not been changed by the Contract Act

This point is also noticed (though apparently little or no weight was attached to it) in the judgment of Sir MICHAEL WESTROPP in the Bombay case. He observes that one of the reasons for [184] the judgment of the lower Court was that, although the Contract Act had then been in force in Bombay for six years, no judicial authority had been cited to show that s. 152 of that Act applied to carriers for reward, and that, although many actions had been tried in the Court of Small Causes, against the G. I. P. Railway Company, such a defence had never been raised in any of those actions.

There is also no doubt that, during the last ten years, similar actions have been constantly tried in this presidency, and, so far as I am aware, this is the first occasion on which the point now before us has been raised

The view which the Courts of law and the public, and even carriers themselves, have taken of the Act for many years after it has become law, is surely a circumstance worthy of our consideration, where the intention of the Contract Act is, to say the least of it, doubtful

Let us now examine the Contract Act itself, and see whether it really did effect this important change in the law

In the first place, as observed by Sir MICHAEL WESTROPP, the Act purports to be only a partial measure. The preamble recites "that it is expedient to define and amend certain parts of the law relating to contracts", and the first section provides "that nothing contained in the Act shall affect the provisions of any Statute, Act or Regulation, not thereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act."

Now here at once a question arises, which, as it seems to me, was disposed of without sufficient consideration in the Bombay case

The learned Chief Justice admits, as I understand him, that the law relating to common carriers is a "*custom of trade*" within the meaning of this section, but he considers that as this customary law is inconsistent with the general rule laid down in s. 152 of the Act, it is not within the saving clause of the section.

Now here I think he is in error; and it seems to me that this clause, when it is rightly understood, affords a solution of the question which we have now to decide.

[185] If the Bombay Court is right, any contract or usage of trade which is inconsistent with the general law laid down by the Contract Act is invalid. Now it seems to me impossible to suppose that this was intended. The Act only lays down certain general rules, which, in the absence of any special contract or usage to the contrary, are binding on contracting parties. But it

could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or customs which may prevail in any particular trade or business. These customs and usages have only the effect of introducing special terms into all contracts or dealings in any particular trade, their very object is generally to modify or control the general law; and the Contract Act, in my opinion, could never have intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with those rules.

For example, the Act lays down rules with regard to the delivery of goods, re-sale, lien, and appropriation of payments. But these rules are only binding in the absence of any agreement to the contrary; and if either particular persons, or persons engaged in any particular trade, choose to contract with one another upon terms inconsistent with those rules, the Contract Act could never have intended to prevent their doing so. It is not necessary for our present purpose to define with precision the meaning of the words "inconsistent with the provisions of this Act." But my present impression is, that they mean no more than this, that no *general* usage or custom of trade, that is, no *usage or custom pervading all trades*, inconsistent with the provisions of the Act, shall be valid. Any general usage of that kind would of course be equivalent to a *general law*, and no general law or usage in contravention of the general law laid down by the Act would be consistent with the validity of the Act itself.

It then remains to be considered, whether the Bombay High Court was right in considering that the custom, which regulates the duties of common carriers, is "a custom of trade." In my opinion they were. I think that in common parlance, and in the [186] more extended sense of the expression, the word "trade" undoubtedly includes the business of a common carrier.

I think, therefore, that the custom of common carriers, upon which the plaintiff relies, has not been affected by the provisions of the Contract Act.

It seems to me moreover that, as that Act was only a partial measure, and as its general scope and object was to codify, so far as it goes, the existing law of *contracts*, the Legislature could never have intended to effect such a material change of the law to the disadvantage of the public, and in favour of common carriers, without some special mention of, or reference to, that intention.

Besides which, it must be borne in mind, that the law and liabilities of common carriers are, as I said before, founded on custom, irrespective of contract. A common carrier is, and always has been, liable to be sued for any breach of this common law duty *in an action of tort*; and therefore, without some special provision relieving them from this duty, it seems to me that an Act which professes to codify the law of *contracts*, and that only partially, cannot be considered as repealing the law relating to the duties of common carriers.

The Bombay High Court, while fully admitting that the English law upon this subject prevails in the Indian mofussil, seems to have lost sight of the fact that this law is founded upon a common law duty apart from contract.

It is true that when the employment of a common carrier has commenced, the law implies a contract on his part to perform the duty imposed upon him; and consequently he is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff in each suit. (*see Bullen and Leake on Pleading*, pp. 101 and 243).

For these reasons I am of opinion that common carriers are not relieved by the Contract Act from their common law liability; and it only remains now to notice s. 10 of the Indian Railways Act, 1879, on which the defendants strongly rely. That section enacts that "any agreement purporting to limit the obligation imposed on a carrier by railway by ss. 152 and 161 of the Indian Contract Act, 1872, in the case of loss, destruction or deterioration of, or damage to property, shall be void unless it is signed [187] by the party sending it, and is in a form approved by the Government."

From this section we are asked to infer that the Legislature has put a construction upon ss. 152 and 161 of the Contract Act, which relieves all carriers in India from any common law liability.

But if, in our opinion, the Contract Act was not intended to have that effect, but, on the contrary, was intended to leave the liability of common carriers as it was before the Act passed, the fact that the Railways Act several years afterwards alludes to ss. 152 and 161 as applying to carriers by railway, is not, I think, sufficient to justify us in giving to the Contract Act a construction which we disapprove, and which we believe to be contrary to its meaning.

Besides, it is really difficult to say what the Legislature did intend by s. 10 of the Railways Act. Very possibly it may have taken for granted that the view of the Bombay Court was right, or it may have supposed that carriers by railway were not common carriers.

It is certainly a very remarkable thing that, in the definition of common carriers in the Carriers Act of 1865, the Government, for some reason or other, are excluded from that category. It is difficult to conceive why, if carriers by railway are ordinarily common carriers, the Government, if they engage in that business, are not to be subject to the same laws and liabilities as other carriers. If the Government engage in any trade for purposes of profit, there would seem no good reason why they should be exempt from duties and liabilities as against the public, by which private persons engaged in that trade are bound, and yet the exclusion of the Government from the definition of common carriers in the Carriers Act would seem to mean one of two things,—either that they were not to be subject to the duties or liabilities of common carriers, or that, being common carriers, they were not to share in the benefit conferred by that Act.

Considering the large share which the Government have now appropriated to themselves in the carrying trade and business of this country, it is certainly very desirable that their position as against the public should be satisfactorily defined. Meanwhile, [188] I think, we ought to hold that the Contract Act has not relieved common carriers from their common law liability. As my learned brothers are also of this opinion, the plaintiffs will be entitled to recover, and they will also have their costs of this reference.

Mitter, J.—This was a suit for the recovery of Rs. 296, being the value of 72 drums of jute shipped by the plaintiffs on board the defendants' flat *Delta* at Kaligunge for being carried to Calcutta. There is no question that the defendants are common carriers under the Indian Carriers Act III of 1865. The learned Judge in the Court below has found that the drums of jute in question were entrusted by the plaintiffs to the defendants for carriage, and that they were not duly delivered to the former. He further finds that the goods in question were lost in the course of their carriage from Kaligunge to Calcutta, and that this loss was not occasioned by the act of God or the

Queen's enemies. He has also found that the defendants took as much care of the goods bailed to them as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed

Upon these facts found by him, the learned Judge in the Court below thinks that the defendants are liable for the loss under the English common law rule under which common carriers are liable as insurers of goods against all risks, except the act of God or the Queen's enemies. The question referred to us is, whether the aforesaid English common law rule, being now in force in this country, will regulate the liability of the defendants in this case

I am of opinion that this question should be answered in the affirmative.

It seems to me that the English common law defining the duties and responsibilities of common carriers was in force in this country at the time when the Indian Carriers Act III of 1865 was passed. The decision of Sir BARNES PEACOCK, C.J., and MACPHERSON, J., in the *East India Railway Company v. Jordan* (I. L. R., O. C., 98) proceeds upon the ground that the English common law is applicable to common carriers in this country. It is also clear from the preamble of the Indian Carriers Act III of [189] 1865 that the Legislature assumed that the English common law relating to common carriers was then in force in this country. Then, again, the business of a common carrier as a *public employment* was unknown in this country, it was introduced first here by persons who were governed by the English law. Under these circumstances it is reasonable to hold that the duties and responsibilities of persons carrying on that business in this country should be regulated by the English common law. In *Molhuo March and Company v. The Court of Wards* (L. R. I. A. Sup., Vol. 86, 10 B. L. R., 312) a question arose whether the English law of partnership was applicable to partnership transactions in India before the Indian Contract Act was passed. Their Lordships of the Judicial Committee held that "in the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision." These observations fully warrant us in holding that the English common law, so far as it was not modified by any Indian enactment, regulates the duties and responsibilities of a common carrier in this country.

The rule of the English common law, which is applicable to the facts of this case beyond all dispute, is that a common carrier is liable for all losses of goods entrusted to him for carriage, except those occasioned by the act of God or the Queen's enemies. The question is, whether this rule of law has been modified by any Indian enactment. It has been contended on behalf of the defendants that the rule in question is no longer in force in India, as it has been replaced by the provisions of ss. 151 and 152 of the Indian Contract Act, IX of 1872. And in support of this contention the decision of the Bombay High Court in *Kuvern Tulsiidas v. G. I. P. Railway Company* (I. L. R., 3 Bom., 109) has been strongly relied upon. The decision cited fully supports this contention, but with due deference to the learned Judges who decided that case, it appears to me that the contention put forward on behalf of the defendants is not correct.

The learned Judges who decided that case appear to me to [190] have not given full effect to that part of s. 1 of the Indian Contract Act (IX of 1872) which provides that nothing contained in it "shall affect any usage or custom

of trade, nor any incident of any contract not inconsistent with the provisions of this Act." With reference to this provision of the Contract Act, WESTROPP, C.J., in delivering the judgment of the Court in the case cited, says: "The provisions of its first section," *i.e.*, the first section of the Indian Contract Act, "that nothing contained in the Act 'shall affect any usage or custom of trade or incident, of any contract not inconsistent with the provisions of the Act,' does not aid us in arriving at a solution of the question submitted to this Court, inasmuch as if the 152nd section of the Act is applicable to common carriers for hire, *the Act is in that respect inconsistent with the rule or usage of common law* relied upon by the Court of Small Causes as the basis of its opinion." Then the learned Chief Justice simply cites the rule in question, and the provisions of ss. 151 and 152 of the Indian Contract Act, without showing in what respect the rule of the English common law is inconsistent with the 152nd section of the Indian Contract Act.

But it seems to me that a careful consideration of the provisions of ss 151 and 152 of the Indian Contract Act, and of the rule of the English common law in question, shows that they are not inconsistent with one another. The 151st section of the Indian Contract Act is as follows:—"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." The 152nd section enacts: "That the bailee, *in the absence of any special contract*, is not responsible for the loss, destruction, or deterioration of the thing bailed if he has taken the amount of care of it described in s 151." Now I shall cite the rule of the English common law regulating the responsibility of a common carrier as stated by COTTON, L. J., in *Beigheim v. The Great Eastern Railway Company* (L. R. 3 C. P. D., 221): "The liability of a common carrier," says he, "as compared with that of other bailees, is exceptional. He is answerable for the loss of [191] goods entrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having *contracted* to insure the safe delivery of, that is to say, as having *contracted* to carry and deliver safely and securely (the act of God and of the enemies of the Queen alone excepted) the goods of which he, as common carrier, is bailee." Now this responsibility of a common carrier is an incident of his contract which the law implies as having been agreed to by him when he accepts goods delivered to him for carriage. Is such an incident of the contract inconsistent with the provisions of the 152nd section of the Indian Contract Act? It seems to me that it is not, because *any carrier* (whether he is a common carrier or not) under the provisions of the 152nd section, would incur the same responsibility if he binds himself by a special contract to that effect. In the case of a common carrier, the law implies that he contracts to undertake the insurance liability, the act of God and of the Queen's enemies alone being excepted. The rule of English law regulating the responsibility of a common carrier is therefore not inconsistent with the provisions of the 152nd section, or any other section of the Indian Contract Act. That rule consequently remains unaffected by the Contract Act as provided in its first section.

It appears from the judgment of the learned Judge in the Court below that the learned counsel who appeared for the defendants in support of his contention relied upon s. 10 of the Indian Railway Act IV of 1879. He contended, on the strength of that section, that the responsibility of a carrier by a Railway, who is undoubtedly a common carrier, is now regulated by ss. 151 and 152 of the Indian Contract Act, and not by the rule of the English common law on the subject. He then argued that if the rule of the English

law was not in force as regards a carrier by Railway, it would be anomalous to hold that it was in force as regards any other kind of common carrier. It seems to me that this argument is based upon a misconception of the provisions of s. 10 of the Indian Railways Act, 1879. That section enacts: "Every agreement purporting to limit the obligation or responsibility imposed on a carrier by Railway by the Indian Contract Act, 1872, ss. 151 and 161 in the case of loss, [192] destruction or deterioration of or damage to property shall, in so far as it purports to limit such obligation or responsibility, be void, unless (a) it is in writing signed by, or on behalf of, the person sending or delivering such property, and (b) is otherwise in a form approved by the Governor-General in Council."

This section does not say that the provisions of s. 151 of the Indian Contract Act, 1872, shall be the *measure* of the responsibility of a carrier by a Railway. It simply provides that if he intends to reduce it below that provided in s. 151 of the Indian Contract Act (IX of 1872), he must comply with the provisions of clauses (a) and (b) of s. 10 of the Indian Railways Act, 1879. The s. 10 does not declare what shall be the measure of his liability, but lays down the particular mode in *which alone* he can reduce it below a certain degree. The section in question does not say that in the absence of the special contract referred to therein, that liability shall not be regulated by the rule of the English common law on the subject. Section 10 of the Indian Railways Act, 1879, is analogous to s. 6 of the Indian Carriers Act, 1865, which by s. 2 of the Act does not apply to carriers by Railway. The object of both sections is not to declare what shall be the carriers' liability, but to provide for the mode in *which alone* he can limit that liability, whatever it may be, according to the law in force.

For these reasons I am of opinion that the rule of the English common law regulating the responsibility of a common carrier is still in force in this country, and that, therefore, the opinion expressed by the learned Judge in the Court below is correct.

Prinsep, J.—I agree in holding that the law relating to carriers in India is not affected by the Indian Contract Act (IX of 1872).

It is unusual to refer to the objects and reasons given for introducing a Bill into the Legislative Council, for they can safely be referred to only as expressing the motives which were present to the particular member of that Council, and experience has abundantly shown us that in the course of legislation the objects and reasons so stated are altogether lost sight of or abandoned, different arguments are put forward to justify legislative action, and the law ultimately passed bears only a slight resemblance to the Bill on which it professes to be based. But in the present case the objects and reasons for introducing [193] the Bill which subsequently became the Indian Contract Act so far as they relate to the law regarding carriers may safely be referred to as they are altogether in accordance with, and corroborated by, proceedings in the Legislative Council immediately after the passing of the Indian Contract Act.

In introducing the Bill which subsequently became the Indian Contract Act, 1872, Mr. FitzJames Stephen said: "We have omitted all reference to special branches of the law of Contract which at present are regulated either by express legislation or recognised custom, *e.g.*, the law of shipping, of bills of exchange, insurance, master and servant, carriers, etc. This omission renders the present Bill so far incomplete: but we consider this incompleteness a less evil than the inconvenience of dealing with so many varied and intricate subjects in a single enactment. It will be easy at a future period,

when the present Bill has been for a time in operation, and its results have been practically tested, to deal with all or any of the subjects above referred to, and to add them as a new chapter to the Act. With this view, leave has already been asked to introduce a Bill to amend and consolidate the law relating to carriers, and it would no doubt be desirable that the law of master and servant should at an early date be put into a clearer form than that in which it is at present. No sufficient information has at present been collected to render legislation on this subject safe."

The proceedings of the Legislative Council, as reported in the supplement to the *Gazette of India*, 1872, page 569, show that immediately on the passing of the Indian Contract Act, and at the very same sitting of the Council, Mr. FitzJames Stephen obtained leave to introduce a Bill to amend the law relating to carriers. For some reason or other (probably because Mr. Stephen left India a few days later) no further proceedings have been taken in this direction, but to my mind, quite independently of the proper construction to be put on s. 1 of the Indian Contract Act (IX of 1872), these facts afford ample indication of the intention of the Legislature, indeed, they seem to me to negative any inferences to the contrary from the terms of the Railways Act of 1879.

[194] **Tottenham, J.**—After the several concurrent judgments which have just been delivered in this case, it is unnecessary that I, having arrived at the same conclusion as therein expressed, should say more than that I entirely agree in that conclusion.

McDonell, J.—I also concur in that conclusion.

Attorney for Plaintiff. Baboo *Joykissen Gangooly*

Attorneys for Defendants. Messrs *Watkins and Watkins*.

NOTES.

[I. CONTRACT ACT, 1872—BAILMENT SECTIONS—COMMON CARRIERS—

The Privy Council held in (1891) 18 Cal. 620 that the liability of common carriers was governed by the English law, as amended by the Carriers Act 1865, and not by the Contract Act 1872, **approving** of this case and overruling 3 Bom. 109. See also (1910) 38 Cal., 28.

II. RAILWAYS—

Railway Companies, though common carriers, are now governed by the Railways Act, 1890, which makes them similar to bailees under the Contract Act, 1872. See 18 Cal., 427, 19 Bom., 165 (181, 182), 32 Mad., 95. —18 M. L. J., 497.

III. INTERPRETATION—STATEMENTS OF OBJECTS AND REASONS—

As to when these may be referred to, see (1892) 19 Cal., 544 (568) F. B.]

[10 Cal. 194]

APPELLATE CRIMINAL.

The 22nd November, 1883.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

[In the matter of the petition of Nobin Krishna Mookerjee.]

Nobin Krishna Mookerjee

*
versus

The Chairman of the Suburban Municipality.

*Bench of Magistrates—Municipal offence—Salaried Officer of Municipality,
Disqualification of—Criminal Procedure Code (Act of 1882), s. 555.*

Notwithstanding anything contained in s. 555 of the Criminal Procedure Code, a conviction for an offence against any municipal law or regulation, had before a Bench of Magistrates which includes a salaried officer of the Municipality is bad

Baboo *Dwarkanath Chukkerbutty* for the Petitioner.Baboo *Ram Churn Mitter* for the Municipality.

THE facts of this case, so far as they are material for the purposes of this report, appear from the **Judgment** of

Field, J.—In this case the accused has been convicted for failing to remove or alter the spouts of his house which discharge water on the high road, and the conviction has been bad as for a breach of Bye-law No. 19 of the Suburban Municipality made under the provisions of s. 313, Beng. Act V of 1876.

The first point raised before us is that the conviction is bad, because it was had before a Bench of Magistrates consisting, amongst other's, of Mr. Sterndale, the Vice-Chairman and a salaried officer of the Municipality. We think that this objection is a sound one, anything contained in s. 555[†] of the present Code [195] of Criminal Procedure notwithstanding. That section enacts "that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try any case to, or in which he is a party or personally interested," and then there is an exception as follows:—"A Judge or Magistrate shall not be deemed to be a party or personally interested within the meaning of this section to or in any case, merely because he is a Municipal Commissioner." It appears to me that the object of this exception was to remove a disqualification, which existed according to the law as laid down in a case decided by this Court before the passing of the present Code of Criminal Procedure, a disqualification that is which, to a gentleman who, being merely a Municipal Commissioner, and having no further interest in the

* Criminal Motion No. 246 of 1883, against the order of Baboo P. N. Mullick and Mr. R.C. Sterndale, Honorary Magistrates of Alipore, dated the 30th day of August 1883.

† [Sec. 555 :—No judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Case in which judge or Magistrate is personally interested.

Explanation.—A judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of this section, to or in any case, merely because he is a Municipal Commissioner.]

subject-matter of the case, was reasonably thought to be unnecessary in the interests of justice. But we think that the present case is altogether different. A gentleman who, without remuneration, is merely discharging a public and honorary office, and who has no personal interest in the proceedings of the Corporation or Municipality, may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested. Such immediate and disqualifying interest does, we think, exist in the case of a gentleman whose time and services are in consideration of a salary given to carry on the work of a Municipal Corporation. The jealousy of the law must presume that such a person, however upright and honourable be his character, is disqualified from taking part in judicial proceedings in which the Municipality is *ipso facto* the prosecutor. (The rest of the judgment is not material for the purposes of this report).

" **Mitter, J.**—I entirely concur in the judgment just delivered. I desire only to add, with reference to the first point, that it seems to me that the Legislature in s. 555 has, by implication, upheld the principle upon which the case of *Wood v. Municipality of Calcutta* (I. L. R., 8 Cal., 891) was decided. In the explanation in s. 555, it is simply laid down that 'a Judge or Magistrate shall not be deemed to be a party or personally interested within the meaning of this section, to or in any case, [196] merely because he is a Municipal Commissioner.' Having that case before them the Legislature simply limited the explanation to the disqualification of a Commissioner in a case in which the Municipality or Corporation may be interested; they did not include in the explanation the case of a salaried officer of a Municipality or Corporation, and the principle on which the case of *Wood v. The Municipality of Calcutta* (I. L. R., 8 Cal., 891) was decided, was that a salaried officer of the Municipality is incompetent to sit as a Judge in a case in which that Municipality is interested

Conviction set aside.

NOTES.

['PERSONAL INTEREST' OF THE JUDGE OR MAGISTRATE—

A Municipal Corporation's servant is disqualified from acting as Judge in a municipal prosecution, 7 Cal., 322; 8 Cal., 891; 10 Cal., 194. See for the English authorities on the point, 7 Cal., 322.

A Municipal Commissioner is not so disqualified, 24 W. R. Cr., 25, but *contra* when he is the Chairman of the Municipal Commissioners (10 Cal., 1030, 15 Mad., 83) or otherwise specially interested (1883 A. W. N., 181, 1886 A. W. N., 291).

As to what amounts to special interest, see 27 All., 25, 18 Bom., 442; 1895 P. R. Cr. J. No. 3; 1896 P. R. Cr. J. No. 5, Weir 11, 728.

Note the Explanation to sec. 556 of the Criminal Procedure Code, 1898, according to which 'a Judge or Magistrate shall not be deemed to be a party or personally interested within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner,' etc.]

[10 Cal. 196]
PRIVY COUNCIL.

The 7th and 30th June, 1883.

PRESENT :

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Mina KonwariPlaintiff
versus
Juggat Setani.Defendant.

[On appeal from the High Court at Fort William in Bengal.]

*Limitation Act (XIV of 1859), s. 22—Registration Act (XX of 1866), s. 53—
“Decree” made upon a registered obligation—Summary decision—
Petition to postpone sale in execution of decree—Estoppel—
Evidence Act (I of 1872), s. 115.*

A summary decision means a decision arrived at by a summary proceeding; and a “decree,” made under s. 53 of Act XX of 1866, is a summary decision. Section 20 of Act XIV of 1859 was intended to apply to decisions, whether called judgments, decrees, or orders, made in a regular suit, and s. 22 of the same Act was intended to apply to all other decisions.

A decree made in 1867 under s. 53 of Act XX of 1866, held to be subject, as regards its execution, to the law of limitation provided in Act XIV of 1859, s. 22.

To petition for the postponement of a sale in execution of decree is not an intentional causing and permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed and occasions no estoppel within the Indian Evidence Act, 1872, s. 115.* The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by lapse of time.

APPEAL from a decree (27th November 1880), of the High Court, reversing an order (15th July 1880) of the Subordinate Judge of the Moorshedabad district.

[197] This appeal arose out of a petition under s. 239† of the Code of Civil Procedure, 1877, filed by the respondent on the 3rd May 1880 in the Court of

*Sec 115 —When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.]

†[Sec 239 —The Court of which a decree has been sent for execution under this chapter shall, upon sufficient cause being shown, stay the execution of such decree, for a reasonable time, to enable the judgment-debtor to apply to the court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of First Instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto ;

and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.]

the Subordinate Judge of the Moorshedabad District objecting to the execution of a "decree" made by the Principal Sudder Amin of that district on the 9th July 1867 for Rs. 10,494, principal and interest, upon a registered obligation, dated 25th Cheyt 1273 (6th April 1867), and executed by Set Gopal Chand in favour of Dhunput Singh.

This "decree" had been made under s. 53 of Act XX of 1866, and the question on this appeal was, whether or not execution of it was barred by limitation.

Set Gopal Chand died shortly after the decree was made, leaving his infant son, Gopi Chand, his heir, of whom Dhunput Singh was appointed guardian. The latter, on the 20th July 1870, made the first application for execution, and the order thereon, dated 3rd August 1870, had reference to his position as guardian, and was followed by the striking off of the case for default on the 29th August 1870. Dhunput Singh having afterwards transferred his interest in this decree to his wife, Mina Konwari, the present appellant, her name was substituted for his in the execution file on the 23rd July 1873, and after that date proceedings were taken in the Nuddea District, to which a certificate was sent for the execution of this decree, apparently with reference to the situation of the judgment-debtor's property in Nuddea.

Struck off in default in the Nuddea District Court on the 4th August 1876, the case was restored to the file on the 25th January 1878, and attachment followed. The minor Gopi Chand having died about November 1878, Dhunput Singh was discharged from his office of guardian, and the respondent, Juggat Setani, as the mother of Set Gopal Chand, succeeded to the estate of her childless grandson.

The Nuddea Court having fixed the 8th December 1878 for the sale under the attachment, a petition by the respondent to stay it for two months was filed on that day. This was granted, and a further stay of one month was ordered by consent on the 9th February 1880. The respondent, before the expiration of this last period, filed a petition, alleging that nothing was due under the decree, and offering to bring evidence in support of [198] this statement. The Nuddea Court rejected this petition as "not preferred within a reasonable time before the Court which had passed the decree." The 8th May 1880 was fixed for the sale, and the respondent on the 3rd of that month filed the present petition in the Court of the Subordinate Judge of Moorshedabad, alleging, among other objections, that execution was barred by lapse of time. To these objections an answer was filed by Mina Konwari, and they were disallowed with costs on the 15th July 1880.

On appeal, the High Court (MCDONELL and BROUGHTON, JJ) reversed this decision. They were of opinion that Act IX of 1871 being applicable, it was not necessary to consider whether there had been proceedings to keep in force the decree of 9th July 1867, within the meaning of Act XIV of 1859, s. 20, as construed by the Judicial Committee in the case of *Maharaja of Burdwan v. Bulram Singh* (5 B. L. R., 611, 13 Moore's I. A., 479). The law of

limitation to be applied they held to be that of Act IX of 1871, sch. II, art. 167.* They found that more than three years had elapsed between the date of the first application for execution and date of the next, between 10th July 1870 and 23rd July 1873. Thus the right to execute the decree of 1867 was, in their opinion, barred by time. This judgment was given before the decision of the Judicial Committee in *Mungal Pershad Dicht v. Griyakant Lahiri* (I. L. R., 8 Cal., 51, L. R., 8 I. A., 123).

On this appeal—

Mr. T. H. Cowie, Q. C., and Mr. R. V. Doynne appeared for the Appellant.

Mr. J. T. Woodroffe for the Respondent.

For the appellant it was argued that execution of the "decree" of 9th July 1867 was not barred by lapse of time under s. 20 of Act XIV of 1859, which was the law applicable, the suit in which the decree of 9th July 1867 was made having been instituted before the date, viz, 1st April 1873, before which applications in all suits, including applications for execution of decree, were excluded from the operation of Act IX of 1871, see *Mungal Pershad Dicht v. Griyakant Lahiri* (I. L. R., 8 Cal., 51; L. R., 8 I. A., 123). Act XIV [199] of 1859 being applicable, that consideration arose which the High Court, in erroneously holding Act IX of 1871 to be applicable, excluded from the case. This, in effect, was that an actual *bond fide* contest was going on between the decree-holder and the judgment-debtor during the time, or part of the time, which had been treated as running against the decree-holder. It was submitted that there was a pending proceeding within the meaning of s. 20 of Act XIV of 1859, and a step taken to enforce, or keep the decree of 1867 in force within three years preceding the application of 23rd July 1873. The application of 20th July 1870, followed by the orders of 3rd August 1870, and 29th August 1870, was a proceeding to keep the decree in force, within the terms of s. 20 of Act XIV of 1859, as explained in *Maharaja of Burdwan v. Bulram Singh* (5 B. L. R., 611, 13 Moore's I. A., 479). The application of 23rd July 1873 was therefore within time. Although proceedings to be sufficient to prevent time from running against the decree-holder must be really taken with intent to obtain the fruits of the decree—see *Hiralall v. Badri Das* (I. L. R.,

* [Art. 167 —

Description of application	Period of limitation	Time when period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No 169	Three years.	The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next herein-after made has been issued) the date of issuing a notice under the Code of Civil Procedure section two hundred and sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.]

2 All., 792),—yet it did not follow that such proceedings need be successful; and, on the contrary, even if abortive, they might be treated as *bonâ fide*, within the meaning of Act XIV of 1859, s. 20.

Moreover, in this case when, on the 23rd July 1873, the appellant made a renewed application for execution in the Moorshedabad Court, there was a judicial determination that there should be further proceedings; whereupon, afterwards, there was a transfer to Nuddea. That being a decision, any objection to it should have been made at the time, and it must now stand as a binding order. The High Court had, in consequence of its applying the wrong Act, *viz.*, IX of 1871, avoided the necessary question as to the effect of proceedings taken, and had applied the three years' bar of limitation, under art. 167 of the 2nd schedule of that Act, to a wrong starting point, the correct one being not earlier than the 3rd August 1870.

It was not open to the respondent in regard to the effect of the two petitions for postponement of the sale, on which she obtained a stay of proceedings, to allege the irregularity of orders [200] anterior to those which she must be taken to have recognized as subsisting. Reference was made to s. 115,* Act I of 1872.

Mr. J. T. Woodroffe, for the respondent, admitting that Act IX of 1871 was inapplicable, argued that the period of limitation, in reference to the "decree" of 9th July 1869, was given by s. 22 of Act XIV of 1859, not by s. 20 of that Act. An order made under s. 53 of Act XX of 1866, though termed in that section a "decree," was a summary decision within the meaning of s. 22 of Act XIV of 1859 as shown by the limited scope of an order under s. 53, Act XX of 1866, and its being the result of summary proceedings. That such a decree could not declare a lien, or provide for interest after the date of the decree [*Asma Bibee v. Ramkant Roy Chowdhry* (19 W. R., 251), *Adur Monee Debta v. Koolochunder Chatterjee* (21 W. R., 140)], and also that no appeal lay against such an order (though it could be set aside on due grounds in execution), tended to show its summary nature. *Bhikambhat v. Fernandez* (1 L. R., 5 Bom., 673) and *Ramdhan Mundal v. Ramessur Bhattacharjee* (2 B. L. R., A. C. 235, 11 W. R., 117) were referred to. Execution, therefore, when the first application was made in 1870, was already barred by lapse of time.

But even if s. 22 did not apply, it could not be shown, with reference to s. 20, that application for execution had been made *bonâ fide*, and for the purpose of enforcing the decree of 9th July 1867, within three years before the application of July 1873. The proceedings had not been regularly taken in conformity with the requirements of the Code of Civil Procedure then in force, Act VIII of 1859, while the decree-holder was in a position rendering regularity essential. To bar limitation the proceedings should have been such that execution might have been lawfully issued upon them, as shown to be necessary in the judgment of the Full Bench in *Bissessur Mullick v. Mahtabchand Bahadur* (B. L. R., Sup. Vol., 967, 10 W. R., F. B., 8). It was not any kind of proceeding that would suffice, *Ram Sahai Singh v. Sheo Sahai Singh* (B. L. R., Sup. Vol., 492; 6 W. R. Mis., 98), *Raghu Nandan Ram v. Sarmessur* [201] *Pundlay* (13 B. L. R., 489, 22 W. R., 235). The transfer of a decree for execution being only a delegation, then, if there was a striking off, the application to restore the execution proceedings must be made to the transferring Court, *Raja Bhoop Singh Bahadur v. Sunkar Dutt Jha* (6 W. R. Mis., 47).

As to the argument that an estoppel had been caused, it was contended that the objector had raised the objection that the execution was barred by

* [*q. v. supra*, 40 Cal., 196.]

time in the only Court having jurisdiction in the matter, *viz.*, that of Moorsheadabad, and for this purpose the postponement was applied for.

Mr. T. H. Cowie, Q. C., replied, arguing that s. 20 of Act XIV of 1859 applied. In reference to the effect of striking off execution proceedings, *Puddomonee Dossee v. Roy Muthooranath Chowdhry* (12 B. L. R., 411; 20 W. R., 133) was cited, showing that this may vary according to circumstances.

Their Lordships' **Judgment** was delivered by

Sir R. Couch.—The question in this appeal is whether the execution of a decree obtained in the Court of the Principal Sudder Amin of Moorsheadabad, by Dhunput Singh against Gopal Chand, is barred by the law of limitation. The appellant is the holder of the decree by assignment from Dhunput Singh. The respondent is the mother of Gopal Chand, and on the death of his minor son Gopi Chand succeeded as the heir of her grandson to the possession of the property which has been attached in execution. The decree was obtained on a mortgage bond, dated the 25th Chait 1273 (6th April 1867), for Rs. 9,995, which sum was to be repaid with interest, at the rate of 2 per cent. per mensem, in the month of Jeyt 1274. The bond contained an agreement that it should be specially registered under the provisions of s. 53 of Act XX of 1866. It was presented for registration on the 7th of June 1867, and was registered and the agreement recorded on the 19th, the time fixed for payment having expired on the 13th of the same month.

Act XX of 1866 provides (s. 52) that,—

"Whenever the obligor and obligee of an obligation shall agree that, [202] in the event of the obligation not being duly satisfied, the amount secured thereby may be recovered in a summary way, and shall at the time of registering the said obligation apply to the registering officer to record the said agreement, the registering officer, after making such inquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by ss. 66 and 68 of the Act, and such record shall be signed by him and by the obligor, and shall be copied into the register book, and shall be *prima facie* evidence of the agreement.

"Within one year (s. 53) from the date on which the amount becomes payable, or where the amount is payable by instalments within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864, or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby or for the instalment sought to be recovered.

"On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court.

"Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

On the 9th of July 1867, Dhunput Singh obtained a decree under this Act, in the following terms. "That the suit be decreed, and the plaintiff do recover the amount of the claim with interest during the pendency of the suit, and costs of the Court, together with interest up to the date of realization at the rate of one rupee per mensem from the property pledged and the defendant." The latter part of this decree is not authorized by the Act, but it will not be material to consider this.

Gopal Chand died some time before May 1870, but at what precise time does not appear in the proceedings. He left a minor son, Gopi Chand, and on

the 10th of May 1870, the first application was made for execution of the decree. This was made by Dhunput Singh to the Court of Moorshedabad against himself, described as guardian and surburakar, on behalf of Set Gopi Chand, minor, son and heir of Set Gopal Chand. It does not appear how he came to be guardian, except that in a petition of the respondent to the Court of Nuddea, which will be afterwards referred to, it is said that [203] he was, according to the arrangement made by Gopal Chand, appointed guardian of Gopi Chand. On the 11th of May it was ordered that the petition be registered, and the decree-holder do deposit the cost of service of notice on the judgment-debtor within seven days. This was merely a formal order, as Dhunput Singh was himself the person on whom the notice would be served.

It will be convenient now to consider what was the effect at this time of the law of limitation.

By Act XIV of 1859, s. 20, it is enacted—

“That no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court unless some proceedings shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for execution

And by s. 22,—

“No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter, or of any revenue authority, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application for such execution.”

The Court of Moorshedabad was not established by Royal Charter. Their Lordships are of opinion that s. 20 was intended to apply to decisions, whether they might be called judgments, decrees, or orders, made in a regular suit, and s. 22 to all other decisions. Act XX of 1866 does, indeed, say that the petitioner shall be entitled to a *decree*, and that such *decree* may be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure, but s. 52* says that the amount secured by the obligation may be recovered in a *summary* way. Summary decision means a decision arrived at by a summary proceeding, which this certainly is, and the decision being called a decree does not make any difference in this respect. It was held by the High Court at Calcutta, in *Rom Dhan Mundal v. Ramessun Bhattacharjee* (2 B. L. R., 235, 11 W. R., 117), that the words “summary decision or award” meant a decision of the Civil Courts not being a decree made in a regular suit or appeal. This construction appears to [204] have been adopted by the Indian Legislature in the Limitation Act, IX of 1871, in art. 166 of the 2nd schedule, where one year is stated as the period of limitation for the execution of a decision, other than a decree or order passed in a regular suit or an appeal of a Civil Court or an appeal. Here the execution shows that the word “decision” is used as including a decree. Therefore the first application for the execution of this decree was barred by the law of limitation.

*[Sec. 52.—Whenever the obligor and obligee of an obligation shall agree that in the

Record of agreement that amount secured by an obligation may be recovered summarily.

event of the obligation not being duly satisfied, the amount secured thereby may be recovered in a summary way, and shall, at the time of registering the said obligation apply to the Registering Officer to record the said agreement, the Registering Officer after making such enquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by sections 66 and 68, and such record shall be signed by him and by the obligor; and shall be copied into the Register Book No. 1 or No. 6, as the case may be, and shall be *prima facie* evidence of the said agreement.]

It remains to be seen whether in the subsequent proceedings the respondent has become estopped from relying upon this. They may be briefly stated : On the 20th of July 1870 Dhunput Singh applied to the Moorshedabad Court that the decree might be executed in the Court of the District of Nuddea. The Court, advertng to the fact that the decree-holder was himself the guardian of the minor judgment-debtor, on the 3rd of August 1870 made an order that he "do recover the money due to him from the estate of the minor, with the permission of the Judge, or else by appointing another guardian on behalf of the minor, do take proper steps to carry on this execution proceeding in his presence within ten days."

On the 29th of August 1870, by an order reciting this order, and that no steps had been taken, it was ordered that the case be struck off for default. On the 23rd July 1873, Dhunput Singh and the appellant presented petitions to the Moorshedabad Court stating that the decree, along with other decrees, had been sold by Dhunput Singh to the appellant for Rs. 1,000, and praying that she might be substituted for him, and the amount of the decree ordered to be paid to her. The appellant is the wife of Dhunput Singh, but this was not stated in the petitions. The object seems to have been to avoid complying with the order of the 3rd of August 1870. On the 28th of August the substitution was ordered. On the 12th of December 1873 it was ordered "that for want of prosecution on the part of the decree-holder this case be struck off for the present." The next step was an application on the 22nd of September 1874 on the part of the appellant for execution of the decree in the district of Nuddea, which was ordered on the 7th of December 1874. On the 9th of April 1875 this application was registered [205] in the Nuddea Court, and, on 4th of August 1876, it was struck off in default. On the 25th of January 1878 another application for execution was made to the Nuddea Court. Gopi Chand, the minor, died in November 1878. The application to the Court, which became necessary on his death, either under s. 210 of Act VIII of 1859, or s. 234 of Act X of 1877, the new Civil Procedure Code, whichever might, according to s. 3 of Act XII of 1879, be applicable, was not made. Notwithstanding this omission the execution proceedings appear to have been continued, for there is in the proceedings a petition, dated the 8th of December 1879, of the respondent by Umanath Ghosal, described as pleader for the petitioner, stating that the decree-holder had executed the decree against her, got her property attached, and that day had been fixed for the sale, and praying that two months' time might be sanctioned, and, the attachment subsisting the 8th of February next might be fixed for the sale. This was assented to by the pleader for the appellant, and an order was made accordingly. On the 9th of February 1880 another petition of the respondent was presented by Nobin Chunder Sircar, another pleader, stating that the decree-holder had consented to allow time up to the 1st of March, and praying that that day might be fixed for the sale, which was ordered with the consent of the pleader for the decree holder. On the 8th of March part of the attached property was sold, and the petition of the respondent to the Nuddea Court to set aside the execution having been rejected on the 6th of March, and an order made for a further sale on the 8th of May, the respondent, on the 3rd of May 1880, petitioned the Moorshedabad Court to stay the sale and adjudicate upon the objections, among others, which need not be mentioned, that the execution of the decree was barred by limitation, and the proceedings in execution had been without jurisdiction : and she denied that she knew of the proceedings. The appellant, in his petition in answer, relied upon the petitions of the 8th of December and 9th of February. The Subordinate Judge of Moorshedabad rejected this petition, and there was an

appeal to the High Court. That Court applied to the case the Limitation Act, IX of 1871, art. 167 of which gives, in the case of a decree or order of a Civil Court not established by Royal [206] Charter, three years from the date of applying to enforce or keep it in force as the period of limitation, and held that the question was whether, within three years before the 23rd of July 1873, anything had been done to enforce or keep in force the decree. They allowed the appeal, on the ground that no application for execution had been made within three years, but, it having since been decided by this Committee, in *Mungul Pershad Dicht v. Grijakant Lahiri* (L. R., 8 I. A., 123, I. L. R., 8 Cal., 51) that, as regards suits instituted before the 1st of April 1873, all applications in them are excluded from the operation of Act IX of 1871, it is admitted that the decision cannot be sustained on that ground. It does not seem to have been considered whether art. 166 was not applicable. It has been held to be applicable to such a case by the High Court of Bombay, in *Bhikambhat v. Fernandez* (I. L. R., 5 Bom., 673).

Their Lordships observe that, although the respondent denied any knowledge of the petitions presented in her name, and the appellant relied upon them, no evidence was given that they were authorized by her; and, further, that the proper steps consequent upon the death of Gopi Chand not having been taken in the Moorshedabad Court, the Nuddea Court had no authority to execute the decree against the respondent. The petitions are of a very suspicious character, and their object appears to have been to have a sale without proclamation. The proceeding in the Nuddea Court against the respondent was altogether irregular, if it was not without jurisdiction, and the petitions to postpone the sale cannot be treated as an estoppel. They contain no admission that the decree could be legally executed against the respondent, and are not within the description of an estoppel given in the Indian Evidence Act, 1872, s. 115 and following sections.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court, by which the order of the lower Court was set aside and the application for execution dismissed, should be affirmed, and this appeal be dismissed, and the costs will be paid by the appellant.

Appeal dismissed.

Solicitor for the Appellant: Mr. T. L. Wilson.

Solicitors for the Respondent: Messrs. Henderson and Co.

NOTES.

[I. ACKNOWLEDGMENT OF DEBT—

A debtor's petition to postpone sale without any further admission cannot be treated as an estoppel, 10 Cal., 196; 11 Cal., 111, 13 I. A., 32, 14 Bom., 78. But it will be different if the petition should contain an expression of the judgment-debtor's willingness to make some private arrangement for paying off the debt — 2 All., 247; 8 Cal., 716; 9 Cal., 730; 10 Bom., 108.

The doubts previously entertained in several decisions whether 'debt' included 'judgment-debt', or not and whether applications included petitions in execution or not, have been set at rest by the additions in the Limitation Act, 1908, of an Explanation to sec. 20, and Explanation III to sec. 19 thereof.

II. DEATH OF PARTY BEFORE JUDGMENT, EFFECT OF—

See 10 Cal., 196 at 206; 19 Cal., 513 at 538, 19 Bom., 807 at 809, 21 All., 314; 26 Mad., 101.]

[207] APPELLATE CRIMINAL.

The 23rd November, 1883.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

[In the matter of the petition of Chundi Churn Bhattacharjea and another.]

Chundi Churn Bhattacharjea and another

versus

Hem Chunder Banerjea

*Criminal Procedure Code (Act X of 1882), s. 437—Further enquiry
under—Proceedings against accused—Notice.*

No order affecting an accused in a criminal matter should be made without giving him notice, so as to enable him to appear and show cause against it.

A Sessions Judge has no power under s. 437 of the Criminal Procedure Code to direct a particular Magistrate by name to make the further enquiry contemplated by that section.

The further enquiry contemplated by s. 437 of the Criminal Procedure Code is an enquiry upon further materials, not a re-hearing of the matter upon the same evidence which was before the Magistrate who held the first enquiry.

IN this case proceedings had been instituted against the petitioner under ss. 342, 379 and 426 of the Indian Penal Code in the Court of the Deputy Magistrate of Serampore. The Deputy Magistrate, who was vested with the powers of a Magistrate of the first class, dismissed the complaint and discharged the petitioner. The Sessions Judge of Hooghly, on the application of the complainant asking that the case might be remanded to the lower Court for the purpose of retaking the evidence, made the following order.—

“I consider that the judicial enquiry into the petitioner’s complaint has been most perfunctory. The complainant prosecuted for alleged offences of assault, wrongful confinement, theft and unlawful assembly committed when he was proceeding with a Civil Court peon to have possession of some property given over to him under a decree. Among the witnesses are the *peada*, the drummer, and a Police officer, to the latter of whom the complainant says he was compelled to fly for refuge from his assailants. A false complainant would not appeal to [208] such witnesses as these, and it is evident that there is a real foundation for his complaint. It seems that for some reason the above witnesses are not very willing to state the whole truth, the *peada* will not speak to the accused’s identity, and the Police officer gives the ridiculous reason for refusing his aid in what is the first duty of every Police officer, namely, the preservation of the peace, that he is attached to the detective branch! But any Magistrate accustomed to deal with evidence should know how to deal with such witnesses. The record of the evidence by the Deputy Magistrate is a perfect burlesque of justice.

“Under s. 437 of the Code of Criminal Procedure, I direct second class Magistrate, Shama Churn Dass, to make further enquiry into this case.”

No notice was given to the petitioner of the proceedings before the Sessions Judge, and the above stated Order was made *ex parte*. The petitioner now moved to have the order set aside.

* Criminal Motion No. 255 of 1883, against the Order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 18th August 1883.

Baboo Juggut Chunder Banerjee for the Petitioner.

Baboo Shama Churn Banerjee for Complainant.

The following **Judgments** were delivered by the Court (MITTER and FIELD, JJ.) :—

Mitter, J.—We are of opinion that the order complained of must be set aside. The first point that was urged before us was that no notice of the application upon which the order in question was passed was given to the petitioner. The complainant's *vakil*, who appeared before us in support of the order of the Sessions Judge, admits this defect. The order is therefore bad upon this ground. The second objection taken before us is that the Sessions Judge, under s. 437, has no power to direct a particular Magistrate by name to make the further enquiry contemplated in that section. It appears to us that this contention is also well founded. The language of s. 437 leaves no room for doubt that the Sessions Judge has not the power which he has exercised in this case, *viz.*, of directing a particular Subordinate Magistrate by name to make the further enquiry under this section. The third point taken before us, and upon which we think the order must be altogether set aside, is that the com-[209]plainant did not complain to the Sessions Judge that he was not allowed to adduce before the Magistrate any evidence which he was ready to adduce, or which he, being in a position now to adduce, would adduce, if a further enquiry were made. It does not appear that any additional evidence would be forthcoming if the order of the Sessions Judge were to be carried out. Section 437 contemplates a further enquiry, that is to say, allowing the complainant to adduce further evidence when necessary on a further enquiry, but this is not what the complainant in this case asked for. What the complainant asked for was to remand the case to the lower Court for the purpose of retaking the evidence that had been already taken, and for the Magistrate to come to a decision upon the evidence so taken. That is not what is contemplated by s. 437.

We are, therefore, of opinion that on all these grounds the order which has been passed is bad in law, and we accordingly set it aside.

Field, J.—I also think that the order complained of must be set aside. In the first place no notice was given to the petitioner before us, and an order affecting him in a criminal matter ought not to have been passed without giving him an opportunity to appear and show cause. In the second place the Sessions Judge has directed a particular Subordinate Magistrate by name to make the further enquiry. The words of s. 437 are that the Court of Session may direct the Magistrate by himself or by any of the Magistrates subordinate to him to make further enquiry. It is clear that the order ought to have been made in these words. The Legislature appears to have contemplated that the Magistrate of the district should exercise a discretion as to the selection of any Magistrate subordinate to him, and this discretion seems to have been vested in the District Magistrate, and not in the Sessions Judge. In the third place s. 437 contemplates a *further enquiry*, that is, as I understand it, an enquiry upon further materials or further evidence, not a rehearing of the matter upon the same evidence which was before the Magistrate who held the first enquiry. Now in this case there was no contention that further materials or further evidence was forthcoming; and, although the Magistrate who first [210] made the enquiry left three witnesses named in the petition of complaint

unexamined, no contention was raised before the Sessions Judge that these persons ought to have been examined, or, if examined, would have thrown further light upon the case. I therefore agree in setting aside the order.

Order set aside.

NOTES

[' FURTHER INQUIRY '—CRIMINAL PROCEDURE—

As regards the meaning of *further enquiry*, this case was followed in 10 Cal , 1027 ; 12 Cal. 522 , 8 Mad 336 , but a Full Bench of the Allahabad High Court dissented from all these decisions and held that the further inquiry need not be upon further materials.

The powers under these sections were discussed elaborately in 10 Bom , 131.]

[10 Cal. 210]

APPELLATE CIVIL

The 12th March, 1883.

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP,
MR. JUSTICE WILSON, AND MR. JUSTICE O'KINEALY.

Moheswar Das.....Plaintiff

versus

Carter.....Defendant.*

*Railway Company, liability of, for loss—Special contract—Railway Act
(IV of 1879), s. 10 —Contract Act (IX of 1872),
ss. 151-161—Carriers.*

The plaintiff despatched certain goods by the E. I. Railway Co., for carriage to A, and signed a special contract, in conformity with the form approved by the Governor-General in Council under section 10 of Act IV of 1879, holding the Company "harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith." The goods were short delivered, and the plaintiff brought a suit to recover their value.

Held.—Per GARTH, C.J., PRINSEP, J. and WILSON, J.—That the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge, inasmuch as the plaintiff had entered into a special contract to hold them harmless in accordance with s. 10 of Act IV of 1879.

* Civil Reference No. 19 of 1882, from Baboo Menu Lal Chatterjee, Subordinate Judge of Beerbhoom, dated the 5th July 1882.

Held.—*Per* O’KINEALY, J., that it was doubtful whether ss. 151 and 161* of the Contract Act applied to carriers by rail, but even assuming that these sections did not apply, the Railway Company would be in the position of carriers before the passing of the Carriers Act, and were entitled to protect themselves from liability by special contract

THIS was a reference under s. 617 of the Civil Procedure Code.

The suit was brought by the plaintiff against “Mr. Carter, Traffic Manager, on behalf of the East Indian Railway Co.,” for damages for the loss of 21½ seers of ghee.

[211] It was admitted that twelve canisters containing 6½ maunds of ghee had been delivered to the Railway Company for carriage from Agra to Ahmed-pore, and it was proved that the plaintiff before taking delivery caused the canisters to be weighed, and found that there was a deficiency of 21½ seers, and seeing that one of the canisters had been cut open by a knife, caused these two facts to be noted on the back of the receipt given to the Company. The defendant (not taking the objection, that the Railway Company and not himself were the proper parties to be sued) contended that the special contract entered into by the plaintiff exonerated the Company from all claim to damages. The special contract “or risk note” was as follows:—“I hold the Railway Company harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage of or to, the said consignment from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith.” This agreement was drawn up in the form prescribed by the Governor-General under Act IV of 1879, s. 10.

The Munsif held the defence to be a good one and dismissed the suit.

The plaintiff appealed to the Subordinate Judge of Beerbhoom. At a late stage of the appeal the defendant raised the objection of non-joinder of the Railway Company as a defendant, but preferred no cross appeal, nor filed any cross objection. The Subordinate Judge gave the plaintiff a decree contingent on the opinion of the High Court as to whether, on the facts disclosed, the defendant or the E. I. Railway Co. could claim exemption from liability by reason of the special contract.

At the hearing of the reference the defendant waived his objection to the non-joinder of the Railway Company as a defendant.

Baboo *Kali Churn Banerjee* for the Plaintiff.

The Advocate-General (Mr. *Paul*) and Mr. *Evans* for the Defendant

The following **Judgments** were delivered —

Garth, C.J. (PRINSEP and WILSON, JJ., *concurring*)—This is a case referred under s. 617 of the Civil Procedure Code. It is [212] unnecessary for us to express any opinion on any of the points which arise, except on that referring to the relations between the parties arising out of the risk note, which was the agreement under which the goods were received and despatched by the Railway Company, because the learned counsel on behalf of the Company in the present case has agreed to waive any objections to the suit as brought against the Traffic Manager, in order that he may obtain our opinion on the main point in issue.

Bailee’s responsibility when goods are not duly delivered or tendered. * [Sec. 161.—If by the fault of the bailee the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.]

It appears that twelve tins containing $6\frac{1}{2}$ maunds of ghee were consigned to the Railway Company at Agra for delivery at Ahmedpore. It has been found, that when these tins were delivered, one had been cut open by a knife, and there was consequently a deficiency of some $21\frac{1}{2}$ seers in the quantity of ghee contained in them.

For the defendants it is contended that under the terms of the risk note, signed by the plaintiff, they are in no way liable for the loss.

The risk note runs as follows.—I hold the Railway Company harmless and free from ~~any~~ responsibility in regard to any loss, destruction, or deterioration of, or damage of or to, the said consignment, from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith." By s. 2 of Act IV of 1879 nothing in the Carriers Act, 1865, applies to carriers by Railway. By s. 10 it is declared that "every agreement purporting to limit the obligation or responsibility imposed on a carrier by Railway by the Indian Contract Act of 1872, ss. 151 and 161, in the case of loss, destruction, or deterioration of, or damage to, property, shall, in so far as it purports to limit such obligation or responsibility, be void, unless (a) it is in writing signed by, or on behalf of, the person sending or delivering such property, and (b) is otherwise in a form approved by the Governor-General in Council.

This agreement, which was signed by the plaintiff, is in a form approved by the Governor-General under Act IV of 1879, s. 10, and its terms leave us no alternative but to hold, that in no case would the Railway Company be liable to account to the consignee for any loss from any cause whatever [213] during the whole time that the goods were in their charge. Similar contracts have frequently been construed by English Courts and full effect has been given to their provisions.

The Legislature in this country has, in respect to the matter specified in s. 10, Act IV of 1879, imposed upon the Government the duty of determining beforehand the propriety of any proposed form of contract between any Railway Company and its customers, instead of leaving this to be decided subsequently by Courts of Justice.

Under such circumstances, we think the suit should be dismissed by the Judge of the Small Cause Court.

O'Kinealy, J.—I agree in the decision delivered by my learned colleague ; but I am not quite sure that I agree in all the reasons on which it is based, as I feel some hesitation in assuming that the Contract Act applies to carriers. There is no doubt, if Railway carriers are subject to the provisions of ss. 151 and 161 of the Indian Contract Act, that the conditions required by s. 10 of the Railway Act have been properly complied with. The risk note is admittedly signed by, or on behalf of, the plaintiff, and is in a form approved by the Governor-General in Council. On the other hand, if ss. 151 and 161 do not apply to carriers by Railway, the Railway Companies are in the position of carriers before the passing of the Carriers Act. Whichever view, therefore, is taken of the case, the question for decision is narrowed to this, namely, whether a Railway Company, which is not subject to the Carriers Act, can protect itself by contract from liability for the negligence or misconduct of its agents and servants.

This very question was elaborately discussed in the case of *Peck v. The North Staffordshire Railway Company* (32 L. J. Q. B. 246). There Mr. Justice BLACKBURN gave as his opinion that "the cases decided in our Courts between

1832 and 1854 established that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct, or fraud on the part of his servants."

This view of the law has been adopted in several later cases. And it may now be taken as settled in England that a carrying [214] company, when not subject to limitation by Act of Parliament, may contract itself from all responsibility arising from the acts of its agents or servants. Looking then at the cases already referred to, I think that under the "risk note" in this case the owner undertook all risks of conveyance and loss, however caused by the servants and agents of the Company during the journey, and that the latter is not responsible for the abstraction of the plaintiff's ghee. Under these circumstances, our answer to the learned Subordinate Judge should be that the Railway Company is protected by the risk note in question, and that neither it nor the Traffic Manager is liable unless either one or the other has committed some independent wrong in connection with the property, and as no such allegation has been made, that the suit should be dismissed.

Suit dismissed.

NOTES.

[RAILWAY COMPANY'S LIABILITY FOR LOSS COVERED BY 'RISK NOTE':—

The Railway Company is absolved from all liability for loss of goods when it is covered by a valid risk note.—10 Cal , 210; 17 Bom., 417 (420); 30 Cal , 257, 5 O C 153; 14 M. L. J. 396 (399), 18 All., 42, 19 Bom., 159, 2 N. L. R., 125; 118 P. R., 1908.]

[10 Cal. 214]

APPELLATE CIVIL.

The 30th August, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PRINSEP.

Arzan.....Plaintiff

versus

Rakhal Chunder Roy Chowdhry and the Secretary of State for India in Council.....Defendants.*

Right of way—Easement—Limitation Act (XV of 1877), s. 26—

User as of right—Prescriptive right.

For the purpose of acquiring a right of way or other easement under s. 26 of the Indian Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. In this respect there is a difference between the acquisition of such rights under that Act, and their acquisition under the English Prescription Act.

THIS was a suit to establish a right of way over certain lands rented by the defendant, and to remove a wall obstructing the alleged right of way.

The land over which the alleged way passed belonged originally to one Sherif Hossein, and was, in 1855, sublet by a tenant of Sherif Hossein to the

* Appeal from Appellate Decree No. 1076 of 1882, against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 27th March 1882 affirming the decree of Baboo Jogendro Nath Ghose, Second Munsiff of Burmaul, dated the 31st December 1883.

Government on a mokurrari lease for the purpose of opening a burial ground. The entire land so leased was not required for that purpose, and the surplus land, over [215] which the way was claimed, remained unoccupied till 1878, when the Government let it to the defendant for building purposes.

The Munsiff found that the plaintiff had enjoyed the right of way peaceably and without interruption for a period of more than twenty years, but was of opinion that the plaintiff's enjoyment was not as of right, and that the owner of the servient tenement was not aware of the user, and therefore dismissed the suit.

The plaintiff appealed to the Subordinate Judge of Backergunge, and the latter came to the same conclusion as the Munsiff.

The plaintiff then appealed to the High Court.

Baboo Jogesh Chunder Roy for the Appellant.

Baboo Doorga Mohun Das for the Respondents.

The **Judgment** of the Court (GARTH, C.J., and PRINSEP, J.) was delivered by

Garth, C.J.—The plaintiff has a dwelling house in Burrisaul, in which he and his family have lived for a great many years, and he claims a right of way in respect of that house to and from the high road which runs from east to west through the village.

On the 2nd of Assin 1285 (17th September 1878) the defendant No. 1 obstructed this right of way by commencing to erect a pucca stable upon the land, whereupon the plaintiff took proceedings in the Criminal Court, but the Magistrate refused to interfere, because he considered it a question to be tried in the Civil Court.

The defendant No. 1, who is the lessee of the land under the Government, denies the plaintiff's right of way, and the Collector who appears for the Secretary of State, the defendant No. 2, also virtually denies it.

It appears that the land over which the alleged way passes belongs to one Sherif Hossein. He let it upwards of thirty years ago to one Ijgutullah, and Ijgutullah, after holding it for some six or seven years, sublet it on mokurrari lease to the Government on the 4th of April 1855, for the purpose of enlarging a burial-ground at Burrisaul. The entire land so leased was not, however, required for that purpose, and the surplus land over which the [216] way is claimed remained unoccupied until the year 1878, when the Government let it to the defendant for building purposes.

It is necessary to state these facts, in order to understand the nature of the defence, and the ground upon which the lower Courts have based their judgment.

The plaintiff proved to the satisfaction of both Courts that he had used the way in question for some thirty or forty years. Indeed, except by the sufferance of his landlord, he appears to have no other means of access from his house to the public road.

But both Courts have found that, notwithstanding this long user, he has not acquired a right of way under the Indian Limitation Act.

The Munsiff finds that he has enjoyed the way peaceably and openly, and also (after some hesitation) that he has enjoyed it without interruption for upwards of twenty years.

He considers, however, that the plaintiff cannot be said to have enjoyed it as of right for three reasons.

First, because the Government, who have been the owners of the servient tenement for twenty years before suit, were not aware of the plaintiff's user of the way; secondly, because the plaintiff submitted to divers encroachments, which the owner of the servient tenement imposed upon him; and, thirdly, because many years ago when Sherif Hossein, the then owner in possession, endeavoured to stop the way, the plaintiff did not bring a suit in the Civil Court as for an obstruction to a private right, but proceeded in the Criminal Court as for an obstruction to a public one.

The Munsiff accordingly dismissed the suit, and his decision was confirmed by the Subordinate Judge, apparently on two grounds.

(1) That a right of way cannot be enjoyed "*as of right*" without the knowledge of the servient owner, and that the Government had no knowledge of the user of this way by the plaintiff, and

(2) That the interruptions which took place from time to time in the user showed that the plaintiff had never peaceably enjoyed the way "*as of right*."

[217] These points have been argued before us on appeal, and the first of them gives rise to a very important question, namely whether the principles which govern the acquisition of a right of way in England by *prescription* apply also to the acquisition of such a right under the *Indian Limitation Act*.

Both the lower Courts have relied mainly upon the doctrine laid down in *Gale on Easements* and other authorities, that a right of way cannot be gained by *prescription* unless with the knowledge of the owner of the servient tenement.

Prescription implies a grant, the user by which a prescriptive right is gained is only evidence of a previous grant, "and, therefore, in order that such user may confer an easement, it follows that the owner of the servient tenement must have known that such an easement was being enjoyed, and also have been in a position to interfere with and obstruct its exercise, had he been so disposed. *Contra non valentem agere non currit prescriptio*." (See *Gale on Easements*, last edition, page 189.)

It was presumably upon this principle that by the 7th section of the English Act, the 2nd and 3rd William 4th, c. 71, the time during which an infant, an insane person, or a married woman is the owner of the servient tenement is excluded from the period, during which a prescriptive right is in course of acquisition.

But there seems to be an important difference between the English and the Indian law in this respect.

The English Act, 2 and 3 William 4th, c. 71, was passed expressly "for shortening the time of prescription in certain cases."

Its object was to remove the difficulties which had previously existed of establishing easements by proof of immemorial user. But the Act did not alter in any way the *nature of the right* to be acquired, and, therefore, the conditions which were generally necessary before the Act to the acquisition of prescriptive rights are still necessary to their acquisition under the Act, though they may be gained by a shorter period of enjoyment.

[218] But the Act, under which rights of way and other easements are now generally acquired in India, has nothing to do with prescription. It is "an Act for the limitation of suits and other purposes," and s. 26 enables any person to acquire a right of way by a twenty-years' user without reference to any grant, express or implied, from the servient owner.

So long as the right of way is enjoyed as an easement peaceably and quietly as of right and without interruption for twenty years by a person

claiming right thereto, his right at the end of that time becomes absolute and indefeasible. Nothing is said in the Act as to the knowledge of the servient owner being necessary to the acquisition of the right, and as the right to be acquired is not a prescriptive one, the rule which obtains in England with reference to prescriptive rights seems inapplicable here.

Of course rights of way, as well as other easements, may still be claimed in this country by prescription; See *Rajrup Koer v. Abul Hossein* (I. L. R., 6 Cal., 529): and when they are so claimed, the principles which apply to their acquisition in England will be equally applicable in this country. But those principles do not necessarily apply to the acquisition of easements under the Limitation Act.

And as a proof that this was the view of the Legislature of this country there is no provision in the Indian Limitation Act corresponding with s. 7 of the English Prescription Act, though there is a provision in s. 27, which answers to s. 8 of the Prescription Act, and which protects, under certain conditions, the rights of reversioners.

It is probable that the words "*peaceably and openly*," which are not in the English Act, have been introduced into the Indian Act for the very purpose of preventing these rights being acquired by stealth or by a constantly contested user, although actual knowledge of the user on the part of the servient owner may not be necessary.

We think, therefore, that the main ground upon which the judgment of the lower Courts has proceeded in this case is without foundation, and we would say further that, even if knowledge of user had been necessary, we think that under the [219] circumstances such knowledge should have been presumed by the lower Courts.

If the personal knowledge of the Collector were necessary in all cases to the acquisition of rights of way over Government land, such acquisition would be almost an impossibility. There is no reason why Government should be in any better position in this respect than any other land-owner, and there appears to have been abundant evidence in this case, from which the knowledge of the superior Government officers should have been presumed.

The land over which the right was exercised was in the village of Burrisaul, immediately adjoining the high road. The plaintiff had used it day after day for 30 or 40 years. The way itself was in the immediate neighbourhood of a public cemetery; and two Government officers, one the Inspector of Police of the district, and the other Deputy Magistrate at the station, were called as witnesses for the plaintiff to prove his user of the way for many years.

Then the alleged interruptions of the plaintiff's user of the way amount to no evidence at all which should defeat his right. It is not pretended that there were "interruptions" within the meaning of the explanation of s. 26, and we cannot find that, except on one occasion, anything was done which operated to prevent his user. And as all knowledge of the user of the right has been persistently denied by the defendants, it is clear that the so-called obstructions were not intended to prevent that user. The one occasion to which we allude was when the way was obstructed by Sherif Hossein upwards of 30 years ago; and so far from the circumstances of that obstruction being unfavourable to the plaintiff, we consider that what happened then tends strongly to support his case.

It is clear that at that time he was using the way *as of right*, because he at once resented the obstruction, and went before the Magistrate to assert his claim. The Munsiff, we observe, treats his conduct on this occasion as shewing

that he claimed a *public* way, and not a *private* one. But it is not at all likely that people of his class should be able to distinguish between public and private rights, or to know the proper remedy for any invasion [220] of those rights. The fact of the plaintiff going before the Magistrate is the strongest possible proof that he at once asserted his right ; and the fact of the obstruction being removed, and of the plaintiff's subsequent user of it without further objection by Sherif Hossein, shows plainly that he was successful in the assertion of his claim.

The cutting of the ditch by the Government, which is relied on by the Subordinate Judge in support of his view, might have been a slight inconvenience to the plaintiff, but certainly did not operate to prevent his user. The ditch appears to have been dug not with a view to obstruct the plaintiff, but to mark out the land which the Government had purchased ; and it appears that after it was dug the plaintiff used the way as before, merely fixing a pole in the middle of the ditch, that he might swing himself over it more easily.

The case must, therefore, go back to the Court of First Instance to consider whether there is any sufficient reason in point of law why the defendant's building should not be pulled down, and the defendant will probably do wisely under the circumstances to come to some reasonable arrangement.

The plaintiff having succeeded in establishing his right of way is entitled to his costs in all the Courts.

Appeal allowed.

NOTES.

[As regards the limitation applicable to the crown, see (1902) 25 Mad., 457 (494).

As regards easements being acquirable in modes other than what is prescribed in the Limitation Acts, see 6 Cal. 394 ; also 8 C. W. N. 425 (427) 31 Cal. 503.]

[10 Cal 220]

APPELLATE CIVIL.

The 6th September, 1883.

PRESENT :

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.**

Mina Kumari Bibee.... Defendant

. versus

Jagat Sattani Bibee and others.....Plaintiffs.

*Sale in execution of decree—Sale afterwards set aside—Execution
of decree found to be barred by limitation—Suit to recover
the property from purchaser.*

A creditor obtained a decree against his debtor, and applied for and obtained an order for execution. This application was unsuccessfully opposed by the judgment-debtor on the ground that execution was barred by limitation. Certain properties of the judgment-debtor were attached and sold in execution of this decree, the judgment-creditor himself becoming the purchaser.

[221] In due course, the sale was confirmed, and a certificate granted to the purchaser. Subsequently to this, the order granting execution came up before the High Court on appeal, and that Court decided that execution was barred. The person who had been the judgment-debtor then brought a regular suit against the purchaser to recover the properties sold in execution.

Held, that he was entitled to have the sale set aside by regular suit.

Jan Ali v. Jan Ali Chowdhry (1 B. L. R. A. C., 56, 10 W. R., 154) distinguished.

ONE Dhunput Singh, on the 9th July 1867, obtained a money decree against Jagat Sattani Bibee and assigned the decree to his wife. On the 23rd July 1867 an application for execution was made, which was opposed on the ground that execution was barred; the application was, however, granted, and subsequently the decree was transferred to another district for execution, and certain properties of the judgment-debtor (the subject of the present suit) were attached and put up for sale, and were purchased by one Baranasi Roy in the name of the wife of Dhunput Singh. Subsequent to the execution sale, the question as to whether execution was barred, came up before the High Court on appeal, and that Court, on the 29th November 1880, decided that the application for execution made on the 23rd July 1873 was barred by limitation. Previously to the decree of the High Court, dated 29th November 1880, the execution sales were confirmed by the District Judge of Nuddea, and a certificate had been granted to the purchaser.

Jagat Sattani Bibee then brought this present suit against Dhunput Singh and his wife, to recover possession of the properties sold in execution as above stated, alleging that the decree of 1867 was fraudulent, that the transfer to Dhunput Singh's wife was *benami*, and that as execution was barred when the sales were held, nothing passed to the purchaser.

* Appeal from Original Decree No. 127 of 1882, against the decree of Baboo Amrit Lal Chatterjee, Subordinate Judge of Nuddea, dated 20th March 1882.

The wife of Dhunput Singh, the second defendant, contended that the order of the High Court on the question of limitation had not become final, as a review was pending on that order, that she was not a *benamidar* for her husband, and that if the sales were void, the application for restoration of the properties ought to have been made to the Court that made the sale.

[222] Dhunput Singh denied that the purchase by his wife had been made for his benefit.

The Sub-Judge held that execution of the decree being barred, the sale under it and purchase by the judgment-creditor would not pass anything to the defendants, and that the plaintiff was in order in bringing a regular suit, as the question raised in the suit was not one relating to the execution or discharge of satisfaction of the decree, and therefore gave a decree in favour of the plaintiff for possession.

The defendants appealed to the High Court.

Baboo *Gurodass Banerjee* and Baboo *Srinath Doss* for the Appellants, contended that, although the plaintiff might be entitled to have the purchase-money paid to her, she was not entitled to set aside the sale, and cited *Jan Ali v. Jan Ali Chowdhry* (1 B. L. R. A. C. , 56 , 10 W. R. , 154).

Munshi *Mahomed Yusuf* for the Respondent.

The **Judgment** of the Court (GARTH, C J , and MACPHERSON, J.) was delivered by

Garth, C. J.—We think that the Court below was quite right.

It is not necessary for us to deal with any other than that which is the principal question in the case, namely, whether the sale, which took place under the execution proceedings in the former suit, can be set aside by the plaintiff in this suit.

She (the present plaintiff) was the judgment-debtor in the former suit, and before the execution issued under which the sale took place, she took the objection that the right to issue execution was barred by limitation.

The Court held that execution was not barred, and consequently the sale took place, and was confirmed to the present defendant.

The plaintiff, the execution-debtor, then appealed to the High Court. The High Court held that the Court below was wrong, and that the right to issue execution was barred. The decision has been since approved by the Privy Council.

The plaintiff then brought this suit for the purpose of having it declared that the sale was invalid.

[223] The Court below has given the plaintiff a decree to the effect, but it has been contended before us in appeal that, although under the circumstances the plaintiff may be entitled to have the purchase-money paid to her, she is not entitled to set aside the sale, and in support of that contention we are referred to a case decided by Sir BARNES PEACOCK and the late Mr. Justice MITTER—*Jan Ali v. Jan Ali Chowdhry* (1 B. L. R. A. C. , 56 ; 10 W. R. , 154).

In that case a sale had taken place under a decree at the time when the decree was valid, and the decree-holder had a perfect right to issue execution under it. But the decree was subsequently reversed on appeal, and it was then contended that the sale itself, which had been made to a *bonâ fide* purchaser for value, could not stand. But the Court there held that, as when the sale took place, the decree was good and the execution proceedings were perfectly regular, the sale could not afterwards be set aside as against a *bonâ fide* purchaser for value.

That case is distinguishable from the present upon two grounds.

In the first place an objection was raised in this case in due time that the right to issue execution was barred ; and as it was afterwards held in appeal that the objection was a valid one, it follows that the sale took place under circumstances which showed that it was illegal.

But in the next place there is this very material difference between the two cases. In this case it cannot be said that the sale was made to a *bond fide* purchaser for value without notice ; because the execution-creditor was himself the purchaser. He was perfectly aware of the objection which had been taken, and he also knew that, if that objection were valid, the execution would be contrary to law. Notwithstanding this, he insisted on pressing on the sale, and was himself the purchaser. He, therefore, bought with full notice that his title might turn out to be invalid, and we think he must take the consequences of his imprudence.

We find that in the case referred to in the lower Court's judgment, *Mahomed Hossein v. Kokil Singh* (I. L. R., 7 Cal., 91), we carefully abstained from giving any opinion as to whether under circumstances [224] somewhat similar to the present, the judgment-debtor could have set aside the sale by means of a regular suit.

That question has now arisen, and we think it only just that the sale should be set aside. It seems to us that if after the objection had been properly taken, the judgment-debtor could not set aside the sale as against the execution-creditor, the appeal to the High Court, though successful, would virtually be infructuous.

It is perfectly true that the execution-purchaser had a right, if he chose, to insist upon the sale taking place, but if he adopted that course, he did so at the risk of the sale being set aside.

We think, therefore, that the appeal should be dismissed, and the appellant must pay the costs of this appeal as well as of the Court below.

Appeal dismissed.

NOTES.

[See also (1900) 27 Cal. 810 (814) ; (1885) 9 Mad. 130 (132).]

[225] ORIGINAL CIVIL.

The 3rd and 4th December, 1883.

PRESENT :

MR. JUSTICE PIGOT.

Gopeenath Mookerjee and another

versus

Kally Doss Mullick and others.

Injunction—Interim injunction—Grounds for continuing to hearing—Hindu Law—Alienation by widow—Consent of next reversioner—Rights of remote reversioners

A Hindu died, leaving a widow and also leaving A his immediate reversionary heir, and B and C more remote reversionary heirs. The widow obtained a certificate to collect debts, but such certificate did not empower her to deal with Government securities. D instituted a suit against the widow on promissory note alleged to have been executed in his favour by her late husband, and obtained a decree. A then instituted a suit against the widow and D to have the decree set aside on the ground of fraud and collusion. This suit was compromised by A's surrendering up his reversionary interest to the widow for a consideration. B and C now sued the widow and D and A for the purpose of having the first mentioned decree set aside for a declaration that the decree on the compromise was inoperative to establish or confirm the fraudulent decree, or to enlarge the powers of the widow to deal with the Government securities, and obtained an *interim* injunction.

Held, that, apart from the question as to whether an alienation by a widow and next reversioner without the consent of subsequent reversioners is binding on them, which question the Court was prepared to answer in the negative, it would, under circumstances of the case, be an abuse of the discretion of the Court not to continue the injunction until the hearing, when the truth or falsity of the charges made by the plaintiffs could be investigated on oral evidence.

THIS was a suit to set aside certain decrees as having been obtained by fraud, and to restrain the defendants from negotiating certain Government securities.

It appeared that one Doorgaram Mookerjee died leaving three sons Ramchunder Mookerjee, Thacoordass Mookerjee and Kasinath Mookerjee. Ramchunder died leaving two sons, Luckynarain and Jonardun. Of these, Luckynarain died leaving two sons, the plaintiff Gopeenath and the defendant Aughorenath, and Jonardun died leaving one son, the plaintiff Nundolall. The second son, Thacoordass, died leaving one son, the defendant Peary Mohun, and the third son Kasinath died leaving a son, Monohur, who subsequently died without issue, leaving a widow, the defendant Sreemutty Mohamoyee Dabee.

[226] After the death of Monohur, the defendant Sreemutty Mohamoyee Dabee obtained a certificate enabling her to collect debts due to his estate, but not empowering her to negotiate any securities belonging thereto, and subsequently Government securities to the value of Rs. 25,000 were brought into the Court of the District Judge of Hooghly.

On the 3rd March 1882 the defendant Kally Doss Mullick instituted a suit, being suit No. 127 of 1882, in the High Court against the defendant Sreemutty Mohamoyee Dabee, describing her as certificated administratrix of Monohur Mookerjee, seeking to recover the sum of Rs. 1,912 alleged to be the amount of principal and interest due on a promissory note for Rs. 15,000,

alleged to have been executed by Monohur Mookerjee on the 14th November 1879 in his favour, in renewal of a former promissory note. The defendant Sreemutty Mohamoyee Dabee, acting as the plaintiffs alleged, in collusion with the defendant Kally Doss Mullick, did not enter appearance, and on the 18th of May 1882 a decree was made against her. A certified copy of the decree was then transmitted to the Court of the District Judge for execution.

On the 28th June 1883 the defendant Peary Mohun Mookerjee instituted a suit, No 279 of 1883, against the defendants Kally Doss Mullick and Streemutty Mohamoyee Dabee, praying that it might be declared that the decree was a false and fraudulent one and had no binding effect so far, at all events, as the estate of Monohur Mookerjee was concerned, that it might be set aside, and the certificated copy recalled, and also praying for an injunction restraining the defendant Kally Doss Mullick from taking any steps on the decree. The case came on for hearing on the 8th August 1883 before PRIGOT, J., and on the 10th the defendant Peary Mohun Mookerjee was permitted, with the consent of the defendants, to withdraw the suit on the terms contained in a petition, which stated that in consideration of the sum of Rs 8,000 paid to him by the defendant Sreemutty Mohamoyee Dabee, he had relinquished his reversionary right to her as far as the Government securities belonging to the estate of Monohur Mookerjee were concerned, so as to enable her to negotiate and sell the same.

The plaintiffs Gopeenath and Nundolall then instituted the [227] present suit against Kally Doss, Sreemutty Mohamoyee Dabee, Peary Mohun Mookerjee and Aghorenath, alleging that the promissory notes were not made by Monohur Mookerjee, that the defendant Kally Doss Mullick was a person of no means, that the decree obtained by him was obtained by forged documents and false and perjured testimony, and that the defendant Peary Mohun Mookerjee withdrew his suit and entered into the compromise, though he knew that the promissory notes were forged, and that the decree in Kally Doss Mullick's suit was fraudulent, because he was uncertain whether he would outlive the defendant Sreemutty Mohamoyee Dabee, and thought it more to his advantage personally to accept the sum of Rs. 8,000 as a consideration for consenting to the fraud, and allowing the defendant Sreemutty Mohamoyee Dabee to act as the absolute owner of the Government securities to the detriment of those who might be the heirs at her death.

The plaintiffs contended that the petition of compromise, and the compromise and the decree made thereon in the suit No. 279 of 1883, did not operate to establish or make good the decree in the suit No. 127 of 1882, or to enlarge the powers of the defendant Sreemutty Mohamoyee Dabee in dealing with the Government securities, and that the compromise was contrary to the policy of the Hindu law and the general law of the country, and was a mere device for evading the provisions of the Hindu law, by setting up a false and fraudulent decree, and that it could not operate as a consent of the nearest reversioner within the true meaning and spirit of the Hindu law. And the plaintiffs, who were the next reversionary heirs after the defendant Peary Mohun Mookerjee, also contended that their right to institute the suit as protectors of the estate arose when the defendant Peary Mohun Mookerjee agreed with the defendants Kally Doss Mullick and Sreemutty Mohamoyee Dabee to allow the false and fraudulent decree to be established against the estate of which he was the first protector, and also agreed for a sum of money to assign over to the defendant Sreemutty Mohamoyee Dabee contrary to Hindu law his right to protect the estate from waste, and thus disabled himself from protecting the estate, and became a party to the fraud on the

Court and on the ultimate reversioners. The plaintiff prayed that it might be declared that the decree obtained in the suit [228] No. 127 of 1882 was obtained by fraud, and that the same had no binding effect so far, at all events, as the estate was concerned, that the decree might be set aside and the certified copy recalled, that it might be declared that the agreement of compromise in respect of the suit No. 279 of 1883, and the decree by consent in that suit were inoperative to establish or confirm the fraudulent decree of 1882, or to enlarge the powers of the defendant Sreemutty Mohamoyee Dabee to deal with the Government securities, for an injunction to restrain the defendant Kally Doss Mullick from taking any steps whatever on the decree in the suit No. 127 of 1882, and for an injunction to restrain the defendant Sreemutty Mohamoyee Dabee from negotiating, selling, or in any wise disposing of the Government securities

The plaintiffs obtained a rule calling upon defendants Kally Doss Mullick and Sreemutty Mohamoyee Dabee to show cause why a writ of injunction should not issue against them restraining the defendant Kally Doss Mullick from taking any steps whatsoever on the decree in suit No. 127 of 1882, and restraining the defendant Sreemutty Mohamoyee Dabee from negotiating, selling, or in any wise disposing of the Government securities

Mr. *Hill* in support of the rule.

Mr. *Pugh* showed cause

Section 44, illustration (c), of the Specific Relief Act shows that the immediate reversioner, a Hindu widow, with the consent of the immediate reversioner, can make a good title in favour of a stranger as against more remote reversioners—*Jadomoney Dabee v Sarodaprosono Mookerjee* (Boul., 120). The reason of the rule is given in *Gunqa Pershad Kur v Sumbhoonath Burman* (22 W. R., 393). It is immaterial whether the conveyance is by one or two deeds—*Kishen Geer v. Busquet Roy* (14 W. R., 379) [PIGOT, J.—Is the rule applicable when the transaction amounts to a fraud on the inheritance?] There is nothing fraudulent in the transaction. The reversioner has the right to relinquish his reversion for whatever consideration he chooses. He has a right to withdraw his objection, and whatever terms may be come to between him and the widow do not affect Kally Doss Mullick [229] [PIGOT, J.—Suppose that Peary Mohun had not brought the suit which was compromised, could the plaintiffs have sued?] I apprehend not. The Privy Council do not say in what cases reversioners remote may sue, but only throw out that there may be such cases.

The cases of *Rajbullubh Sen v. Omesh Chunder Roop* (I L. R., 5 Cal., 44) goes the length of deciding that even where the immediate reversioner, who has relinquished his right, dies before the widow, the next reversioners have no rights. See also *Trilochur Chuckerbutty v Umesh Chunder Lahiri* (7 C. L. R., 571), *Noferdoss Roy v. Modhu Soondari Burmonia* (I. L. R., 5 Cal., 732). [PIGOT, J., referred to *Gauri Dat v Gur Sahu* (I L. R., 2 All., 41), where more remote reversioners were allowed to sue on the ground of fraud.] In *Kishen Geer v. Busquet Roy* (14 W. R., 379) MARKBY, J., refers to a decision of the Privy Council as being opposed to the rule. That appears to be the case of *Rajlaxi Debia v. Gakul Chandra Chowdhry* (3 B. L. R., P. C., 57, 12 W. R. P. C., 47; 13 Moore's I. A., 228), where their Lordships say that the consent of kindred must generally be understood to be all those who are not likely to be interested in disputing the transaction. But they do not decide that all possible reversioners must consent. [PIGOT, J., referred to *Ram Chunder*

Poddar v. Hari Das Sen (I. L. R., 9 Cal., 463), *Varjivan Rangji v. Ghelji Gokaldas* (I. L. R., 5 Bom., 563), *Sia Dasi v. Gur Sahai* (I. L. R., 3 All., 362,)]

Pigot, J.—I need not detail the form in which this matter now comes before me. It appears sufficiently from the pleadings and affidavits in the present case and from the pleadings in the former case from which this case springs.

The plaintiffs seek to restrain the defendant Kally Doss from executing a decree of this Court in a suit brought by him against the defendant Sreemutty Mohamoyee Dabee on the ground that the decree in that suit was obtained by collusion between her and Kally Doss.

The first point taken by the defendant is, that the plaintiffs are clothed with no right such as to entitle them to maintain their suit at all, on the ground that the suit instituted by Peary [230] Mohun against Kally Doss and Sreemutty Mohamoyee Dabee to set aside the decree in the before-mentioned suit was compromised in such a manner as entirely to bar the plaintiffs' rights in respect of her deceased husband, Monohur Mookerjee, inasmuch as the consent decree obtained in that suit amounted in effect to a disposition by the widow and next reversioner (to use the inaccurate but generally used phrase of the estate so as entirely to defeat the right of persons subsequent to that reversioner, and in support of that proposition the case of *Jadomoney Dabee v. Sarodaprosono Mookerjee* (Boul., 120) and *Gunga Pershad Kuri v. Shumbhunath Burmun* (22 W. R., 393) and other authorities have been relied upon. I refrain from detailing those authorities, because deciding this matter as I now do before the conclusion of Mr. Pugh's address, I desire to leave it open to counsel in case of an appeal to rely not only on those cases, but on others which he may find necessary to refer to having regard to the opinion I have thrown out

Were it necessary to decide whether or not an alienation by a widow and next reversioner without the consent of subsequent reversioners is binding on them, I am ready to decide the negative of that proposition, and as authority I refer to *Varjivan Rangji v. Ghelji Gokaldas* (I. L. R., 5 Bom., 563), *Gouri Dat v. Gur Sahai* (I. L. R., 2 All., 41), and *Sia Dasi v. Gur Sahai* (I. L. R., 3 All., 362) in the matter of which cases, it was, as I think correctly, thrown out by the Court that the law could not be considered as settled in favour of the law as contended for by Mr. Pugh. I follow the Bombay case as expressly negating that proposition, and it appears to me difficult to meet the argument suggested by Mr. Mayne in his work on Hindu Law, s. 547: "It must be remembered that where an estate is held by a female, no one has a vested interest in the succession. Of several persons then living, one may be the next heir in the sense that, if he lives, he will take at her death in preference to any one else then in existence. But his claim may pass away by his own death, or be defeated by the birth or adoption of one who would be nearer than himself. It certainly does seem to be common sense that the person who turns out to be the actual reversioner should not find his rights [231] signed away by the consent of one who when he consented had a preferable title in expectation, but who in the actual event proved to have no title at all." I can see no answer to that argument in justice, and I do not think that the authorities as they now stand would bear me out in dissenting from it. I am not unconscious of the deep respect to be paid to the Judge who decided the case of *Jadomoney Dabee v. Sarodaprosono Mookerjee* (Boul., 120). But that case was decided before the expression of opinion by the Judicial Committee of the Privy Council in *Rajlaxmi Debia v. Gakul Chandra Chowdhry* (3 B. L. R. P. C., 57; 12 W. R. P. C., 47, 13 Moore's I. A., 228), which is relied upon by SARGENT, C.J., in the Bombay case, and last, but not least important,

in the expression of doubt as to the proposition now under discussion, expressed by GARTH, C.J., and FIELD, J., in *Ram Chunder Poddar v. Hari Das Sen* (I. L. R., 9 Cal., 463).

I have said that so far as necessary I decide the proposition in the negative, but I must add that under the circumstances of this case, had I acceded to Mr. Pugh's proposition, which I do not, I should still continue the injunction to the hearing. It appears to me, for reasons I shall refer to presently, that it is important to the parties that the property should be preserved to the hearing, and that it is not contrary to the law of the Court under those circumstances to grant the injunction (His Lordship then dealt with the facts of the case and continued) In the face of those facts it would be an entire absence of the discretion of the Court to remove the protection which an injunction places over the property until the truth or falsehood of the grave charges against these two persons shall have been investigated by oral evidence. It appears to me that neither in law nor on facts such as can be established by affidavit should I be justified in releasing the property from the injunction. But, of course, in doing this I must not be taken as expressing any opinion as to the truth or falsehood of the plaintiffs' case.

Rule absolute

Attorney for the plaintiffs Baboo Okhoy Chunder Dutt.

Attorneys for the defendants Baboo P. N. Bose and Baboo A. T. Dhur.

NOTES

[CONSENT OF THE REVERSIONER—

The question to what extent the consent of the next reversioner to an alienation by a Hindu widow binds the reverter reversioners was discussed by a Full Bench of the Calcutta High Court in (1884) 10 Cal 1102 See the Notes to that case See also 25 Bom. 129 (140).

II INTERIM INJUNCTIONS—

See also (1895) 22 Cal p 459 (460)].

[232] PRIVY COUNCIL.

The 20th and 30th June, 1883.

PRESENT :

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH
AND SIR A. HOBHOUSE.

Kalikomul Mozumdar and others. Defendants

versus

Uma Sunker Moitra.... . Plaintiffs.

[On appeal from the High Court at Fort William in Bengal]

Hindu law—Inheritance—Succession of adopted son on the mother's side

An adopted son under the law prevailing in Bengal occupies, as regards inheritance, the same position in the family of the adopter as a natural born son (except in a few instances defined in the Dattaka Chandrika and Dattaka Mimamsa) succeeding collaterally as well as lineally, his relations by adoption *Pudma Kumari Devi Choudhary v The Court of Wards* (I. L. R., 8 Cal , 802 , s c., L. R , 8 I A , 229), referred to and followed Where a natural-born son, had there been one, would have been entitled to succeed a maternal uncle, as being

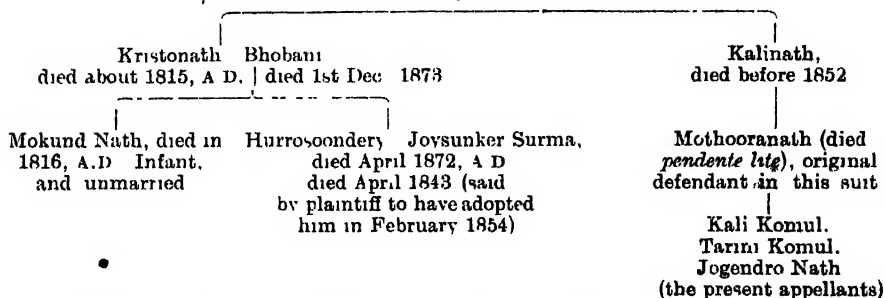
brother's daughter's son to the latter, *held*, that an adopted son, who had been adopted by a widow under her deceased husband's authority, was entitled, in like manner to inherit, at the death of the widow, from her father's brother.

APPEAL from a decree (21st June 1880) of a Full Bench of the High Court (I. L. R., 6 Cal., 256), reversing a decree (31st May 1878) of the Officiating Additional Judge of the Rajshahye District, which affirmed a decree (20th December 1877) of the Second Subordinate Judge of Rajshahye.

The suit out of which this appeal arose was brought for the possession of a share in a family estate in lands situate in the Pubna zillah, the plaintiff claiming to inherit in the family of a widow who had adopted him under the authority of her deceased husband. The widow died in 1872, before her mother, who lived till 1873, and who had inherited from her son in 1816, the share which, with additions to it, her daughter's adopted son now claimed. The defendants were grandsons of the widow's father's brother, as shown by the following pedigree table:—

[233] SHIBNATH MOZUMDAR

died many years ago.



Bhobani, widow of Kristonath, having inherited from Mokund Nath, continued for some years joint with Kalinath, her deceased husband's brother, and before the death of the latter had separated from the rest of the family.

After Kalinath's death his son Mothooranath, father of the present appellants, held jointly with Bhobani, these two becoming separate in 1852, and specifying their shares in an "ansha patro."

In 1873 Bhobani died, having survived by one year her daughter Hurrosoondery Debia, who had been married to Joy Sunker Surma Moitra. He died without issue in 1843, having given, as was alleged, the authority under which his widow adopted the plaintiff in or about 1852.

In December 1876 the plaintiff, who had received the name of Uma Sunker Moitra, made the present claim to the estate of which Bhobani, his maternal grandmother by adoption, had been in possession. The plaint classified in three schedules the properties comprised in that estate, the first and second containing what the plaintiff alleged to have jointly belonged to Bhobani and Kalinath after their separation from the rest of the family, and the third referring to property acquired by Bhobani and Mothooranath while joint.

The defence was that Hurrosoondery Debia had not obtained any permission, either real or written, from her husband to adopt a son, nor had she adopted the plaintiff.

Also that by the shastras an adopted son could not inherit in the manner claimed.

Issues having been fixed on these points, the Second Subordinate Judge of Rajshahye found that the plaintiff had been duly adopted by Hurrosoondery

under power given to her by her husband. But [231] he held that, by Hindu law as declared in *Morun Moyee Debeah v. Bejoy Krishto Gossamee* (W R F. B. 121), an adopted son did not inherit from the relatives of his adoptive mother. The suit was therefore dismissed.

The plaintiff appealed to the District Judge, the defendants filing a cross appeal against the finding of the adoption. Both appeals were dismissed by the Officiating Additional Judge.

On an appeal to the High Court, a Divisional Bench (MORRIS and PRINSEP, JJ.) referred to a Full Bench the question of the plaintiff's right to inherit in the family of his adoptive mother, citing the abovementioned *Morun Moyee Debeah v. Bejoy Krishto Gossamee* (W R F B. 121) as against the right claimed, and the case of *Puddokumarce Debia v. Juggut Kishore Acharjee* (I. L. R. 5 Cal., 615) as in favour of it.

The **Judgment** of the Full Bench (GARTH, C J., and JACKSON, MORRIS, MITTER, and TOTTENHAM, JJ.) was delivered by **Mitter, J.**, to the effect that the weight of authority supported the proposition that an adopted son takes, according to the Hindu law prevailing in Bengal, by inheritance from the relatives of his adoptive mother. The judgment of the Full Bench is reported in the Indian Law Reports, 6 Cal 256.

The decrees of the lower Courts were accordingly reversed. In review, afterwards, the amount of the share in the family property allowed to the plaintiff was modified, the present appeal including both decrees.

Mr. J. Graham, Q.C., and Mr. R. V. Doyne appeared for the Appellants.

Mr. J. F. Leith, Q.C., and Mr. C. W. Arathoon for the Respondent.

For the appellants it was argued that the present case was not governed by the decision in *Pudmakumari Debia v The Court of Wards*. In the latter case the question had been raised whether the adopted son of the maternal grandfather of the deceased whose estate was in dispute had a title as heir nearer than the maternal grandfather's grandnephew. The adopted son in that case [233] made his first step in tracing his title through his adopted father, and he was held entitled to succeed his adoptive father's daughter's son. That decision, however, must be understood *secundum materiam*, and would not apply where, as here, the adoptive son claimed at once through his adoptive mother. It had not yet been held that an adopted son could claim through the adopting widow without tracing through his adoptive father. The right of the adopted son to succeed in the family of his adoptive father's widow might be attributed to the widow's being regarded as a surviving part of the husband himself. To his gotra she belonged. The act of the widow in adopting was the husband's act, and she was only the instrument. Thus it was that the widow, though a minor, could adopt. See 2 Macnaghten's Hindu Law, chapter VI, case 5, and the Vyavastha Darpana, 521. Where there were more wives than one the adopted son became the son of all, and not of one wife specially. So that doubts must exist as to the right on the part of the adopted son to inherit from the widow apart from inheriting through his adoptive father. Reference was made to Sutherland's Synopsis, note 20. Dattaka Mimansa, sections 2 and 6, Dattaka Chandrika, sections 3 and 5; Dayabhaga, chapter X, Macnaghten's Hindu Law, chapter VI, I Strange H. L., chapter 4, paragraph IV, II Strange H. L., appendix to chapter 4, Mayne H. L., and Usage, paragraphs 149 *et seq.*, 1st edition, *Gunga Mya v Kishen Kishor Chowdhry* (3 Sel. Rep. 128, new ed 170); *Gunga Persad v Briggsme*

* I. L. R., 8 Cal. 302. The judgment of the Judicial Committee in this case was given on 14th November 1881.

Chowdram (S. D. A. 1859, p. 1091), *Morun Moyee Debeah v. Bejoy Krishto Crossamee* (W. R., F. B. 121), *Chinna Rama Krishna Ayyar v. Minachi Ammal* (7 Mad. H. C. 245), *Teen Cowrie Chatterjee v. Dinonath Banerjee* (3 W. R. 49); *Puddokumaree Debia v. Juggut Kishor Acharjee* (I. L. R. 5 Cal. 617).

Their Lordships' **Judgment** was delivered by

Sir R. Couch.—This suit was brought by the respondent against the appellant to recover certain property which he claimed [236] as an adopted son. The former owner of the property was Kristonath, who died in 1815, leaving a widow, Bhobani, and a son who died in the following year unmarried and a daughter Hurrosoondery who was married to Joy Sunker Surma, and died in April 1872. Bhobani died on the 1st of December 1873, and the respondent claimed to be entitled to the property on her death, as having been adopted by Hurrosoondery, with the permission of her husband, who died in 1843. The appellants are the sons of Mothooranath, the original defendant, who died pending the suit. He was the nephew of Kristonath, and took possession of the property on the death of Bhobani.

It was satisfactorily proved that Hurrosoondery adopted the respondent and performed the requisite ceremonies in 1854, having previously adopted a son, who died in October 1850, and the questions in this appeal are:—

(1) Whether Hurrosoondery had the permission from her husband to adopt, which is required by the law of Bengal, and

(2) Whether the respondent, as an adopted son, can succeed to the property in suit.

The Subordinate Judge held that an authenticated copy of a written permission, purporting to be executed by Joy Sunker, empowering Hurrosoondery to adopt three sons in succession, was admissible in evidence. The Appellate Court held that it was not admissible, as there was no evidence that a search was made for the original. It is not necessary to decide which is right, as their Lordships are of opinion that there is sufficient evidence of the permission without the copy. A hebanama, or deed of gift, executed by Joy Sunker in favour of Hurrosoondery contains a statement that he had executed in her favour a deed of permission to adopt. In the deed by which the first adopted son was given in adoption by his mother to Hurrosoondery there is this passage:—"Your husband, Joy Sunker Moitra, being without issue, gave you during his lifetime permission to adopt a son, and has since died." This deed is witnessed by Mothooranath. And in his deposition taken in the suit he admits that "the respondent was treated and acted as a son to Hurrosoondery, calling her mother, and Bhobani grandmother, and Mothooranath himself 'mama' or maternal [237] uncle, and he answered accordingly." There is, therefore, no ground for setting aside the findings of the lower Courts that there was a valid adoption.

As to the second question, their Lordships have held in *Padma Kumari Debia v. The Court of Wards* (L. R., 8 L. A., 229. I. L. R., 8 Cal. 302), that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption. In that case the claimant was the adopted son of the maternal grandfather of the deceased, and it was argued for the appellant that it was distinguishable from this case. But their Lordships laid down that an adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the *Dattaka Chandrika* and *Dattaka Mimamsa*. That this is the Hindu law is shown by the careful examination of the authorities by the learned Native Judge who delivered the judgment of the Full Bench of the High Court,

which is the subject of this appeal. The respondent claims to succeed as being the daughter's son, and consequently the heir of his maternal uncle at the death of the widow, which he would be if he were a natural-born son, and as an adopted son he is in the same position. This is clear from the Dattaka Mimamsa, s. 6, p. 50, where it is said "The forefathers of the adoptive mother only are also the maternal-grandsons of sons given and the rest, for the rule regarding paternal is equally applicable to maternal grand-sires (of adopted sons)." Their Lordships are, therefore, of opinion that the decree of the High Court in favour of the respondent is right, and they will humbly advise Her Majesty that it should be affirmed, and this appeal dismissed, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants Messrs Wrentmore and Swinhoe.

Solicitor for the respondent. Mr. T L Wilson.

NOTES

[I. EFFECT OF ADOPTION, AS REGARDS STATUS IN THE ADOPTED FAMILY—

The adopted son is, in all respects like a natural son except to the extent defined in the texts —10 Cal 232 affirming 6 Cal 256, 8 Cal. 302. Thus, he can succeed as the daughter's son (9 Cal 70), as the sister's son (10 Cal 232), *collaterally* as *bandhu* 17 Cal 518, *lineally* as a *sakulya* or *samanodaka* (6 Cal 289).

The grandson by an adopted son is a grandson equally with the grandsons by a legitimate son, though the extent of his share relatively to them may differ —(1905) 1 C L J 388 (400).

On account of this identity between the natural born son and the adopted son, a daughter, having adopted a son, may be entitled to take a bequest limited to 'daughters with sons' — (1906) 33 Cal 947 10 C W N 695, 3 C L J 502. The inferiority of shares of the adopted son does not obtain as against other collateral heirs —(1881) 9 C L R 373, 8 C L R 57. Having regard to the fact of only one man succeeding to an impartible estate, and to the fact that an adopted son is but the *substitute* for an aurasa son and occupies an inferior position relatively to him, the Madras High Court upheld the claims of the legitimate son born *after* the adoption, to succeed to an impartible estate subject to the law of primogeniture —17 Mad 422.

II. THE AUTHORITY OF THE DATTAKA CHANDRIKA AND THE DATTAKA MIMAMSA

This point was fully discussed in (1895) 17 All 291 but the judgment of the majority was reversed in 21 All. 412 P.C.]

[238] PRIVY COUNCIL.

The 10th and 11th July, 1883.

PRESENT

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

Najban Bibi.....Defendant

versus

Chand Bibi.....Plaintiff.

[On appeal from the Court of the Commissioner of the
Sitapur Division of Oudh.]

*Grant—Construction of gift—Resumption—Tribal custom—Evidence of
intention.*

In view of the circumstances under which an oral lease of villages at a favourable rate of rent and of indefinite duration, was made by the proprietor, a talukdar, in favour of her daughter, it was *held* not to be a lease for life, but to be resumable at the lessor's pleasure.

The parties belonged to a tribe (Ahban), appearing to be Mahomedan, but in regard to inheritance and maintenance, having customs of its own, which permitted the resumption.

There was no evidence of the lessor's intention contemporaneous with the making of the lease, but her will executed within two years after and made known to the Government to show the future succession to the taluk, contained a bequest of the same village to the lessee, with express reservation of power to alter this disposition. *Held*, that this was evidence bearing on the question of intention.

APPEAL from a decree (26th March 1879) of the Commissioner of the Sitapur Division of Oudh, confirming a decree (30th July 1878) of the Settlement Officer of Kheri.

The plaintiff in the suit out of which this appeal arose sued in the Settlement Court of the Kheri District, claiming as proprietor to recover possession of four villages from the defendant, stating that in the Fasli year 1267 (A. D. 1859-60), she had temporarily leased the villages in dispute to the defendant, her daughter, a widow then without means, on favourable terms for her support, but had afterwards cancelled that lease.

For the defence the right of the plaintiff to resume was denied, and a title to these villages founded on a division of the family estate made by the defendant's brother, Asmatulla Khan, since deceased, was alleged. It was also contended that the plaintiff had become, constructively, a trustee of these villages for the defendant, the latter having been induced by her to consent to the settlement being made with her in A. D. 1858, corresponding to 1266 Fasli.

The plaintiff obtained a decree in the Settlement Court, which [239] was confirmed by the Commissioner on appeal, the following statement of the facts being given in his judgment —

"Madar Buksh was the talukdar of Kotwara, Mussamut Chand Bibi (the plaintiff) was his wife, and Mussamut Najban Bibi (the defendant) was their daughter. Madar Buksh died about the time of the annexation of Oudh, and if after that event, too soon for the summary settlement to have been made with him. His eldest son having died before his father, the first summary settlement was made with the second son Asmatulla Khan who was killed during the mutiny in 1265 Fasli. In consequence, the second summary settlement, that of 1266 Fasli, was made with the plaintiff. Her name is in the general list of talukdars prepared under Act I of 1869, and in the subordinate list No. II, which declares the taluka to descend one and undivided. The defendant married one Karamatulla Khan who died in 1265 Fasli, and after his death she lived with her late husband's family up to 1267 Fasli, when finding that her husband's brothers sought to deprive her of her husband's share of the common property, she went to live with her mother at Kotwara. Since 1267 Fasli, the defendant has been in possession of the four villages forming the subject of this suit. In 1269 Fasli, in consequence of a circular issued by the Deputy Commissioner under the orders of the Local Government, the plaintiff made a will, in which she bequeathed the said villages to defendant. She did not specify in the will whether they were to be defendant's for life or for ever, but she directed the defendant was to pay whatever Government revenue might be assessed on the villages to the talukdar in whose kabuliati they were to remain. In this will the plaintiff reserved the right to revoke it or to alter it at her pleasure. This will was duly registered. In the year 1285 Fasli, however, the plaintiff had become displeased with her daughter, the defendant, and she executed a codicil to the will in which she revoked the grant of the four villages in defendant's favour."

The Commissioner also found, in concurrence with the Settlement Officer, that there was no evidence showing that the defendant had obtained posses-

sion of the four villages in dispute upon a division by Asmatulla Khan, or before 1267 Fasli, or had any title to them independently of the lease. He confirmed the find-[240]ing that the parties were of the tribe of Ahban Thakurs according to whose customs, they being an old Hindu clan, the mother was not bound to provide maintenance for her daughter.

Mr. J. D. Mayne and Mr. Theodore Thomas, for the Appellant, argued that, there being no evidence of the terms of the lease, the presumption was that it was for the life of the lessee. The alleged special customs had no application to the rights of the parties. The case did not fall within s. 52 of Act XVII of 1876 (The Oudh Land-revenue Act, 1876),* which also provided in s. 53 a special procedure; nor could the right to resume be claimed under any other law.

Mr. R. V. Doyne for the respondent was not called upon.

Their Lordships' Judgment was delivered by

Sir A. Hobhouse.—The single question in this appeal is whether a lease or gift made orally, and for indefinite duration, by one of the parties to the other, is a lease for life, or a lease or gift resumable either at the pleasure of the lessor or upon notice.

With respect to any difference between resumption at will and resumption upon notice no question has been raised, and it would seem, from the state of the pleadings, that no question could be raised, because in the plaint it is stated that the defendant, who is the lessee, was informed by the lessor of her intention to cancel the lease, and that she resisted the action, and no issue is taken upon that statement.

The parties stand in the relation of mother and daughter, and the circumstances under which the gift was made are these. The mother is the talukdar of a taluk containing a number of villages. The daughter married and became a widow. For some time she lived with her husband's family. She then quarrelled with them, and it would seem that they deprived her of her share of the husband's property, upon which she came to her mother in destitute circumstances, and her mother gave her the property in question by way of maintenance. The parties belong to the tribe of the Ahbans, who appear to be Mahomedans, but with several customs of their own, and it would seem that their law of inheritance and their law of maintenance is a tribal law.

[241] Now, in the first place, it is to be observed that the mother, the plaintiff below, is only seeking to resume that which is a portion of her taluk. *Prima facie* she has a right to do that, and it is incumbent upon the person who is resisting the resumption to show a good title against the talukdar. The question is whether the defendant, who sets up this gift or lease, has shown such a title.

There was a great deal of evidence given in the Court below as to the customs of the Ahbans. The evidence principally related to the custom of inheritance, because the defendant set up a title either by inheritance, or by the law of succession mixed up with the allegation of a will in her favour. Those issues have been found against her in the Courts below, and there is no dispute about them now. But besides the evidence of the customs which relate to inheritance or succession, several witnesses have said that where a gift is made by way of maintenance it is a gift resumable by the grantor. It appears to their Lordships that both Courts have found in favour of that evidence. There is none the other way. The only witness who speaks as to the non-

* Relating to the liability to resumption of rent free grants, and grants at favourable rates of rent.

resumability of such grants, speaks of grants made to a daughter of the family by way of dowry and upon marriage. Both the Courts below, as their Lordships read the judgments, have found in favour of the power of resumption. The Settlement Officer says, speaking of the gift to the defendant. "It is shown to be now, and was so from the first, a lease to her for her maintenance, and therefore resumable at the pleasure of the proprietor of the estate." That is in accordance with the evidence, and then Lordships read that, not as a conclusion of law found by the Judge himself, but as his interpretation of the evidence. The Commissioner says this. First he finds that, according to the custom of the Ahbans, the defendant would have no right to maintenance from her mother. He then adds "Defendant has therefore no claim, either by custom or by special necessity, to the continuance, of this grant, which it appears to me cannot be regarded as anything but a compassionate allowance for her maintenance, granted by her mother under peculiar circumstances, which now no longer exist." Then he goes on to say that if it had been made in money there could be no doubt [242] that it could have been stopped, and it cannot make any difference that the mother had followed the common custom of giving a beneficial interest in land instead of an allowance in money. He further shows that the old native custom always recognized a right of resumption on the part of the talukdar even in cases of maintenance proper, though he says it was exercised with a great deal of discretion in a gradual and merciful way, so that the whole of the resumption did not fall upon a single generation. But, he argues, if the right of resumption existed in cases where there was a right to maintenance, much more would it exist in such a case as this, where there is no right to maintenance at all.

Therefore both Courts have found that by the tribal custom the right to resumption exists, and it appears to their Lordships that such is the fair effect of the evidence on the subject.

Then there is another piece of evidence which is not without bearing upon the plaintiff's right to resume. In answer to the circular sent out by the Government talukdars, desiring to know who were their successors, the plaintiff followed the not uncommon course of making what was called a will by way of pointing out to the Government who the successor was. In that will she appoints as her general successor her grandson, Raza Hussain, but she states that "those entitled to any rights will continue to enjoy those respective rights in accordance with the details recorded herein." Then she goes on to say. "Until I die I have the right of revoking and confirming, and of decreasing and increasing and of altering." So that, although she states that certain persons have rights, she at the same moment asserts her own right of altering those dispositions if she pleases. Now among those rights are four villages to be held by the defendant, and it is stated again that "these four villages will remain with the defendant with the Government jumma upon them," and so forth. There we have stated on the face of a formal document, put in for the purpose of informing the Government of the state of this taluk, that the talukdar then claimed the entire right of altering the disposition of these very four villages.

[243] Such evidence is by no means conclusive, and under some circumstances it might be worthless or even inadmissible. But in this case we have absolutely no evidence of the intention of the donor, which is contemporaneous with the gift. The will was made within two years, at the longest, after the gift, and many years before the events which led to its revocation. Under such circumstances a formal declaration by the donor as to the positions of herself and the donee with reference to the gift ought not to be disregarded.

In the year 1876 the plaintiff made what is called a codicil to her will, and thereby revoked the gift to her daughter.

At that time the circumstances in which her daughter was, had very much altered for the better, and the relations between the mother and the daughter had altered too, but for the worse. We have, however, no concern with the reasons given by the mother for altering her dispositions. The fact is that she claimed the full right of altering them, and she has chosen to do so. Having altered them, she brought this action for possession, and it has been decided that she has the power of resumption. For the reasons above given their Lordships entirely agree with the decision of the Courts below.

Something has been said as to the effect of s. 52 of Act XVII of 1876, the "Oudh Revenue Act," but it does not appear to have been the ground of the decision in the Courts below, nor to have been much discussed, and their Lordships express no opinion about it.

The result is that the appeal should be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed

Solicitors for the Appellant Messrs Barrow and Rogers

Solicitor for the Respondent Mr T L Wilson

[244] APPELLATE CIVIL.

The 23rd November, 1883

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR JUSTICE MACLEAN.

Rajanikanth Biswas and others Defendants

versus

Ram Nath Neogy and others Plaintiffs.¹

Sale in execution of decree—Share in joint family property—Family dwelling-house—Service rents—Right of purchaser

Where the interest of one of several joint tenants in a family dwelling-house and in certain lands let out on service tenure, is sold in execution, the purchaser is entitled to joint possession of the dwelling-house with the other shareholders and also to a right to share in the service rents.

Kowar Byor Kesal Roy v. Samasundari (B L. R. Sup Vol 172, 2 W R. Mis., 30) commented on

THE plaintiffs on the 17th July 1867 purchased at an execution sale 1 anna 3 gundas 2 cowries 2 krants in a certain taluka belonging to the Biswas family; and on the 17th Srabun 1275 they took symbolical possession through the Court, but on attempting to take actual possession of a part of their purchase, they were obstructed and prevented by the defendants (the judgment-debtors) from so doing. On part of the land so purchased, the family dwelling-house of the defendants was situate, another part of the land claimed was let

¹ Appeals from Appellate Decrees Nos 733, 734, 738 and 739 of 1882, against the decree of Baboo Parbuti Kumar Mitter, Extra Subordinate Judge of Mymensing, dated the 6th February 1882, modifying the decree of Baboo Tara Prasanno Ghose, the Second Munsiff of Attiah, dated the 22nd April 1880.

out on lease to certain tenants on service tenures. In three other suits the plaintiffs claimed possession of certain tenanted land and of lands which the tenant had relinquished, and on which one of the defendants had built a house. The plaintiffs, therefore, on the 12th July 1879, brought these suits against the defendants (the judgment-debtors and the rest of the Biswas family and the trespasser) to recover khas possession of the properties, praying for their share in the family dwelling-house and for a share in the rents in the tenanted properties, and for wasilat. The defendants pleaded limitation, and stated that some of the lands [245] claimed did not belong to the taluk claimed. The suits were heard together.

The Munsiff found that the suits were not barred, and that the plaintiffs were entitled to the properties sued for, but held that they were not entitled to khas possession, and gave them a share in the rental of the family dwelling-house and in the other lands in dispute, leaving the amount of wasilat to be ascertained in execution of the decree. The defendants appealed, and the plaintiffs brought a cross-appeal as to the question of khas possession to the Subordinate Judge.

The Subordinate Judge dismissed the defendants' appeal, and decided that the plaintiffs were entitled to khas possession, and were entitled to joint possession with the Biswas family in the family dwelling-house, and to a declaration of their rights to receive rents of the properties claimed.

The defendants appealed to the High Court.

Baboo *Kishon Mohun Roy* for the Appellants

Baboo *Srinath Dass* and Baboo *Bussunt Coomar Bose* for the Respondents

The **Judgment** of the Court (GARTH, C.J., and MACLEAN, J.) was delivered by

Garth, C.J.—These are four cases, in which somewhat similar claims were made by the plaintiffs.

At an auction sale in execution, the plaintiffs purchased the right, title and interest of the defendants Nos 1 and 2, who are members of the Biswas family, in certain property, which those defendants were jointly entitled to, and in possession of, with the other Biswas defendants, and amongst other lands, which were included in the purchase, was the right, title and interest of the defendants 1 and 2 in the joint family dwelling-house.

Other portions of the family property consisted of lands let out to tenants, whilst others again were held by one or two of the Biswas defendants in rather a peculiar way, which I shall presently explain.

At present we will deal with one of the cases only (No. 738), which relates to the joint family dwelling-house, and to one or [246] two plots of land which were held by tenants of the family on service tenure.

The Munsiff held that the plaintiffs were not entitled to be put into joint possession of the dwelling-house with the rest of the Biswas family, but only to receive what would be a fair rent for the interest which they had bought in it.

The Subordinate Judge thought otherwise. He decreed that the plaintiffs were entitled to be put into joint possession with the other Biswas defendants of the family dwelling-house, and also that the plaintiffs were entitled to receive their share of the service rents of the other plots.

It has been contended before us that the Subordinate Judge was wrong, and that when the interest of one of several joint tenants in a family dwelling-house is sold in execution, the purchaser is not entitled, as a matter of law, to joint possession of the dwelling-house with the other shareholders.

We know of no law which justifies this contention. We find, on the contrary, that, in order to obviate the inconvenience which would arise from strangers being thus introduced into a joint family dwelling-house, the Code of Civil Procedure (*see* s. 310*) gives the other shareholders under such circumstances a right of pre-emption of the property.

If the other shareholders do not choose to avail themselves of this right, the law must take its course, and the purchaser has the same right of joint possession as the shareholder whose property he buys.

This is what the Subordinate Judge has decided, and we think he is right.

We have been referred to a Full Bench decision upon this point—*Kowar Bijoi Kesal Roy v. Samasundari* (B. L. R. Sup. Vol 172; 2 W. R. Mis., 30)—in which the Judges appear to have differed in opinion, and Mr Justice KEMP took a somewhat peculiar view of the law. The rest of the Judges seemed to think that a purchaser under such circumstances was entitled to possession of the interest which he bought, but that an Ameen might be directed in the execution proceedings to make a partition between the purchaser and the other joint share-[247]holders. But, so far as we are aware, there is no provision in the present case, which would justify the Court in ordering such a partition.

Then, with regard to the other plots, it is said that the Subordinate Judge was wrong, because the rents of those plots were in the nature of service rents. But whether they were or no, we think that the plaintiffs were entitled to their share of them. If the plaintiffs were entitled to joint possession of the family dwelling-house with the others, it may be that the services to be rendered by way of rent would be quite as beneficial to them as to the other shareholders.

Then, as regards appeals Nos 733 and 734, the state of things was this. that in one of those cases some seven years ago, and in the other, some three or four years ago, the ryots had relinquished possession of a portion of the joint property, and one of the defendants had wrongfully (so far as appears) taken possession of that property, and had been in possession ever since. The plaintiffs' prayer being that they should be restored to possession of those properties conjointly with the Biswas defendants, the Subordinate Judge has given them a decree to that effect, we see no reason to dissent from that decree.

With regard to the last case, No 739, it differs from the two last in this respect: that there the ryots had also relinquished a portion of the joint property, and one of the Biswas defendants had built a house upon it, in which he was living, and the order which had been made by the Subordinate Judge is, that the plaintiffs should be entitled to a reasonable rent for their share of the plot upon which the house was built. They would certainly either be entitled to that rent, or else to joint possession of the land on which the house is built; and probably the order which the Subordinate Judge has made is more favourable to the other defendants than it ought to be. At any rate, as a

*[Sec 310 —When the property sold in execution of a decree is a share of undivided

immoveable property, and two or more persons, of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.]

Co-sharer of share of undivided estate sold in execution to have preference in bidding. §

matter of equity and fairness, we think that those defendants have no reason to complain of the decision of the Subordinate Judge.

All four appeals, therefore, will be dismissed with costs.

Appeals dismissed.

NOTES

[The C P. C 1908 O 21 & 35 contains a new provision in sub-clause (2) whereby "when a decree is for the joint possession of immoveable property such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.]"

[248] APPELLATE CIVIL.

The 7th December, 1883.

PRESENT .

SIR RICHARD GARTH, KT. CHIEF JUSTICE, AND
MR. JUSTICE McDONELL.

Akhil Chandra Chowdhry.Plaintiff

versus

Nayu and others.Defendants.

Evidence—Jumma-wasil-baki papers—Right of witness preparing them to refresh his memory from them.

Jumma-wasil-baki papers are not admissible as independent evidence of the amount of rent mentioned therein, but it is perfectly right that a person who has prepared such *jumma-wasil-baki* papers on receiving payment of the rents, should refresh his memory from such papers when giving evidence as to the amount of rent payable.

THIS was a suit for arrears of rent brought by the plaintiff against the defendants. The plaintiff contended that the annual rental was Rs. 31-8-0, whilst the defendant contended that it was Rs. 25-13-0 only.

The Munsiff gave the plaintiff a decree slightly in modification of the amount claimed.

The defendants appealed to the Subordinate Judge, who found that witness No. 1 on the plaintiff's side could not speak with certainty as to the amount of rent received by him for the plaintiff, in former years, without referring to the *jumma-wasil-baki* papers which had been written out by him at the time of receiving rent, and held that no weight could be attached to the evidence of this witness, as the *jumma-wasil-baki* papers were not independent evidence of themselves, and the witness himself could not speak with certainty. He, therefore, modified the decree of the Munsiff, and gave the plaintiff a decree at the rate which the defendants had stated was the proper rate.

* Appeal from Appellate Decree No. 793 of 1882, against the order of Baboo Raj Chunder Sannyal, Subordinate Judge of Chittagong, dated the 21st February 1882, modifying the decree of Baboo Nitogopal Sircar, Officiating Munsiff of Satkania, dated the 22nd January 1881.

The plaintiff appealed to the High Court.

Baboo *Aukil Chunder Sen* for the Appellant.

Baboo *Srinath Banerjee* for the Respondents

The Judgment of the Court (GARTH, C.J., and McDONELL, J.) was delivered by

[249] Garth, C.J.—We regret very much that we find it necessary to remand this case, but we do so, because we are led to believe, from what the Subordinate Judge himself says, that he has made a mistake in applying the rules which have been laid down by this Court with reference to the use of *jumma-wasil-baki* papers.

There were two questions in the case. first, with regard to the rate of rent which the defendants had to pay, and, secondly, with regard to the appropriation of the payments.

We need not say anything as to the latter point, because we think that the Subordinate Judge was substantially right in the way in which he appropriated the payments.

But with regard to the first point, the Subordinate Judge says that he cannot believe the first witness who is called for the plaintiffs, because he is unable to say what is the amount of rent which he realized from the defendant in the year 1241, without referring to the *jumma-wasil-baki* papers.

Now we have had the evidence of this witness read, and it appears that he prepared the *jumma-wasil-baki* papers and collected the rents himself, and yet the Subordinate Judge thinks that he had no right to refer to the papers, to see how much he collected from the defendants.

Of course, if he collected the rents, and put down the amounts collected in these papers, he had a perfect right, in giving his evidence, to refer to the papers to refresh his memory as to the amount of the rent which he received. It must be almost impossible for any tahsildar, employed to collect rent in this way, to say what amount of rent he received in each year from a large number of tenants, unless he refers to his books, and therefore to disbelieve a man, because he is obliged to refer to his papers, is obviously wrong. Upon this ground alone we think it right to send the case back for re-trial.

Of course, the credibility of the witnesses is a question for the Subordinate Judge, and if he had disbelieved this witness or any other for a sufficient reason, we could not have interfered.

But as on the one hand we are bound to see that no improper use is made of these *wasil-baki* papers, so on the other we are bound to see that witnesses are allowed to make a proper use of them.

[250] We, therefore, send the case back for re-trial upon this ground only.

The Subordinate Judge is no doubt perfectly right in saying that *jumma-wasil-baki* papers are not admissible as independent evidence taken by themselves, but when a witness is called, and he refreshes his memory from them, that is not independent evidence, and to use such papers for such a purpose is perfectly legitimate.

The costs of this appeal will abide the event.

Case remanded.

NOTES.

[See 11 Cal. 407 at 409 to a similar effect.]

[10^a Cal. 250]

APPELLATE CIVIL.

The 18th December, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE
O'KINEALY.

Chunder Nath Roy and others..... ..Defendants

versus

Bhoyrub Chunder Surma Roy..... Plaintiff.¹*Registration Act, 1877, s. 48—Oral agreement of sale—Subsequent sale to third party—Notice of prior agreement—Rights of purchaser.*

Notwithstanding the provisions of s. 48 of the Registration Act, a party who purchases, even under a registered deed of sale, with notice of a prior agreement for sale of the same property, will not be allowed to retain the property as against the person claiming under the prior agreement

Solano v. Lala Ram Lal (7 C. L. R., 481) followed; *Fuzluddeen Khan v. Fakir Mohamed Khan* (1 L. R., 5 Cal., 336, 4 C. L. R., 257) distinguished.

ON the 5th Aghran 1287 (29th November 1880) the defendants Nos. 1, 2 and 3 verbally agreed with the plaintiff to sell him a five-anna share in certain properties for Rs. 95, and received Rs. 10 as earnest money on the bargain. A few days subsequent to this agreement the defendant No. 1 wrote out a contract of sale, and the plaintiff tendered the balance of the consideration money. The defendants, however, refused to receive the money and sign the contract on sundry pretences, and eventually, on the 13th Aghran 1287 (7th December 1880) sold the property to defendant No. 4 (who was aware of the agreement made with the plaintiff) under a registered deed of sale.

[251] The plaintiff, therefore, brought this suit against the four defendants for specific performance of their oral agreement.

The defendants Nos. 1, 2 and 3 contended that no bainama had been made with the plaintiff, and that there was no agreement to be enforced, and denied the advance of Rs. 10. Defendant No. 4 set up his registered deed of sale.

The Munsif found that the defendants Nos. 1, 2 and 3 had entered into a legal oral contract with the plaintiff, and had received Rs. 10 as earnest money thereon, and set aside the kobala made between the defendants Nos. 1, 2, 3 and 4 and directed the defendants Nos. 1, 2 and 3 to execute their contract with the plaintiff.

The defendants appealed to the Subordinate Judge, who agreed with the finding of the Munsif and dismissed the appeal.

The defendants appealed to the High Court.

* Appeal from Appellate Decree No. 1174 of 1882 against the decree of Baboo Nobin Chunder Gangooly, First Subordinate Judge of Dacca, dated the 6th April 1882, affirming the decree of Baboo Krishno Behari Mookerjee, First Munsif of Mauickgunge, dated the 25th August 1881.

Baboo *Rash Behari Ghose* for the Appellants.

Baboo *Guru Dass Banerjee* for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and O'KINEALY, J.) was delivered by

Garth, C.J.—We think that this appeal should be dismissed.

The plaintiff brought this suit for specific performance of an oral agreement for the purchase of the property, and it was decided by the Court below that he was entitled to a decree as against the defendant No 4, who with full notice of the agreement, has subsequently bought the property from the other defendants, and had registered his purchase deed.

It is contended by the appellant that this decision was wrong. But we find that the very point has been considered by Justices MITTER and MACLEAN in the case of *Solano v. Lala Ram Lal* (7 C. L. R., 481) and decided against the appellant's view.

Those learned Judges founded their decision upon the general doctrine of equity, which had been previously acted upon in several cases in this Court, and which has been always recognized in England, that notwithstanding the provisions of the Registration Act, a party who purchases, even under a registered deed, [252] with notice of a prior agreement for sale, shall not be allowed to retain the property as against the person claiming under the prior agreement.

It has been argued that Mr Justice PONTIFEX, in the case of *Fuzludeen Khan v. Fakir Mohamed Khan* (I. L. R., 5 Cal., 336; 4 C. L. R., 257) has expressed an opinion adverse to that adopted by Justices MITTER and MACLEAN. But it will be found that the equitable doctrine upon which those learned Judges acted did not apply to the last-mentioned case at all.

It is true that in the course of his judgment Mr Justice PONTIFEX used some expressions which might be construed in favour of the appellant's argument, but those expressions were not material for the purposes of the case, because both he and I distinctly decided that no notice was proved.

The very principle, therefore, upon which Mr. Justice MITTER's judgment proceeds was inapplicable to the case decided by Mr. Justice PONTIFEX and myself.

It appears also that Mr. Justice MITTER's view is supported by a decision of the Bombay Court—*Panha Khamaji v. Fatta Upaji* (12 Bom H. C., 179).

The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[SALE—REGISTERED PURCHASER WITH NOTICE OF PRIOR SALE—

This case was followed in (1885) 9 Mad. 119 (124), (1890) 13 Mad., 324 (330); (1907) 4 L. B. R. 26 (27); *see also* 5 L. B. R., 184]

[10 Cal. 252]

ORIGINAL CIVIL.

The 23rd May, 1883.

PRESENT.

MR. JUSTICE PIGOT.

Johur Mull Khoorba

*versus*Tarankisto Deb and others.¹

*Sale in execution of decree—Certificate of purchase by Registrar—
 Conveyance—Suit for partition—Declaration of right
 to share—Rules of Court, 415, 431.*

The position of a purchaser at a sale in execution of a decree of the High Court after he has obtained a certificate from the Registrar under Rule 415 of the Rules of Court, is that of a person clothed with a right to a conveyance in virtue of a contract, he does not hold, save as regards the parties to the contract of sale, the position of an owner. When the sale is confirmed the purchaser is entitled to conveyance, and until he obtains a conveyance the property in the estate purchased does not, having regard to Rule 431, pass to him so as to give him rights as against parties not bound by the decree under which the sale took place. All that passes to him as [253] against the defendant in that suit is an equitable estate and a right to a conveyance of the property. And, therefore, as the estate in the property purchased has not passed, the purchaser is not entitled to maintain a suit for partition. In such a suit he could not on partition give a good conveyance to the parties interested in the estate, nor would he be entitled to a declaration of his share in the property.

THIS was a suit for a declaration of the plaintiff's right to certain property sold by the Court under a decree, and for partition.

The plaint stated that three brothers, Prosunno Narain Deb, Woopendro Narain Deb, and Shib Narain Deb, were jointly entitled to certain properties, and that by deed Prosunno Narain and Shib Narain each conveyed a one-sixth share in the properties to Woopendro Narain. On the 29th of May 1875, Woopendro Narain mortgaged his share in the properties. The mortgagee on the 19th of May 1876 obtained a decree for sale of the mortgaged properties.

On the 7th of June 1879 the properties were put up for sale in lots by the Registrar, and the present plaintiff purchased some of the lots, and obtained a certificate that he was the purchaser from the Registrar under Rule 415 of the Rules of Court, but no conveyance to him, such as is provided for under Rule 431, was executed. He now sued for a declaration of his rights under the purchase and for a partition, making the various members of the joint family defendants.

Mr. *Pault* and Mr. *Mitter* for the Plaintiff.

Mr. *Bonnerjee* and Mr. *M. P. Gasper* for the Defendant, Tarankisto Deb.

Mr. *Dutt*, Mr. *Apcar*, Mr. *Wilkinson*, Mr. *Agnew* and Mr. *O'Kinealy* for the other Defendants.

Mr. *Mitter* tendered the Registrar's certificate as showing the plaintiff's title.

* *Note*.—In this case the plaintiff preferred an appeal, which was dismissed on the 28th of January 1884, the appellant not appearing.

Mr. *Bonnerjee* objected. The proper proof is the conveyance under Rule 431. The preliminary steps are not evidence; they would only be relevant if an objection was taken to the validity of the conveyance. The certificate is merely proof of a right to a conveyance. It is the conveyance that vests the property, not the sale.

Mr. *Mitter*.—The certificate is part of the plaintiff's title, it shows what properties were sold and who was the purchaser [254] [PIGOT, J.—The question is whether the property was assigned, and the way to prove that is by the assignment] No conveyance is necessary. The plaintiff was declared to be the purchaser by the Registrar, and the certificate is relevant as showing that. [PIGOT, J.—The fact that the plaintiff was the purchaser and paid the deposit does not give him a title, Rule 431.¹ A conveyance is not made absolutely necessary by the Rules. A sale certificate is necessary, because possession cannot be given without it—Civil Procedure Code, s. 318. If the purchaser by accepting the title and paying the purchase-money can claim possession, why should a conveyance be necessary? The parties are Hindus, and no conveyance is necessary, the property passed as soon as the money was paid, and the plaintiff declared to be the purchaser. A sale certificate when confirmed passes the property—*Tara Prasad Mytee v Nund Kishore Giri* (I. L. R., 9 Cal., 482)]

Rule 408 provides that the Registrar shall make an entry in his note-book declaring the highest bidder to be the purchaser, and when that is certified it is conclusive under Rule 564.

Pigot, J.—The plaintiff claims as a purchaser of the share and interest of Woopendra Narain (who is mentioned in the 7th, 9th, and 14th paragraphs of the plaint) in certain family property in which Woopendra Narain is stated to have had an interest, together with the defendants, or those whom they represent, by inheritance, and also under the provisions of the deed mentioned in the 9th paragraph of the plaint.

Woopendra Narain mortgaged his share in the property (described in the plaint simply as lots one to five), and under a decree in a suit brought on the mortgage, the property mentioned in the mortgage was sold under the Rules for the sale of mortgaged property.

The plaintiff became a purchaser of part of the property at the sale by the Registrar under the decree, and he now prays for a declaration of his rights under the purchase, he submits that he is entitled to specific shares in the properties mentioned, and prays in the alternative for a declaration as to how much he so became entitled to, and for a partition.

[255] The sale took place, as stated in the plaint, under the rules for the sale of mortgaged property. The Registrar certified the result of the sale under Rule 415, and no application appears to have been made to discharge or vary the certificate, which would under Rule 417 be deemed to be confirmed, unless such application were made within the time prescribed by the rules.

But no conveyance, such as is contemplated by Rule 431, was executed. The plaintiff relies upon the certificate issued by the Registrar after the sale by him, and argues that that sale passed the property—no application such as is contemplated by Rule 417 having been made, and the sale mentioned in the certificate having thus become by virtue of that rule confirmed. But I don't think that gives a title such as to enable the plaintiff to maintain this suit. I regard his position as that of a person clothed with a right to a conveyance in virtue of a contract of sale, he does not hold, save as regards the parties to the contract of sale, the position of owner. Here the sale having become

confirmed, the purchaser is entitled to a conveyance, and until he obtained a conveyance I do not think that, having regard to Rule 431, the property in the estate purchased passed to him so as to give him rights as against parties not bound by the decree under which the sale took place, and as regards them I consider his position to be analogous to the position of a purchaser as described for instance by COTTENHAM, L. C., in *Tasker v. Small* (3 M. & Cr. 71, 70).

I have been referred to a case, *Tara Prasad Mytee v. Nund Kishore Giri* (I. L. R., 9 Cal., 482), decided this year. But I apprehend that the learned Judges in that case said no more than that a sale under the Code of Civil Procedure when confirmed by the Court passes the property.

That decision does not touch this case. Here there was no certificate of sale issued under the Code, and no confirmation of a sale so certified. I learn from the Registrar that Rule 431 was drawn up in contemplation of this point. After consideration by Sir RICHARD COUCH, and the rest of the Court this rule was expressly framed so as to exclude the issue of a certificate under the Code. The result is that there passed to the plaintiff, not the [256] estate in the property purchased, but only as regards the defendant in the suit, an equitable estate and a right to a conveyance of the property.

The estate in the property purchased not having passed to the plaintiff, he is not entitled to maintain a suit for partition. he could not on a partition give a good conveyance to the other parties interested in the estate, nor is he entitled as against them to the declaration prayed for.

The suit is dismissed with costs.

Attorney for the Plaintiff · Baboo N. C. Bose

Attorneys for the Defendants, *Sen & Co.*, Baboo Bolye Chand Dutt and Baboo Preonath Bose

[10 Cal 256]

APPELLATE CIVIL.

The 12th December, 1883

PRESENT ·

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR. JUSTICE
MCDONELL

In the matter of the petition of Kristo Lall Nag ·

*Legal Practitioners Act (XVIII of 1879), ss. 15 and 40—Interim
suspension—Police papers.*

Depositions of witnesses, or confessions taken at a Police investigation are not, as far as their subject-matter is concerned, any more the property of the Police than the property of the prisoners, and a pleader is not guilty of misconduct of any kind in making use of such documents for the benefit of his client, when delivered to him by the client however improperly the client may have become possessed of such documents, provided the pleader is neither party nor privy to their obtainment.

The power of *interim* suspension given under s. 14 (cl. 5) of Act XVIII of 1879 when read with s. 40 of the same Act, can only be exercised after the pleader has been heard in his defence and pending the investigation and orders of the High Court.

* Rule No. 1142 of 1883, against the order of Mr. H. W. Barber, Deputy Magistrate of Noakhally, dated the 30th August 1883.

IN this case one Kristo Lall Nag, a first grade pleader, practising at Noakhally, whilst defending one Chand Myan on a preliminary enquiry into a case of dacoity, put certain questions to the witnesses, which tended to show that he was in possession of copies of certain Police investigation papers. It subsequently was proved that he had in his possession copies of the confessions of two men who were charged jointly with his client. At the preliminary enquiry Chand Myan was discharged, but the other [237] prisoners were committed to the Sessions fixed for the 10th September, and at the Sessions Court Kristo Lall Nag was engaged to defend them.

On the 30th August, Mr Barber the Deputy Magistrate of Noakhally, passed an order calling upon Kristo Lall Nag to appear and show cause why he should not be dismissed or otherwise punished for misconduct in using copies of Police papers, and suspending him, pending the hearing of the rule, from practising as a pleader. This order of suspension was specially sanctioned by the District Magistrate, and an application made to the Sessions Judge against the order was rejected. Mr Ghose, on the 12th September 1883, applied to the High Court for a rule to show cause why the proceedings of the Deputy Magistrate should not be set aside on the following grounds —

(1) That the pleader had been guilty of no misconduct, and (2) that the Magistrate had no right to suspend him from practice under the Legal Practitioners Act.

The High Court granted a rule calling upon the Deputy Magistrate to show cause why his *interim* order of suspension should not be set aside.

It appeared that on the 2nd October 1883, after the granting of the last-mentioned rule and before it came on for hearing, the Deputy Magistrate heard the case against Kristo Lall Nag on the 21st September 1883, and found him guilty of dishonest and unprofessional conduct, and recommended that he should be suspended for one month.

At the hearing of the rule granted by the High Court,

Mr. Ghose and Baboo Kashi Kanto Sen appeared for Kristo Lall Nag.

The Deputy Legal Remembrancer (Mr Kilby) for the Crown.

The following was the **Order** passed by the Court (GARTH, C.J., and McDONELL, J.) —

Garth, C. J.—In this case Mr. Ghose applied to this Bench in September last for a rule under the following circumstances —

A preliminary enquiry had taken place at Noakhally before the Deputy Magistrate, Mr Barber, with regard to several persons, who were charged with dacoity. One of the prisoners, [258] Chand Myan, was defended by a first grade pleader, named Kristo Lall Nag, who, in the course of the enquiry, asked questions of the witnesses, which showed that he was in possession of copies of certain Police investigation papers.

It afterwards appeared that he had copies of confessions which had been made to the Police by three of the prisoners (other than the man he was defending) and also copies of depositions of certain witnesses also taken by the Police, and he made use of these copies in conducting his client's case.

As copies of these papers are not allowed by the Police authorities to be given to anybody, the Deputy Magistrate considered that those which the pleader used must have been obtained improperly, if not dishonestly, and after some communication with the Officiating District Magistrate, Mr Cooke, an enquiry was instituted in the Police Office, the result of which was that some of the Mohurrirs employed in that office were punished.

Meanwhile, Chand Myan, the prisoner whom the pleader defended, was discharged by the Deputy Magistrate: but some others of the prisoners were committed for trial upon the charge of dacoity. The Sessions, at which the case was to come on, were fixed for the 10th of September last, and the pleader *Kristo Lall Nag* was retained to defend some of the prisoners.

In this state of things it seems that on the 30th August, after the enquiry at the Police Office had closed, Mr Barber, the Deputy Magistrate, with the sanction, and apparently by the direction of Mr. Cooke, made an order calling upon the pleader to show cause why he should not be dismissed, or otherwise punished for misconduct in using these copies of the Police papers, and meanwhile suspending him from practice as a pleader.

This order, so far as it is material for our present purpose, was in the following terms —

"In conducting the preliminary enquiry, and while witnesses were being examined against his client, Chand Myan, on the 27th June and 5th July 1883, the pleader asked certain questions, which tended to show that he was in possession of copies of certain Police investigation papers

* [239] "In a subsequent investigation it was proved that he had in his possession copies of the confessions made to the Police by Eda Ghazi, Ram Kanai Jugee and Wajuddin, who were jointly charged with his client, and the depositions taken by the Police of the witnesses, Hasan Ali, Womaid Ali, Abdul and Tita Ghazi, and that he made use of some of these copies in the dacoity case

"Copies of the Police investigation papers are never given by authority, and this pleader in obtaining and making use of such copies, which were got by fraudulent and dishonest means, has laid himself open to a grave charge of very unbecoming and unprofessional conduct, such as cannot be countenanced in any mukhtar, much less a pleader

"As the pleader has confessed in his statement that he had in his possession and made use of these papers, it is necessary that he should be called on to show cause why he should not be dismissed or otherwise punished. In the meantime, I think he should be suspended pending the investigation

"Ordered, therefore, that with the District Magistrate's sanction, the pleader, *Kristo Lall Nag*, be suspended, and that he be noticed under s 14 of the Act to appear on the 17th September next to answer to these charges. The witnesses, the names of whom appear in the Police papers, will be summoned on that date and special sanction to the suspension be solicited."

This order of suspension was specially sanctioned by Mr. Cooke, and it seems that Mr Rees, the Sessions Judge, upon being applied to, refused to interfere.

Upon an affidavit disclosing these facts, Mr. *Ghose* applied to this Bench on the 12th of September last for a rule to show cause why the proceedings of the Deputy Magistrate should not be set aside upon two grounds:—

- (1) That the pleader had been guilty of no misconduct; and
- (2) that the Magistrate had no right to suspend him from practice under the Legal Practitioners Act

Mr. *Ghose* further urged upon us that the suspension was the more unjustifiable, because, as the trial of the dacoity case was fixed for the 13th of September, the pleader was prevented from defending the prisoners for whom he was retained

[260] After hearing this application, we thought it right to issue a rule in the following form :—

“ Let a rule issue, calling upon the Deputy Magistrate of Noakhally to show cause why the order of suspension of the pleader in question should not be set aside. Meanwhile, let the record of the proceedings be sent for, and we direct that the order of suspension be itself suspended, until the High Court has had an opportunity of investigating and deciding the matter.

“ A copy of this rule will be served on the District Magistrate, as well as the Deputy Magistrate, and it will be heard in due course before the Vacation Bench.

“ We may add, that so far as we can ascertain from the facts brought before us, the only charge made against the pleader was that he had in his possession copies of certain Police papers, which, for aught that appears, he may have obtained by perfectly honest means. Even assuming that the Deputy Magistrate had any authority by law to suspend the pleader, which at present we much doubt, it certainly seems a very arbitrary proceeding, not only as regards the pleader himself, but the prisoners whom he was defending, that he should be suspended from practice pending the enquiry, without any opportunity having been given him of showing cause against the suspension.”

Our object in making this rule returnable in the vacation was, that the matter should be disposed of with as little delay as possible, but it seems to have been considered desirable that the Rule should be heard by the Bench which granted it.

It was, therefore, brought on again by Mr. Ghose before this bench on the 22nd of last month, and we have now had an opportunity of reading the record of the proceedings, as well as a statement, dated the 19th of September last, prepared by Mr. Cooke, in which that gentleman explains his view of the matter, and the reason why proceedings were taken against the pleader.

No cause has been shown against the Rule by the Deputy Magistrate, Mr. Barber, and he appears, notwithstanding our order, to have heard the case against the pleader on the 21st of September. We have received his final judgment, returned [261] with the other papers, dated the 2nd of October, in which he finds the pleader guilty of dishonest and unprofessional conduct, and recommends that he should be suspended from practice for one month.

This non-compliance with our order appears to have been due to some misunderstanding upon the part of Mr. Cooke. His clear duty was, upon receiving that order, to have forwarded it to Mr. Barber, with directions that it should be at once obeyed. We desired to have the record sent up with Mr. Barber's own explanation, in order that this Court might decide, whether the case against the pleader should be proceeded with at all, and whether he had been legally suspended, and we were specially desirous of having an explanation from Mr. Barber himself, because we wished to know whether at the time when he issued the order of suspension, he was aware that the pleader had been retained to defend the other prisoners. We now find no reason to suppose, upon a perusal of the papers, that he was aware of that fact. If he had been, we should have considered it our duty to deal with the matter in a very different way, and to have brought it to the notice of His Honour the Lieutenant-Governor.

We have now to consider the two main points, upon which the Rule was originally obtained by Mr. Ghose, namely :—

1st.—Whether there was any ground for the finding of the Deputy Magistrate that the pleader had been guilty of misconduct.

2ndly.—Whether, under the Legal Practitioners Act of 1879, the Magistrate had any power to make the *interim* order of suspension. As our first impression upon both these questions was entirely opposed to the view which has been taken not only by the Magistrates concerned, but also, as it would appear, by the Sessions Judge, we thought it more than usually important that the Government should be represented at the hearing, and as we found that Mr. Kilby, the Deputy Legal Remembrancer, had not been sufficiently instructed, we postponed the hearing for some days, in order that he might have an opportunity of considering the papers, and consulting, if necessary, the Advocate-General upon the subject

[262] We have now heard the case discussed a second time, and we find that Mr. Kilby, having consulted the Advocate-General, is not prepared to uphold the decision of the Magistrate upon either point.

It, therefore, only remains for us to give our reasons for overruling that decision

As regards the first point, it appears from the judgment of Mr. Barber, that the only ground upon which he considered, and has since found, the pleader guilty of misconduct was, that he had in his possession and had used in the defence of his client certain copies of depositions of witnesses which had been taken against the prisoners by the police, and of confessions which had been also made to the police by some of the prisoners

We understand that these depositions and confessions had been taken down in writing, and were in the custody of the mohurrirs employed in the Police office, and it was no doubt the duty of those persons not to allow copies of them to be taken.

It has not been proved, nor even alleged, as against the pleader, that he was himself either party or privy to the procuring from the Police office the copies which he had in his possession, but the Deputy Magistrate seems to think that as he must have known what the rules of the office were, he was guilty of dishonest, or at any rate dishonourable and unprofessional, conduct in using copies, which had been improperly obtained

The Officiating Magistrate, we observe, goes further. He compares the conduct of the pleader with that of a receiver of stolen goods.

We consider that this view of the case is entirely erroneous, and that it is based on misconception not only of the duties of an advocate, but of the nature of the right, which the Police authorities had, to the depositions and confessions, which were taken down in writing. There was nothing, so far as we can see, in the subject-matter of those depositions or confessions, which gave the Police authorities any special property in them or which prevented the pleader, upon either legal or moral grounds, from using them on behalf of his client.

[263] If any one of the prisoners or other persons who were present at the time when the depositions were taken, or the confessions made, had been a sufficiently good scribe to take down in writing what either the prisoners or the witnesses said, or had a sufficiently good memory to have correctly related what took place to the pleader, it is clear that the latter would have been perfectly justified in using the information for the benefit of his client in any way which the rules of evidence allowed.

The only impropriety, if there was any, was in the manner in which the copies of these documents were obtained from the Police office, and to that, so far as appears, the pleader was neither party nor privy.

If the subject-matter of the documents had been of a private or personal nature, the case might be different, but there is nothing either in the depositions of the witnesses, or in confessions of a prisoner at a Police investigation, which makes them, *so far as their subject-matter is concerned*, any more the property of the Police than the property of the prisoner.

Nor is there anything inconsistent either with justice or morality in the pleader's using the information for the benefit of his client. As a matter of fact and of practice, it constantly happens that copies of Police papers are obtained and used at criminal trials. Mr *Ghose*, who has had a large experience in criminal cases in the mofussal, informs us that there is hardly any case of importance, in which counsel are engaged to defend a prisoner, in which some copies or statements of proceedings which have taken place in the Police office are not handed to counsel by way of instructions. And Mr. Kilby, who has also had considerable experience in such matters, and who has appeared here in this case on behalf of the Government, is not prepared to deny that statement, or to justify the Magistrate in the course which he has taken.

We are of opinion, therefore, that the facts found by the Magistrate disclose no misconduct of any kind, professional or otherwise, on the part of the pleader.

The next question is, whether in making the order of the 30th of August, calling on the pleader to show cause why he [264] should not be punished, the Magistrate had any right to suspend him in the meantime from practice?

Here again, we consider that both the Magistrates and the District Judge have taken an erroneous view of the law.

Reading s 14 of the Legal Practitioners Act, 1879, in conjunction with s 40, we have no doubt whatever that the power of *interim* suspension, which is given by cl 5 of s 14, can only be exercised after the pleader has been heard in his defence, and pending the investigation and the orders of the High Court.

This indeed appears to us to be the natural interpretation of the clause, even when read by itself, but coupled with s 40, the meaning is still more clear. And it seems only right and reasonable that this should be its meaning, because it would seem a dangerous and arbitrary power to entrust to any Court, to suspend a pleader from practice, before he has had an opportunity of being heard in his defence.

This very case is a remarkable illustration of the injustice that might be done, not only to the pleader himself, but to his clients, by the exercise of such a power without any legal ground.

The High Court, so far as we are aware, does not possess any such power, and it certainly tends to strengthen our view of the meaning of the Act, that under s. 42 there is an express provision, that the Chief Court of the Punjab is not to dismiss or suspend an advocate, until he has had an opportunity of being heard in his defence.

The Rule will therefore be made absolute to set aside *ab initio* the proceedings of the Deputy Magistrate.

Rule absolute

[265] APPELLATE CIVIL.

The 28th December, 1883

PRESENT :

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR. JUSTICE
O'KINEALY

Khetter Mohun Chuckerbutty.Defendant
versus

* Dinabashy Shaha and others Plaintiffs.*

*Limitation Act (XV of 1877) s. 14—Special limitation under Acts other than
the Limitation Act—Suit under Registration Act (III of 1877), s. 77.*

Section 14 of the Limitation Act provides for cases in which a plaintiff in perfect good faith, but under mistake, has instituted proceedings in a Court not having jurisdiction in the matter, and is applicable not only to the provisions of all Acts providing a special time for the limitation of suits, but also to the provisions of the Limitation Act itself.

THIS was a suit brought under s. 77 of the Registration Act for the purpose of obtaining registration of a hynaputtro, which the Registrar on the 12th December 1879 had refused to register on the ground that he was not satisfied as to the signature of the defendant. The plaintiffs thereupon filed this suit in the Court of the Munsiff of Munshigunj on the 7th January 1880. On the 28th September 1880, the Munsiff decided that he had no jurisdiction to try the suit, and on the 29th returned the plaint to the plaintiffs in order that they might file it in the proper Court. The suit was then filed in the Court of the Subordinate Judge of Dacca on the 30th September 1880.

The defendant contended that the suit was barred by limitation, and set up other defences on, amongst other things, the merits, which are not necessary for the purposes of this report.

The Subordinate Judge decided that the suit was not barred inasmuch as the time during which it remained pending in the Munsiff's Court should be deducted for the purpose of determining the question of limitation, and on the merits decided the suit in favour of the plaintiffs.

The defendant appealed to the District Judge, who affirmed the decision of the Munsiff on the point of limitation, and dismissed the appeal.

The defendant appealed to the High Court.

[266] Baboo Mohun Mohun Roy (with him Baboo Akhil Chunder Sen) for the appellants contended that the plaintiff was not entitled to the benefit of s. 14 of the Limitation Act, inasmuch as the provisions in that section applied only to the provisions of the Limitation Act itself, and not to any special rules of limitation provided in other Acts of the Legislature.

Baboo Kali Mohun Dass for the Respondents.

The Judgment of the Court (GARTH, C. J., and O'KINEALY, J.) was delivered by

Garth, C. J.—This was a suit brought under s. 77 of the Registration Act for the purpose of obtaining registry of a deed.

* Appeal from Appellate Decree No. 1204 of 1882, against the decree of R. F. Rampini, Esq., Judge of Dacca, dated the 6th April 1882, affirming the decree of Baboo Gunga Churn Sukar, Subordinate Judge of that District, dated the 8th September 1881.

The reason why the Registrar refused to register it was that the signature of the defendant had not been proved to his satisfaction.

A suit was then brought by the plaintiffs in the Munsif's Court, which was eventually dismissed upon the ground that such Court was not the proper one to try the question, and the plaint was consequently returned by the Munsif, in order to its being presented in the Subordinate Judge's Court, which was accordingly done.

Both the Subordinate Judge and the District Judge have now decreed the plaintiffs' claim and upon appeal to this Court, two points have been raised, first, that the plaintiffs' claim is barred by limitation, and, secondly, that the District Judge ought not to have found, as he has done, that the application was made to the Registrar by the plaintiffs' authorized agent.

With regard to the first point it is said that the Courts below were wrong in giving the plaintiffs the benefit of s. 14 of the Limitation Act of 1877.

They gave them the benefit of this section, upon the ground that they had brought their suit by mistake in the wrong Court.

It has been argued that the plaintiffs were not entitled to the benefit of that section, because the general provisions of the Limitation Act, relieving plaintiffs under certain circumstances from the consequences of not bringing their suits in time, apply only to the provisions of the Limitation Act itself, and not to any special rules of limitation, such as that contained in s. 77 of the Registration Act, which requires a plaintiff to bring his suit to rectify the Registrar's order within thirty days after it is made.

[267] We consider, however, that this point has been virtually decided (against the appellant's contention) in more than one case in this Court.

An objection upon the same ground was taken in the case of *Golap Chund Nowlakha v. Kinto Chunder Das Biswas* (I L R, 5 Cal, 314), and decided by JACKSON and McDONELL, JJ. That was a suit brought for rent, in which the plaintiff had not sued within the three years prescribed by the Rent law. On the day when the three years expired the Court was closed, but the plaintiff filed his plaint on the following day, and he then claimed the benefit of s. 5 of the Limitation Act, which enacts, that if the prescribed period of limitation expires on a day "when the Court is closed, the suit may be brought on the day when the Court re-opens."

It was argued there, as it has been here, that general provisions in Limitation Act would not apply to the special limitation provided by the Rent law, but the Court held that they did.

The principle of that case is directly applicable to the present. Section 14 of the Limitation Act provides for cases, where a plaintiff in perfect good faith, but under a mistake, has sued in the wrong Court, and we see no reason why that section should not avail to protect the plaintiffs in the present case.

There are cases in this Court, besides the one which we have quoted where the same principle has been acted upon, and the learned pleader for the appellant has not been able to find a single authority which favours his own contention.

Then with reference to the other point, namely, that the Judge ought not to have found that Ram Chunder Shaha, who applied for the registration of the deed, was duly authorized by the plaintiffs, we do not find that this point was taken either before the Registrar, or in the Court of First Instance. It has

certainly not been raised in the issues, and we are therefore not disposed to entertain it now, especially as the lower Appellate Court has found as a fact that Ram Chunder was duly authorized by the plaintiffs.

The appeal will therefore be dismissed with costs.

Appeal dismissed

NOTES.

[This case has been practically **overruled** on the ground that the Registration Act was a complete Code in itself providing special periods of limitation —(1903) 30 Cal 532 (535); (1894) 18 Mad, 99 F B, see also 10 C L J 517; (1889) 17 Cal 263 (266), (1889) 12 Mad, 467, (1884) 8 Bom. 529 (531), (1895) 20 Bom 543 (546), (1901) 4 O. C. 182 (185), as regards the general question of the applicability of the Limitation Act to special Acts which contain also provisions as regards limitation]

[268] APPELLATE CRIMINAL

The 14th January, 1884

PRESENT

MR JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the Matter of the Petition of Nobin Kristo Mookerjee.

Nobin Kristo Mookerjee

versus

Russick Lall Laha "

Criminal Procedure Code (Act X of 1882), ss. 435-437—Further Enquiry, Power of District Magistrate to direct—" Inferior Criminal Court"—Notice to accused.

The words "inferior Criminal Court" in s. 435 of the Criminal Procedure Code mean, inferior so far as regards the particular matter in respect to which the superior Court is asked to exercise its revisional jurisdiction

A criminal charge instituted before a Magistrate of the first class was finally disposed of by him by an order discharging the accused. Subsequently the Magistrate of the district proceeding under s. 437 of the Code of Criminal Procedure directed a further enquiry to be made by a Subordinate Magistrate. This order was made without notice to the accused.

Held, that the Magistrate of the district had no jurisdiction to direct a further enquiry.

Semle, that as a matter of strict law the accused was not entitled to be heard by the District Magistrate before granting the order directing the enquiry

* Criminal Motion No. 351 of 1883, against the order of C. C. Stevens, Esq. Magistrate of 24-Pergunnahs, dated the 5th December 1883.

Mr. *Evans*, Baboo *Umbica Charan Bose*, Baboo *Grish Chunder Chowdhry*, Baboo *Saroda Prosad Roy*, Baboo *Harendra Nath Mookerjee*, and Baboo *Dwarkanath Chuckerbutty* for the Petitioner

Mr. *Allen* for the opposite party.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD JJ.), which was delivered by

McDonell, J.—In this case a rule was granted by MACLEAN and NORRIS, JJ., on the 20th December last, calling upon one Russick Lall Laha to show cause why a certain order made by the Magistrate of the 24-Pergunnahs under s. 437 of the Code of Criminal Procedure and dated the 5th December last should not be set aside

The facts of the case are briefly these. On or about the 27th day of September 1881, one Baboo Romanath Laha lent a sum of Rs 5,000 upon a mortgage bond to a person who represented [269] himself to be one Khirode Chunder Mookerjee. This person was identified by Nobin Kristo Mookerjee, the petitioner now before us. The sum so lent upon mortgage was payable upon the expiry of six months. The money not having been paid, a demand was made on behalf of the mortgagee upon the real Khirode Chunder Mookerjee, who denied any knowledge whatever of the transaction and repudiated liability under the mortgage bond. Subsequently Khirode Chunder Mookerjee instituted a suit in the Civil Court to have the mortgage bond cancelled on the ground that he had not executed it, and that the whole transaction was an attempt to commit a fraud upon him. That suit was decreed, and immediately after its being so disposed of, a criminal charge was preferred by Russick Lall Laha, the brother of Romanath Laha (who had in the meantime died), against the petitioner before us, Nobin Kristo Mookerjee, and another person who is said to have been the broker in the transaction. The broker absconded, and the criminal charge proceeded as against Nobin Kristo Mookerjee alone. This criminal charge was instituted on the 20th June 1883 before a Magistrate of the First Class sitting at Sealdah, and after numerous postponements, it was finally disposed of by him three months later, viz., on the 25th September 1883 by an order discharging the accused person. Subsequently an application was made to the Magistrate of the district, that is, the Magistrate of the 24-Pergunnahs, and the Magistrate of the district, proceeding under s. 437 of the Code of Criminal Procedure, made on the 5th of December 1883 the order which is now sought to be set aside. By that order the District Magistrate, after referring briefly to the facts of the case, directed that a further enquiry be made, and for the purposes of making this enquiry he made over the case to a Subordinate Magistrate. It is now contended before us that the order of the District Magistrate of the 24-Pergunnahs is bad and ought to be set aside on two grounds. *first*, because the order of discharge having been made by a Magistrate of the First Class the District Magistrate had, upon the proper construction of s. 435 of the Code of Criminal Procedure, no jurisdiction to call for the record, and therefore had no jurisdiction under s. 437 to direct a further enquiry; *secondly*, because [270] the order was made without notice having been given to the accused person, and therefore without such accused person having had an opportunity of being heard before the District Magistrate proceeded to make an order to his prejudice. We shall deal with these two points *seriatim*.

With reference to the *first* point, s. 435 of the present Code of Criminal Procedure provides as follows—

“The High Court or any Court of Session or District Magistrate, or any Sub-divisional Magistrate empowered by the local Government in this behalf,

may call for and examine the record of any proceeding before any inferior Criminal Court, etc." Then s. 437 provides as follows. "On examining any record, under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged." Now we have first to consider what is the meaning of the term "inferior Criminal Court" in s. 435, and in order to determine what the correct meaning of this expression is, we must resort to a usual mode of construction, that is, we must examine the present Code as compared with the provisions of the previous Code upon the same subject. Section 435 of the present Code corresponds with s. 295 of the Code of 1872, and in that section the words used are "any Court subordinate to such Court or Magistrate." Now, we may observe that as to the meaning of the term "subordinate" no question can now arise. The subordination of the Magistrates in a district, other than the District Magistrate, to the Magistrate of the district, was provided for by the second paragraph of s. 295 of the Code of 1872, and these provisions are re-enacted and amplified by s. 17 of the present Code. It being then clear that the Legislature has made no change in the subordination of Magistrates, we have to consider what is the intention which is to be gathered from the substitution of the term "inferior Criminal Court" in the present Code for the words "subordinate to such Court" in the former Code. It appears to us unreasonable to [271] suppose that this new expression has been substituted without any definite object; and the conclusion to which we are ultimately led is this, that the term "inferior Criminal Court" must be construed to mean "judicially inferior," that is, a Court over which the Court or Magistrate proceeding under s. 435 of the Code has appellate jurisdiction. It was contended before us by the learned counsel, Mr. Allen, that a Subordinate Magistrate of the first class is a Criminal Court inferior to the Magistrate of the district, because there are in the present Code certain provisions under which a Magistrate of the first class is in certain matters subject to the appellate jurisdiction of the Magistrate of the district. These provisions are to be found in ss. 406³ and 515¹. Undoubtedly there is much weight in this argument, which we have carefully considered. It appears to us, however, that a construction can be put upon s. 435 which will in no wise be contradicted by the existence of the appellate jurisdiction given to the Magistrate of the district over First-class Magistrates by ss. 406 and 515. We think that the words "inferior Criminal Court" in s. 435 must be construed to mean inferior, so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction. In arriving at this conclusion, we have considered, as I have already stated, the intention to be gathered from the substitution of the word "inferior" in the existing Code for the word "subordinate" in the Code of 1872. But there is another and a material circumstance which has also influenced our minds. It was settled law under the old Code that when a Magistrate other than the Magistrate of the district had discharged an accused person after hearing the

Appeal from order requiring security for good behaviour.

* [Sec. 406:—Any person required by a Magistrate, other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour under section 118, may appeal to the District Magistrate.]

Appeals from and revision of orders under section 514

† [Sec. 515.—All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate shall be appealable to the District Magistrate, or if not so appealed, may be revised by him.]

evidence for the prosecution, the Magistrate of the district had no jurisdiction to direct a further enquiry or revive the prosecution upon the same evidence. It was held in two cases, the case of *Mohesh Mistri* (I. L. R., 1 Cal. 282), and the case of *Donnelly* (I. L. R., 2 Cal., 405) that if the District Magistrate was of opinion that further proceedings should be taken upon the evidence on the record (in a case, that is, where no fresh evidence is forthcoming, see page 411 of the Report in the latter case), he must refer the case for the orders of the High Court. The District [272] Magistrate had at the same time the power of directing a further enquiry in one particular case, that is, where a complaint had been made, and such complaint had been summarily dismissed without the examination of witnesses (see s. 298 of the Code of 1872 as amended by s. 31 of Act XI of 1874). Section 437 of the present Code extends this power to the case of any accused person who has been discharged (see the last ten words of the section), and it is very reasonable to suppose that the Legislature in conferring upon the District Magistrate a new power, a power that is, which he was not competent to exercise under the law of 1872, considered it proper that this power should be exercised by him over those Magistrates only who are subject to his appellate jurisdiction. We think that this is a reasonable construction, and when we further construe the term "inferior" used in s. 435 to mean, as I have already said, inferior, so far as regards the particular subject-matter, we are enabled to put upon the Code a construction which reconciles sections at first apparently conflicting

But then it is contended that the words "or otherwise" in s. 437 give the District Magistrate a power quite independent of the power conferred upon him in cases in which he has proceeded under s. 435. We have considered this argument, and we are unable to accede to it. We think that these words "or otherwise" being words of general import following the particular words "under s. 435" must be construed according to the usual rule, and that they mean not "in any other way whatsoever," but in any other way provided by the Code. For example, in the case of an appeal, the Appellate Court is empowered by s. 423 to send for the record, and this would be a case in point. Then there is the further argument that if we were to put upon the words "or otherwise" the wide and general construction contended for, the whole of the limitation necessarily implied in the provisions of s. 435 would become unnecessary; and such a result would suppose in the Legislature an absence of all intention, which we think ought not to be imputed or presumed.

We now come to the second contention, viz., that no notice was given to the accused, and that no order could have been made without giving him an opportunity of being heard. Section [273] 440 provides as follows - "No party has any right to be heard either personally or by pleader before any Court when exercising its power of revision, provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, etc." This is the general rule provided by the Legislature, and it must be taken to be a legislative *recession* of the usual principle that persons are entitled to be heard before any order affecting them to their prejudice can be made. To this general rule so laid down by the Code there are two exceptions to be found in the Code itself. The first is to be found in clause (a) of the provision to s. 436. The second is contained in the second paragraph of s. 439. The case now before us does not come within either of these exceptions. We therefore think that, as a matter of strict law, it is impossible to say that the petitioner in this case was entitled to be heard by the District Magistrate of the 24-Pergunnahs before the order complained of could be made. But this Court, in the exercise of its revisional jurisdiction, is competent to

question not only the *legality* but the *propriety* of any finding, sentence or order, and we therefore think that it is quite open to us to deal with the question whether a District Magistrate, in exercising the power conferred upon him by s. 437, exercises a proper discretion in proceeding to make an order for further enquiry without giving notice to the accused, and allowing him an opportunity of being heard. As the present case can, however, be sufficiently disposed of upon the first point, we do not propose to enter into the merits, or to express any opinion whether the District Magistrate in the present instance exercised a proper discretion in making the order complained of without giving notice to the accused person. A case was quoted by the learned counsel for the petitioner, in which Mr. Justice MITTER and myself thought that the accused ought to have had notice. That opinion had reference to the particular facts of that case, and we laid down no general rule. In the case now before us, having read the petition which was presented to the District Magistrate, the inclination of our minds is that that petition contained arguable matter—matter upon which it would have been fair to the accused to have heard him in person or by Counsel before an order was made [274] which was followed immediately by a warrant issued for his arrest. But, as I have already said, inasmuch as the present case can be sufficiently disposed of upon the first point, we think it unnecessary to come to any definite conclusion upon the second point.

It appears to us that, for the reasons which I have stated, the Magistrate of the 24-Pergunnahs had no jurisdiction to make the order of the 5th December 1883 complained of, and we must therefore set aside that order. We were asked by Mr. *Allen*, the learned counsel for the opposite party, to take up this case under s. 429, and proceed to exercise our revisional jurisdiction after entering into the merits. We have considered this application, and we think that it is not one with which we can comply. The accused person has had no notice of such an application, and has not come here prepared to meet such a case. If we thought that we ought to exercise our revisional jurisdiction, it would be necessary to issue a fresh notice, and appoint a further day for the hearing of the case upon its merits. But having regard to the fact that if the prosecutor desires to proceed further, the Court of the Sessions Judge of the 24-Pergunnahs, which has jurisdiction, is close at hand, we think it unnecessary that the time of the High Court should be taken up in disposing of a matter which can be dealt with by that tribunal.

The rule will be made absolute.

Rule absolute

NOTES.

[This case which was followed in 10 Cal. 551 (see also 7 All 134) was dissented from in 8 Mad. 18 F B. and overruled in 12 Cal 473 F B]

[10 Cal. 274]

APPELLATE CIVIL.

The 17th January, 1884.

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER AND
MR. JUSTICE FIELD.

Anonymous case,*

- Stamp Act (I of 1879), schedule I, art. 44 (clauses a and b)—
Mortgage-deeds.

Per Curiam—Clause (a) of art. 44† of schedule I of the Stamp Act, 1879, applies only to those deeds in which possession of the mortgaged property is given, or agreed to be given at the time of the execution of the deed, or in other words where immediate possession of the property is given or agreed to be given by the terms of the deed to the mortgagees

[275] *Per* GARTH, C J —The principle of the distinction between the two classes of mortgages named in art 44 is, that where the title to the land and the possession or immediate right to possession both pass to the mortgagee, the same duty is charged as upon a conveyance by way of sale, but when the title only passes, and possession, or the right to possession, does not, the lower duty is chargeable.

Per MITTER, J —The word “given” in clause (a) of art 44 points out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security for the mortgage money, but where the mortgagee becomes entitled to enter upon possession irrespective of the consent of the mortgagor to make over possession, clause (a) will not apply

Per FIELD, J —The Stamp Act is a Revenue Act, and the rule of construction of such Act is, that in case of a doubt, the construction most beneficial to the subject is to be adopted. The words “agreed to be given” in art 44, clause (a) can only apply where there is an express or implied agreement to give possession, they will not apply where there is no such agreement express or implied, but the effect of the document is such that a mortgagee has merely a right which he can enforce in a Court of law to obtain possession

- * Reference No. 7 of 1883, from the Board of Revenue

† [Art 44 —

Description of instrument	Proper Stamp-duty
Mortgage-deed not provided for by No. 14, No 15, No. 29 or No 55 of this schedule	(a) when at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given.
See exemptions, schedule II No. 12 and No 14 (b)	(b) when at the time of execution possession is not given or agreed to be given as aforesaid
	The same duty as a Conveyance (No 21) for a consideration equal to the amount secured by such deed
	The same duty as a Bond (No. 13) for the amount secured by such deed.]

THIS was a reference by the Board of Revenue to the High Court under s. 46 of the Stamp Act. The question referred was, whether all or any of the mortgage deeds (the necessary clauses of which are hereinafter set out) were liable to pay duty under clause (a) or clause (b) of art. 44 of schedule I of the Stamp Act. The question depended mainly on the effect and construction of certain covenants for quiet enjoyment such as are usually inserted in English mortgages

Document No. 1 granted and assigned unto the Alliance Bank of Simla, Limited, and its assigns, certain premises with the buildings, etc., thereon and all the estate, right, title and interest of the mortgagor in the said premises, to hold the said premises, etc., unto and to the use of the Bank and its assigns subject to a proviso for redemption, and empowered the Bank to sell the mortgaged premises or any part thereof without the consent of the mortgagor, and to execute and do all such assurances for effectuating a sale as the Bank should think proper, and contained the following covenant for quiet enjoyment, *viz.*, "and that all the said premises may be quietly entered into, held and enjoyed by the [276] Bank and its assigns without any interruption by any person" The deed contained no actual clause giving possession or agreeing to give possession to the mortgagee

Document No. 1a was a mortgage of certain premises to the Alliance Bank of Simla, Limited, of the same description as Document No. 1, save that it contained no covenant for quiet enjoyment

Document No. 2 was a trust deed to secure mortgage debentures issued or to be issued by the Assam Railways and Trading Company, Limited, and mortgaged the concessions and railways, etc., of the Company in Assam to two persons as trustees for the whole body of the debenture-holders. The properties were conveyed, granted and assigned unto and to the use of the trustees, but upon and for the trusts and purposes therein mentioned declaring the same, and provided that the trustees should stand seized and possessed of the mortgaged premises upon trust to permit the Company to hold and enjoy the same premises, and to carry on thereon and therewith any of the business authorized by the Memorandum of Association until default in payment of any of the principal monies secured by the debentures, or of any interest for the period of one month after due date thereof, or until the winding up of the Company, and after any such default, empowered the trustees in their discretion, or at the request of holders of one-half the debentures, to enter upon and take possession of the mortgaged premises and sell, call in, collect or convert into money the same, and contained the following covenant for quiet enjoyment, *viz.*, "and that all the said premises may be quietly entered into and enjoyed by the trustees or trustee without any interruption by any person," there were further clauses providing that in the case of the Company being wound up, the trustees before making entry or sale should give three months' notice of their intention to do so, and providing that the Company should, until the trustees should take possession in pursuance of the trust, deal with the mortgaged properties in the ordinary course of business in such manner as they might think fit

Document No. 3 was an ordinary mortgage of an indigo concern in the English form to the Agra Bank, it contained a power of sale authorizing the Bank after default to enter into and upon and to sell and absolutely dispose of the mortgaged premises; and a [277] power of entry, and a power if the indigo should not be consigned to the Bank, to seize the indigo, also the following covenant for quiet enjoyment after default, *viz.*, "and also that if

default shall be made in payment of the moneys hereby secured or intended so to be, or the interest on the same or any part thereof respectively, or in the event of the breach or non-performance of any of the covenants herein contained, and on the part of the mortgagors, their heirs, executors or administrators to be observed and performed contrary to the true intent and meaning of these presents, it shall be lawful for the Bank, their successors or assigns at any time or times thereafter, to enter into and upon the said mortgaged premises, or any part or parts thereof, and the same thenceforth to hold and enjoy and to recover the rents and profits thereof without any lawful interruption or disturbance by the said mortgagors or either of them, their or either of their heirs, executors, administrators, or assigns or any other person or persons claiming or to claim through, under, or in trust for him or them", and also a further covenant by the Bank that until default the mortgagors might hold and enjoy and take the rents, issues and profits of the mortgaged premises.

The Advocate-General (Mr. Paul) appeared for the Crown

Although in the first document there is no actual covenant for possession, there is a covenant to pay the mortgage money on demand, and although the mortgage money may not be due, yet the mortgagee might take possession. A Court of Equity would not restrain such a mortgagee from taking possession. The present Stamp Act I consider was not intended to cover the present case, but it has actually done so in using the words "possession agreed to be given" in art. 44, schedule I. Where possession is given, there is larger duty payable than in cases where possession is not given. [FIELD, J.—Does the word "agreed" refer to an express or an implied agreement, or both?] Both, in this case there is an implied agreement. The covenant to enter into possession and the covenant for quiet enjoyment mean really that the mortgagee should have possession without opposition.

The second mortgage, No. 1a, does not contain the words "giving quiet possession," and it therefore appears that the mortgage stands on a different footing.

[278] The third mortgage, No. 2, permits the Company to hold and enjoy the premises until default, and I therefore apprehend a Court of Equity would not allow a mortgagee to enter into possession under such a covenant

The fourth mortgage, No. 3, is practically the same as No. 2. There the Bank covenants with the mortgagor that until default shall be made the mortgagor shall hold possession. Therefore, these two deeds do not fall under clause (a) of schedule I of the Stamp Act. [FIELD, J.—In the second mortgage does not the clause, which gives power to the Bank to do all such things as may be necessary for effectuating a sale, allow a power to put the mortgagee in possession in order to effectuate the sale?] I think not; the power of sale can be exercised wholly irrespective of the question of putting the mortgagee into possession.

No one appeared on the other side

The **Opinions** of the High Court were as follows . -

Garth, C.J.—I am of opinion that each of the deeds submitted for our consideration comes under clause (b) of the art. 44 of the Stamp Act, and should be stamped accordingly.

I consider that clause (a) applies only to those deeds, in which possession of the mortgaged property is given, or agreed to be given at the time of the execution of the deed; or, in other words, where immediate possession of the property is given, or agreed to be given, by the terms of the deed to the mortgagee.

It seems to me that this is the only construction of clause (a) by which any meaning can be given to the words "*at the time of execution*," because the agreement to give possession must of course be made in and by the deed itself; and therefore if clause (a) is to be read, as the learned *Advocate-General* contends, the clause would mean the same without the words "*at the time of execution*," as with them. Again, if the *Advocate-General's* view were correct, clause (a) would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily for non-payment of interest. I cannot think that the Legislature meant to extend so largely or so unreasonably the class of mortgages which are to be chargeable with the higher duty. [279] Under Act XVIII of 1869 those deeds only were so chargeable where possession was *actually given* at the time of the mortgage. and the spirit of this rule might have been, and probably was, evaded by possession not being taken for some time after the execution of the deed, although an agreement for immediate possession was contained in the deed itself.

I think that the change in the language of the Act was merely intended to prevent any such evasion of the law, and not to make the higher duty chargeable upon a large class of mortgages of a totally different character.

The principle of the distinction between the two classes of mortgages was clear enough under the Act of 1869, namely, 1st, those which were accompanied by possession, and, 2ndly, those which were not. According to the construction which I would put upon the present Act, the same distinction is maintained, but only with a safeguard against the evasion of the higher duty, whereas, according to the other construction, the distinction is altogether lost sight of, and the principle of this distinction, as I understand it, appears to me to be founded on good sense. Where the title to the land, and the possession or immediate right to the possession of it, both pass to the mortgagee by virtue of the deed, the same duty is charged as upon a conveyance by way of sale, because in that case the mortgagee gets the same potentiary interest in the land, which a sale would give him, but when the title only passes, and possession, or the right to the possession, does not, the interest which he gets is not necessarily a potentiary interest at all, and possibly may never become so. In such a case the lower duty is chargeable.

It seems to me that this is an easy and reasonable solution of the doubt which has arisen, and, as I consider that immediate possession of the mortgaged property is not given, or agreed or intended to be given, in any of the cases submitted to us, I am of opinion that the lower duty [under clause (b)] is chargeable in each of those cases.

I would add that I consider my views upon this subject are strongly confirmed by the fact, which appears to be admitted that, since the passing of the last Stamp Act in 1879, it has been the constant practice to stamp deeds of the nature of those sub-[280]mitted to us with the lower duty under clause (b). When a particular construction has for some years been put upon a fiscal enactment *in favour of the public*, and that construction has been generally acted upon and acquiesced in by the Government, I think that a strong presumption arises in favour of that construction, and I consider, moreover, that no other construction, unfavourable to the public, should afterwards be put upon the enactment, except for some very cogent reason indeed.

This principle has been acted upon by the High Court on more than one occasion; and notably in the late case of *Kishori Lal Roy v. Sharut Chunder Mozoomdar* (I. L. R., 8 Cal., 593).

Mitter, J.—I am of opinion that clause (a) of art. 44 of schedule I of the Stamp Act of 1879, covers only those mortgage deeds in which as security for the money advanced on mortgage, possession of the property, or any part of the property mortgaged, is actually given or agreed to be given. But it does not include mortgage deeds in which it is stipulated that the mortgagee *would be entitled* to take possession of the property, or any portion of the property mortgaged in case there should be any breach of the covenants of the deed. The word "given" in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the *agreement on the part of the mortgagor to deliver over* possession as part of the security of the mortgage money. But where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply, because there it cannot be said that the mortgagor consents to give possession.

If this construction of the clause in question is correct, none of the documents referred to us falls under it. It is true that under the first two deeds the mortgagee may exercise his right of entry upon possession immediately in consequence of the form in which they are executed, but there is no agreement on the part of the mortgagor to *give* possession of the mortgaged premises as part of the security. Such agreement exists only [281] in those cases where it is agreed that the rents and profits of the mortgaged premises are to be enjoyed by the mortgagee, or taken by him in satisfaction of his debt. There is no such agreement to be found in these deeds. As regards the other two deeds it is clear from their terms that the mortgagee would be entitled to enter upon possession in case of default in payment;

Field, J.—This is a reference under s. 46 of the Indian Stamp Act (Act I of 1879). The question referred to us is, whether four deeds of mortgage ought to be stamped under clause (a) or under clause (b) of art. 44 of the first schedule to the Act. Clause (a) is as follows:—"When at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given"—and the stamp duty upon the mortgage deed in this case is the same as for a conveyance for a consideration equal to the amount secured by the mortgage deed. Clause (b) is as follows:—"When at the time of execution possession is not given or agreed to be given as aforesaid." In this case the duty is the same as on a bond for the amount secured by the mortgage deed.

In the second case the stamp duty is very much less than in the first case, and in this consists the interest which the matter has for the public generally. A large number of mortgage deeds similar to those which form the subject of this reference have been stamped under clause (b), and these deeds will have been insufficiently stamped if we hold that clause (a) applies.

Clause (a) is divisible into two propositions which are as follow:—First, "*when at the time of execution possession of the property, or any part of the property comprised in such deed is given by the mortgagor.*" I may at once say that this proposition is not applicable in the present case, there being no suggestion that possession of the property or any portion of it has been given. The second proposition is: "*when at the time of execution possession of the property, or any part of the property comprised in such deed, is agreed to be given.*" The point to be determined really comes to this, whether by the mortgage deeds which form the subject of the reference, or any of them, it was

at the time of execution agreed that possession of the property [282] should be given. I understand this to mean *given at any time*. I take it that the words "at the time of execution" must be construed with "agreed" and not with "given." Now the Stamp Act is a Revenue Act, an Act which imposes pecuniary burdens; and the rule of construction in respect of such Acts is that in case of a doubt the construction most beneficial to the subject is to be adopted. The subject is not to be taxed, and therefore not to be compelled in this case to pay the higher duty, unless the language is clear and unambiguous. I am of opinion that the words "agreed to be given" can only apply where there is an express agreement to give possession—an agreement, that is, in so many words—or an agreement, to be gathered by necessary implication from the whole contents of the documents. I think that clause (a) of art. 44 does not apply when there is no such agreement, express or implied, but the effect of the document between the parties is such that the mortgagee would have a right, that is a right which he could enforce in a Court of law, to obtain possession if he desired to have possession.

Applying this principle to the four deeds in question, I come then to the following conclusion as regards each of them. The first deed of mortgage contains the following provisions. "And this indenture also witnesseth that, for the consideration aforesaid, the mortgagor doth hereby grant and assign unto the Bank and its assigns all and singular, etc., together with all buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said hereditaments appertaining, or with the same held or enjoyed or reputed as part thereof or appurtenant thereto, and all the estate, right, title and interest of the mortgagor in and to the said premises . . . to hold the said premises unto and to the use of the Bank and its assigns subject nevertheless to the proviso for redemption hereinafter contained." Then the mortgagee is empowered to sell the mortgaged premises or any part of them without the further consent of the mortgagor, and then we have a covenant for quiet enjoyment. Under this deed it may well be that the mortgagee has a legal right to take possession, but I think we cannot say that possession of the property or any part of it is agreed to be given within the meaning of clause (a), art. 44 of schedule I of the Stamp Act.

[283] The second mortgage deed which forms the subject of the reference is marked No. 1a, and is generally similar to the first instrument, save that it contains no covenant for quiet enjoyment. I think we cannot say that possession of the property is agreed to be given by this instrument

The third deed forming the subject of the reference is marked No 2, and is of a more complicated nature. It recites that the mortgagees, their heirs, executors, etc., shall stand "seized and possessed" of the mortgaged premises. I think that upon the construction of the entire contents of this document it is clear that the words "seized and possessed" are used in the sense merely of English legal phraseology, and that it is not meant by these words that the mortgagees should enter into possession. This would appear to be clear from a subsequent provision of the deed which authorizes the trustees or trustee upon the happening of certain events to enter upon and take possession of the mortgaged premises. This instrument also contains a covenant for quiet enjoyment. Now, although there is an authority to the mortgagees and trustees to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession. This instrument therefore comes, in my opinion, under the provisions of clause (b) of art. 44.

The fourth deed which forms the subject of the reference is marked No. 3. It declares that it shall be lawful for the mortgagee, his successors, assigns, etc., upon a breach of the covenants to enter into and upon the said mortgaged premises, but here also there is no agreement by the mortgagor to give possession, and I think that this instrument also comes under clause (b).

The result is, that in my opinion, all four instruments should be stamped under clause (b), art. 44, schedule I of the Stamp Act.

NOTES.

[I. STAMP ACT—MORTGAGE WITH POSSESSION.

In the stamp Act of 1899 art. 40, the words, 'at the time of execution' which were in the corresponding article in the Stamp Act of 1879 were omitted.

II. STRICT CONSTRUCTION OF TAXING STATUTES—

See also (1890) 13 All 66 (74), (1889) 13 Bom. 440 (445), (1888) 13 Mad. 255 (263); (1886) 9 Mad. 146 (148), (1881) 8 Cal. 259 (262)

[284] FULL BENCH.

The 15th September, 1883.

PRESENT

SIR RICHARD GARTH, Kt., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND MR. JUSTICE
TOTTENHAM.

Dukhi Sahu and another..... ..Plaintiffs

versus

Mahomed Bikhu... ..Defendant.

*Limitation Act, XV of 1877, sch. II, art 64 --Statement of Account unsigned—
Cause of Action.*

The plaintiffs claimed on a statement of account in writing, dated the 18th October 1877; this statement of account was not signed by the defendant. The date of the institution of the suit was the 30th September 1880. A Division Bench of the High Court held on the appeal on the case coming up before them on the 18th October 1877, that the suit was not based upon any express contract made between the parties, and that the transaction which took place on that date did not constitute an implied contract, and that, therefore, these contentions were not open to the plaintiffs, but the Court referred the question whether the plaintiffs' claim, so far as it was based on the statement of account on the 18th October 1877, fell within article 64† of sch. II of Act XV of 1877.

* Full Bench in Sp. App. No. 788 of 1882, against the decree of the Officiating Judge of Sarun, dated 30th January and 28th February 1882, modifying the decree of the Munsiff of Sarun, dated the 27th of May 1881

† [Art. 64. —

Description of suit.	Period of limitation.	Time from which period begins to run
For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years ...	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.]

Held, by MITTER, PRINSEP, and McDONELL, JJ.—That the question referred was a matter of limitation arising in the case which had not been decided in the order of reference, and without such a decision the case could not be disposed of, and as to that point, that the statement of account not being signed by the defendant, did not fall within the terms of art. 64 of sch. II of Act XV of 1877.

Held, by GARTH, C.J., and TOTTENHAM, J.—That the Division Bench having held that the transaction afforded no basis for a suit, had disposed of the case, and the question referred was therefore immaterial.

THIS case was referred to a Full Bench by MITTER and WILKINSON, JJ., on the 21st June 1883, with the following remarks.—

“ This appeal relates to that part of the plaintiffs’ claim which was based on a statement of account on the 18th October 1877. The plaint states : ‘ The defendant has had for a long time dealings in cloth with the plaintiffs’ shop, so on the 12th Sudī Assin 1334 Sumbut accounts of the dealings were made up and adjusted [285] in the presence of the defendant, and the sum of Rs. 8,676 was found due and owing to the plaintiffs by the defendant, which was entered in the *khatta-bahi* in his presence. ”

“ The cause of action with reference to this item of the claim is stated in the plaint to have arisen on the 12th Sudī Assin 1334 Sumbut (18th October 1877), the date of the statement of account. The suit was brought on the 30th September 1880, i.e., within three years from that date. The balance so found was not signed by the defendant. Three witnesses were examined in support of this adjustment of account. Witness, Nakched Ram, says that after the balance was found the defendant admitted its correctness. Progash Lal further says that the defendant requested the plaintiffs to take from him a conveyance or a lease of some property in liquidation of the debt thus found. The third witness, Senī Roy, not only deposes to the defendant having admitted the correctness of the balance, but also states that he, the debtor, promised to pay it in the following month of Kartic.

“ The defendant pleaded limitation, and the Munsiff overruled it on the ground that the suit was brought within three years from the date of the adjustment of account, which fact was, in his opinion, established by the evidence of these witnesses.

“ The District Judge on appeal has reversed this decision on the ground that the account stated was not signed by the defendant as is required by article 64 of schedule II, Act XV of 1877.

“ The question which we have to decide in this appeal is, whether the claim, so far as it is based upon an account stated, is barred by limitation.

“ It has been contended before us that the claim is not barred by limitation : (1) because there was a new contract for the payment of the debt found due, created on the date of the adjustment of account; and (2) because the provisions of article 64 of schedule II, Act XV of 1877 are applicable, notwithstanding the account stated was not signed by the defendant.

“ As regards the first ground, the learned pleaders for the appellants mainly rely upon the finding of the Court of First Instance, based upon the testimony of the witness, Senī Roy, that [286] the defendant promised to pay the money found due in the following month of Kartic.

“ It appears to us that this express promise to pay the debt found due in the following month of Kartic was not the ground upon which the suit was

brought. The ground of action, as alleged in the plaint, was the statement of account on the 18th October 1877, and it is expressly stated in the plaint that the cause of action for the item under consideration arose on that date.

"There is, moreover, a special reason in this case which disentitles the plaintiffs from changing the ground of the action as laid in the plaint. It was admitted by the learned pleaders of the appellants that there are no materials upon the record from which it can be ascertained whether on the date of the statement of account all or any of the items were barred by limitation. If they were so barred under s. 25¹ of the Contract Act, a parol contract for the payment of the debt found due would not be valid, see *Ramji v. Dharma* (I. L. R., 6 Bom., 683). We are, therefore, of opinion that the appellants cannot in this suit rely upon any express promise.

"Although upon the plaint it is not open to the appellants to rest their claim upon any express contract, yet it is open to them to contend that there was an implied promise to pay the balance found due, arising from the defendant admitting the debt. This question was fully discussed in *Umed Chand Hukam Chand v. Shah Bulakidas Lalchand* (5 Bom. H. C., O. C., 16). The statement of account referred to in that decision appears to us to be the striking out of a balance after the adjustment of cross accounts between the parties. In a case of this nature, as observed by ROLFE, B., with reference to *Ashby v. James* (11 M. and W., 542), there is 'a transaction between the parties out of which a new consideration arises for a promise to pay the balance.'

"In the case before us there were no cross demands. The defendant was a customer of the plaintiffs, who had a shop for the sale of cloth. He used to take articles on credit and made part-payments from time to time. An account was kept by the plaintiffs of these transactions and also of the part-payments made by the defendant. On the 18th October 1877, this account [287] was examined in the presence of the defendant, and the amount claimed was found to be the balance of the debt due from the defendant who admitted its correctness. Such an adjustment of account does not amount to a new contract so as to entitle the plaintiffs to claim a new period of limitation from the date thereof. It only amounts to an admission or acknowledgment of the debt which, if it could be brought within the purview of s. 19¹ of the Limitation Act, would have saved the claim from being barred by the law of limitation.

Agreement without consideration void.— * [See 25.—An agreement made without consideration is void unless—

unless it is in writing and registered, (1) it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

or is a promise to compensate for something done, (2) it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do, or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits

In any of these cases, such an agreement is a contract

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate, but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.]

This view is quite in accordance with the law as laid down in *Mul Chand Golab Chand v. Giridhar Madhav* (8 Bom. H. C., A. C., 6); *Kankya Lall v. Bynsee* (1 Agra H. C., F. B., 94); *Doyle v. Allum Biswas* (4 W. R., S. C. C. Ref. 1). In our opinion, therefore, there was no such implied contract made out as would entitle the plaintiffs to a new period of limitation from the date thereof.

"The only question that remains to be considered is, whether the claim to which this appeal relates falls within article 64, 2nd schedule of Act XV of 1877. Upon this point the learned pleaders rely upon *Sheik Akbar v. Sheik Khan* (I. L. R., 7 Cal., 256). It was held in that case that the second column of article 64 fixes three years as the period of limitation in all suits upon accounts stated, whether in writing or word of mouth, and whether signed by the defendant or not. With great deference to this opinion, we are unable to take this view of the article in question. We must construe the language of the article by giving effect to every part of it, whether it occurs in the first, second, or the third column. It seems to us that the third column shows that the article only applies to cases where the accounts are stated in writing, signed by the defendant or his agent duly authorized in this behalf. This view of the article in question was taken in *Thakurya v. Sheo Singh Rai* (I. L. R., 2 All., 872). We, as at present advised, concur with the Judges who decided that case. As our opinion is in conflict with the ruling in *Sheik Akbar v. Sheik Khan* (I. L. R., 7 Cal., 256), we refer the following question for the decision of a Full Bench.—

[288] "Whether the claim of the appellants, so far as it is based upon the statement of account on the 18th October 1877, falls within article 64, 2nd schedule, Act XV of 1877."

Babu Kali Kishen Sen, and Babu Aukhil Chunder Sen for the Appellants.

Babu Chunder Madhub Ghose, Babu Karuna Sindhu Mookerjee and Babu Kuloda Kanker Roy for the Respondent.

The following **Judgments** were delivered by the Full Bench—

Mitter, J.—I am of opinion that the question referred in this case is a question of limitation which arises in the case, and has not been decided in the order of reference.

The plaint in this suit, which was filed on the 30th September 1880, states that there was an adjustment of accounts between the parties on the 18th October 1877.

In the order of reference, we decided two questions—first, that the suit was not based upon an *express* contract made between the parties on the 18th October 1877. secondly, that the transaction which took place on that date

* [Sec. 19 —If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed]

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section 'signed' means signed either personally or by an agent duly authorized in this behalf.]

did not amount to an implied contract. We felt no doubt upon this last mentioned point; and the authorities which are all cited in our judgment are all one way, and fully support the view which we have taken; no conflict of authorities, as far as we are aware, exists on this point. Under these circumstances, we felt that we could not refer this question to the decision of a Full Bench. Our opinion upon the point being clear, and there being no conflict of authorities, we should not have been justified in referring this question to a Full Bench.

The points that we have decided, therefore, in the order of reference are: (1) that the suit was not based upon any express contract made between the parties on the 18th October 1877, and (2) that the transaction which took place on that date did not constitute an implied contract. The question now is whether the conclusion at which we arrived upon these two points, virtually disposed of the third contention that was raised before us, viz., that the suit was not barred by limitation, because it falls under article 64, schedule II, Act XV [289] of 1877. It has been said that our conclusion that the transaction, which took place on the 18th October 1877, did not constitute a new contract, is tantamount to a finding that the cause of action upon which the plaintiff based his suit was not made out. The plaintiff sued for the price of cloth supplied to the defendant from time to time. I have examined our order of reference, and I do not find a single passage in which we have held that his claim was not made out. It is true that the plaintiff alleges that the cause of action arose on the date when the statement of accounts took place. If that turns out to be a mistake on his part, it would not follow that he would not be able to recover in this suit upon establishing a real cause of action not inconsistent with his allegations in the plaint. Let it be supposed for a moment that the plaintiff's claim is not barred by limitation, can it be said that upon our judgment it must be held that his claim is not made out when that claim is established by the witnesses believed by the lower Courts—witnesses who deposed that the defendant *admitted* the correctness of the balance found against him? It had been said that a statement of account necessarily constitutes a new contract and as we have held in the order of reference that the transaction of the 18th October 1877 did not constitute a new contract, therefore we have held also that there is no cause of action in this suit.

With reference to this observation I have simply to say that in the reference order *we* have not held that a statement of account necessarily constitutes a new contract. Neither have I been able to come to that opinion. But if that be a correct proposition of law, even then it cannot be said that on our reference there was no question to be decided, because that question is decided on this reference, although there was no argument upon it.

I shall now state the reasons which weigh with me in thinking that it is not a correct proposition of law. If it were a correct proposition, it would follow that a statement of account would supersede and extinguish the debts of which it is a statement. But there is abundant authority for the proposition that an account [290] stated does not supersede those debts see *Smith v. Page* (15 M. and W., 683), *Perry v. Attwood* (25 L. J., Q. B., 108). Then it has been asked that if an account stated does not constitute a new contract, what is it? The answer is, that it is only evidence of an existing debt. see *Newhall v. Hall* (6 M. and W., 662). This question has been exhaustively discussed by SCOTLAND, C. J., and INNES, J., in *Hirada Karibasappa v. Gadig Muddappa* (6 Mad. H. C., 197). I cannot do better than reproduce here the following extract from the judgment bearing upon this question. The learned Judges, after finding that in that case there were no cross demands which were adjusted between the parties, and that the transaction in question in that case

simply amounted to "the ascertainment by reference to the plaintiff's accounts of the whole amount of the item on the debit side, and of the payments on account credited on the other side, and the acknowledgment of the balance appearing thereupon to be due," observed as follows :—

"Then does the arrangement, alleged to have taken place between the appellant and the respondent, evidence a new contract? The striking of the balance and the admission that the amount was due, evidenced a present promise to pay it, but that was nothing more than the law already implied from the previous existence of the debt, and was all that such an executed consideration could support and it is obvious that, if nothing more than that were necessary, the limitation bar might always be evaded by acknowledgments and admissions not in writing. What we must look to see is, whether the arrangement involved any new consideration for the promise to pay the balance. Now, where there are cross demands and, on a settlement of accounts, items, agreed to on one side, are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck and payment promised, the mutual agreement to set off, *pro tanto*, one set of items against the other constitutes a new consideration for the promise to pay the settled balance, and both make a new contract. For this *Ashby v. James* (11 M. and W., 542) is a [291] direct authority. But where there is no cross claim to be set off, and no new agreement of appropriation, a settlement of the balance due on the examination of accounts is merely a statement of an antecedent debt. The parties simply agree as to how much of the debt remains due. In such a case there is plainly no new contract. This distinction is briefly expressed in *Laycock v. Pickles* (33 L. J., Q. B., 43). BLACKBURN, J., there said. 'In common talk, an account stated is treated as an admission of a debt due from the defendant to the plaintiff, but there is also a real account stated, which is equivalent to what is called in the old law an *usual computaculum*, when several items of claims are brought into account on either side, and being set against one another a balance was struck, and the consideration for the payment of the balance was the discharge on each side.' And the arrangement in that case was upheld as being such a real statement of account.

Enough of authority has been shown to establish the proposition that a statement of account does not necessarily constitute a new contract. It is only where there are cross demands, and they are set off one against another *so as to extinguish the old debts*, that an account stated does amount to a new contract. Therefore, the reference order deciding that the transaction of the 18th October 1877 between the parties to the suit did not constitute a new contract, did not dispose of the question whether it amounted to an account stated within article 64, schedule II of the present Limitation Act.

If an account stated necessarily constituted a new contract, that would be a ground upon which the question referred should be answered in the negative. If it does not in all cases amount to a new contract, then it is to be seen whether in other respects the account stated in this case falls under article 64, schedule II of the Limitation Act. The question referred to the Full Bench, therefore, was not decided by us in the order of reference, and it arises upon the facts stated in the order of reference and found by the lower Court. It was urged before us that the claim is not barred by limitation, because it falls under article 64, schedule II of the Limitation Act. Our view [292] upon this question was against this contention, but that view is in conflict with the decision in *Sheik Akbar v. Sheik Khan* (I. L. R., 7 Cal., 256) as will appear from the following extract from that judgment :—

"It was ingeniously suggested in argument on behalf of the plaintiff, that as article 64 of schedule II of the Limitation Act says nothing in the third

column as to accounts stated by word of mouth, that article must be considered as applicable only to accounts stated in writing, and that as no special period of limitation is prescribed for suits upon accounts stated orally, the period of limitation for such suits would be six years. It is certainly difficult to understand what the Legislature could have intended by this omission, *but we think that giving a reasonable construction to article 64, we must consider that the second column means to fix three years as the period of limitation in all suits upon accounts stated.* To prescribe a limitation of three years in suits upon accounts stated in writing, and six years in suits upon accounts stated orally, would be an obvious absurdity."

Our opinion being thus in conflict with the decision cited above under the rules of practice of this Court, we were bound to refer the question which we have referred.

For the foregoing reasons, it seems to me (1) that the question referred is a question of limitation, (2) that it arises in the case which cannot be disposed of without deciding it, and (3) that it was not disposed of in the order of reference.

I am of opinion, therefore, that the question should be answered by the Full Bench, and, for the reasons given in the order of reference, which I need not repeat here, it should be answered in the negative.

McDonell, J.—In this case the learned Judges of the Division Bench have decided that what occurred on the 18th October gave rise to no substantive cause of suit. They find that there was no express contract on that day, and then that there was no implied contract, and that the plaintiff's claim would be barred by limitation unless article 64, schedule II of the Limitation Act of 1877 applies, and I concur with them in [293] holding that it does not do so; and that to give a fresh ground of limitation under that section, the account stated should be in writing, and that when there is no writing, article 64 does not apply.

Prinsep, J.—It is no doubt at all times more satisfactory that on a reference to a Full Bench, all matters connected with the particular point should be referred, and so far I think it is to be regretted that we have not had to consider the exact effect of an account stated, both as a cause of action and as giving a fresh starting point for the purpose of limitation, independently of the original transaction which may have led to that account stated.

I am further of opinion that we should give our answer to the point referred, which, as pointed out by MITTER, J., legitimately arises in the case.

With respect to the point referred, I am of opinion that the account stated in the present case, which is not a written document signed by the defendant, cannot properly fall within the terms of article 64, schedule II of the Limitation Act, nor under article 120 as relating to a "suit for which no period of limitation is provided elsewhere in the schedule." The statement of account, admitted by defendant by word of mouth, is only evidence of the admission of the defendant. The present suit would, as regards limitation, depend upon the date of the contracts or debts to which each item included in that account relates.

Tottenham, J.—I confess that I do not very clearly see how the particular question put to us arises in the present case.

The suit which purports to be based upon a transaction which took place on the 18th October 1877 was instituted within three years of that date; and if it be assumed that a suit can be brought upon the basis of that transaction, it is hardly material to enquire if it is governed by article 64. Similarly, if it be held that the transaction affords no basis for a suit, it is superfluous to inquire whether this or that article of the schedule to the Limitation Act applies, for when there is no cause of [294] action, no article of that schedule applies.

As, however, the majority of the Court are of opinion that we should give a reply to the question, I find no difficulty in stating that inasmuch as article 64 distinctly refers only to accounts stated in writing and signed by the defendant or his agent, it does not include the transaction upon which this suit is based which was not accompanied by any signature of the defendant or his agent.

Garth, C. J.—With all due respect to the opinion of some of my learned brothers, it seems to me that this case has been already disposed of in the order of reference, and that the question referred to us does not arise.

That question is *one of limitation*, namely, whether the claim of the plaintiffs, as based upon the statement of account of the 18th of October 1877, falls within article 64, schedule II of the Limitation Act of 1877?

Now it seems to me that before any question of limitation can arise under this or any other article of the Limitation Act, we must assume the existence of a cause of suit.

Each of these articles of limitation applies to some particular cause or causes of suit, and unless there is first proved to be a cause of suit, no question can arise as to limitation.

Now the plaintiffs' suit in this case was based entirely upon the alleged statement of account on the 18th of October. They contended that the statement of account which then took place gave rise to a substantive cause of action as upon an account stated. This appears not only from the plaint, and from the judgments of the lower Courts, but also from the very first sentence of the referring order, which runs thus —

"This appeal relates to that part of the plaintiffs' claim, *which was based on a statement of account on the 18th of October 1877.*" And, again, a few lines further on,—*"the ground of action, as alleged in the plaint, was the statement of account on the 18th of October 1877, and it is expressly stated in the plaint that the cause of action for the item under consideration arose on that date."*

No other cause of action was alleged or proved; and therefore, unless the statement of account on the 18th of October gave [295] rise to a substantive cause of action as upon an account stated, the plaintiffs, as it seems to me, had no case.

Now the learned Judges of the Division Bench have decided, if I understand them rightly, that what occurred on the 18th of October gave rise to no substantive cause of suit. They find, first, that there was no express contract on that day, and then that there was no implied one.

That finding, as it seems to me, disposes of the case. If no substantive cause of action arose on the 18th of October, it must surely be immaterial, whether, if there had been a cause of action, it would have been barred by limitation.

In the case which has been alluded to in the order of reference with which the learned Judges say they cannot agree, the only question of limitation which we had to decide was, whether a cause of action on an account stated orally came within Article 64 or Article 120* of the Limitation Act; or, in other

* [Art. 120.—

Description of suit	Period of limitation.	Time from which period begins to run.
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years ...	When the right to sue accrues.]

words, whether the three years or the six years rule of limitation applied to such a cause of action.

But for the purposes of that question we assumed that a substantive cause of action upon an account stated orally had arisen; and except upon that assumption any question of limitation would have been immaterial.

The point, therefore, which arose in that case does not in my opinion arise in this, for two reasons.—1st, because, as I have before explained, it has here already been found by the Division Bench that the transaction of the 18th of October gave rise to no new or substantive cause of action; and, 2ndly, because if it had given rise to such a cause of action, the suit was brought within three years from that date; so that no question as to the three years or the six years limitation could arise.

If I rightly apprehend the meaning of my brother MITTER'S judgment, I gather that the main difference between us is not upon any question of limitation, but as to the nature and meaning of a cause of action upon an account stated. He appears to think that a cause of action upon an account stated is not a substantive cause of suit, or, in other words, a *new contract*.

[296] I have always understood that, unless it is a *new contract*, it is no cause of action at all. The consideration for it may be, and generally is, a past debt; but it is as much a new contract as a promissory note or a bill of exchange, which may also be given for a past debt.

Again, I think, that some misapprehension has arisen as to the difference between an account stated, which is a substantive cause of suit in itself, and a promise to take a debt out of the operation of the Limitation Act, which need not, and often does not, amount to a substantive cause of suit.

A promise of that kind *must be in writing*, both here and in England. An account stated in England may or may not be in writing, and I see no reason why the law should not be the same here. But as to that, there seems some difference of opinion.

This is a question which I shall be very glad to discuss when the occasion arises; but it seems to me, for the reasons which I have given, that it does not arise in this case.

There are also other points in my brother MITTER'S judgment with which I do not agree; but I do not think it necessary to advert to them, because, in my opinion, they are not material to this case.

Although *some* of my learned brothers and myself take a somewhat different view of the question referred to us, the result, I consider, will be the same; namely, that the special appeal will be decided in accordance with the views of the Division Bench.

The appeal will therefore be dismissed with costs.

Appeal Dismissed.

NOTES

[ACCOUNT STATED—

"Accounts stated" are of two kinds, to both of which the language of art. 64 applies, provided they are in writing, and signed by the defendant or his agent. According to the Bombay and the later Allahabad cases the article applies only to written and signed adjustments of cross-demands.—Mitra on Limitation, (1911) Vol II p 958.

The Bombay and the Allahabad views are contained in 23 All 502, 15 All. 1, 22 Bom. 513. See also 11 C. P. L. R. 65. As regards the Calcutta and the Madras High Courts, see 10 Cal. 284; 26 Mad. 186.

As to when a new promise to pay is to be implied, see 10 Cal. 1033, 20 P. R. 1883; 21 Mad. 866; 6 Bom. 683; (1899) 3 O. C. 195 (201), (1892) 16 Mad. 339 (340).]

[297] ORIGINAL CIVIL.

The 28th February, 1884.

PRESENT .

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Madon Mohon Poddar and others..... Plaintiffs

versus

Purno Chundra Purbot and others..... Defendants.

*Small Cause Court, Mofussil—Act XI of 1865, s. 21—New trial—Review—
Limitation Act, 1877, art. 173.*

Section 21 of Act XI of 1865 is still in force notwithstanding the right of review given to Small Cause Courts in the Mofussil by s. 623 of the Code of Civil Procedure.

Where the circumstances of a case admit of a new trial, an application for such new trial is governed by s. 21 of Act XI of 1865, but where the circumstances of a case do not admit of a new trial, but do admit of a review, then the time within which an application for review should be made is to be governed by art. 173,† sch. II of Act XV of 1877.

THIS was an application made for the purpose of obtaining a re-trial of a suit which had been dismissed on the 30th December 1881 by the Munsif of Madaripore, who at that time was exercising the powers of a Small Cause Court Judge. The application was made on the 30th January 1882. It, however, was not clear from the papers sent to the High Court whether a new trial or a review was the subject of the application; the Munsif was of opinion that a new trial could not be granted, as under s. 21 of Act XI of 1865 the application was out of time; but he thought that it was open to the applicant to make the application under s. 623 of the Code of Civil Procedure. But inasmuch as chapter 47 of the Code did not prescribe any limitation for such an application, he was of opinion that (regard being had to s. 6 of the Limitation Act), an application for review of a judgment of a Court of Small Causes should be presented within the time prescribed by s. 21 of Act XI of 1865, and that the term of ninety days prescribed by the Limitation Act, as the period in which a review might be presented, was not applicable to such cases. He therefore rejected the application subject to the opinion of the [298] High Court on the following question: "When a judgment is passed against a plaintiff by a Small Cause Court, and an application for review of the same is made under s. 623 of the Civil Procedure Code, is the application within time if made after seven but within ninety days from the date of the judgment, s. 21 of Act XI of 1865 notwithstanding?"

* Civil Reference No. 18 of 1882, from Baboo Chundra Coomar Dass, Munsif exercising powers of a Small Cause Court Judge at Madaripore, dated the 31st March 1882.

† [Art. 173 :—

Description of application.	Period of limitation	Time from which period begins to run
For a review of judgment, except in the cases provided for by No. 162.	Ninety days ..	The date of the decree or order.]

Baboo *Kashee Kant Sen* for the plaintiff.

Baboo *Anund Gopal Palit* for the defendant.

The **opinion** of the Court (GARTH, C.J., and FIELD, J.), was delivered by

Garth, C.J.—It has already been decided by this Court in several cases that s. 21 of Act XI of 1865 is still in force, notwithstanding the right of review which is given to Small Cause Courts in the mofussil by s. 623 of the Civil Procedure Code—(see reference No. 19 of 1878 from the Small Cause Court of Bhangah, decided by this Bench on 26th August 1879, and reference No. 14 of 1881 from the Munsif of Soodharam, decided on 8th December 1881), (*Rattan Krishen v. Poddar Raghoo Nath Shaha*, I. L. R., 8 Cal., 287).

There are some cases in which a new trial might be the proper remedy, and where a review would not be allowed by law, and there are others where a new trial could not be had, and the appropriate remedy would be by a review.

It does not appear from the reference in this case, what the nature of the application was, or whether the plaintiff's proper remedy would be by a new trial or a review, but we think that he should not be bound by the mere form in which the application was made, and that the answer which he ought to give to the reference depends upon whether a new trial or a review would be the proper remedy.

If a new trial is necessary, then the plaintiff is out of time by reason of the seven days' notice not having been given but if the relief which he seeks may be granted upon a review, he appears to be in ample time

[299] APPELLATE CIVIL

The 4th January, 1884.

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE O'KINEALY.

Bir Chunder Manikya.... .Defendant

versus

Mahomed Afsarooddeen.Plaintiff.

Mortgage—Money decree—Sale under mortgage decree—Prior sale under money decree—Suit for possession.

On the 21st of April 1864, A mortgaged a certain taluk, and on the 13th of December 1865, the mortgagee obtained a mortgage decree on his mortgage. On the 5th of April 1867 (in execution of a money decree obtained against A by a third party on the 20th of September 1864) the right, title and interest of A in the taluk was purchased by the defen-

* Appeal from Original Decree No. 229 of 1882, against the decree of F. W. REES, Esq., District Judge of Noakhally, dated the 6th of July 1882.

dant who entered into possession. On the 1st of July 1868, the right, title and interest of A in the taluk was sold in execution of the mortgage decree and purchased by the plaintiff. In these execution proceedings the defendant intervened, but his claim was disallowed. On the 28th of June 1880, the plaintiff brought the present suit for possession of the taluk.

* *Held*, that the plaintiff was not entitled to possession, but should have brought his suit to enforce the mortgage lien against the defendant

THE material portions of the **judgment** of the lower Court are as follows :—

“ The plaintiff’s suit was dismissed by my predecessor, as being barred under s. 13, Code of Civil Procedure. On appeal the Judges of the Honourable High Court reversed his decision and remanded the suit to be tried on the merits (see *Mahomed Afsar-ul-deen v Bir Chunder Manikya*, 1 L. R., 8 Cal., 470). The facts are these :—

“ On the 21st of April 1864, one Ram Coomar Bhuttacharji (and another) borrowed Rs. 2,000 from one Soorja Kumari, and gave a mortgage bond, pledging (among other properties) the taluk in suit. The money was to be repaid in four months. As it was not paid, Soorja Kumari instituted a suit on the 23rd of November 1865, and obtained a decree on the 13th of December in the same year. On the 5th of April 1867, the right, title and interest of Ram Coomar Bhuttacharji in the taluk in question was sold in execution of a decree on a simple money bond and bought by the defendant No. 2, benamidar for the [300] defendant No. 1. After this the decree on the mortgage bond was executed, and, notwithstanding an objection put in by the defendant No. 2, the right, title and interest of Ram Coomar Bhuttacharji was again sold, and bought by the plaintiff on the 1st of July 1868. The plaintiff alleges that he obtained symbolical possession on the 4th of September 1868, but was immediately dispossessed by defendant No. 1. The defendant denies that the plaintiff obtained symbolical possession, and admitting the other facts as given by plaintiff pleads that the suit is barred by limitation, and that the plaintiff’s purchase was of no effect. In addition to the issue as to *res judicata*, the following issues were framed. (a) Did the plaintiff take symbolical possession in September 1868 of the property in suit? (b) Is the suit barred by limitation? (c) Did the disputed property pass to plaintiff by the purchase of July 1868? ”

The District Judge found all these issues in favour of the plaintiff [citing on the last issue the case of *Harau Chunder Ghose v. Dinu Bundhoo Bose* (14 B. L. R., 408, 23 W. R., 186), and gave the plaintiff a decree.

The defendants appealed to the High Court.

Baboo Kally Mohun Dass and Baboo Doorgu Mohun Dass for the appellant.

Munshi Serajul Islam for the respondent.

The **Judgment** of the Court (TOTTENHAM and O’KINEALY, JJ.), was delivered by

Tottenham, J.—The parties in this suit were purchasers at auction of the same property in execution of two separate decrees. The plaintiff’s was the more recent purchase, it having taken place on the 1st July 1868. The defendant’s purchase was on the 5th April 1867, but the plaintiff’s case was that the decree in execution of which his purchase was made was a mortgage decree, the mortgage having been made and the decree upon it having been obtained previously to the purchase made by the defendant. The date of the mortgage was 21st April 1864, and the date of the decree upon the mortgage bond was 30th December 1865. On the other side, for the defendant,

[301] appellant, it is contended that the decree obtained in December 1865 upon the mortgage bond was not a mortgage decree, but a simple money decree, and this has been held by the lower Court. The District Judge, however, was of opinion that, notwithstanding this fact, the plaintiff was entitled to recover possession upon the authority of the Full Bench case of *Haran Chunder Ghose v. Dino Bundhoo Bose* (14 B. L. R., 408 ; 23 W. R., 186), which established the principle that a mortgagee causing the sale of the mortgaged property conveys to the purchaser the entire interest in the property which he and the mortgagor could jointly sell, as well when the sale is under a decree for sale as when it is under a money decree. He held that the defendant in the present case could not claim to be a person not a party to that suit claiming interest in the property, because at the time, when the suit was tried and the decree given, the defendant had acquired no interest in the property, for his purchase took place in April 1867. It seems that in the execution proceedings under which the present plaintiff purchased, the defendant did come in as a claimant objecting to the attachment and sale upon the ground of his own previous purchase and possession. That claim was rejected, and the Judge observes that the defendant then had an opportunity of redeeming the property by paying off the mortgage money, but as he had not taken advantage of this opportunity, the plaintiff was entitled to succeed in the present suit. It appears to us that the case really depends upon the question whether the decree of the 30th December 1865 was a mortgage decree or not, and looking to the description of a mortgage decree given in the case of *Gopi Nath Singh v. Sheo Sahay Singh* (B.L.R. Sup. Vol. 72, 1 W. R., 315), we think the decree obtained by Soorja Kumari Dabi against Ram Coomar Bhattachary (mortgagor), was a mere money decree. Upon the authority of the cases above referred to it is clear that the plaintiff, though he may have purchased the lien of the mortgagee, is not entitled to recover possession of the property, as against a person who was no party to that decree and is a *bonâ fide* purchaser for value without bringing a suit to enforce the lien. The present suit, which is one for ejectment, is not one in which [302] he is entitled to succeed. His remedy, if he has any, must be by a regular suit to enforce his lien under the mortgage. In the meantime we think the defendant was entitled to retain possession of the property. We accordingly reverse the decree of the lower Court, and direct that the suit be dismissed with costs of both Courts.

Appeal dismissed

NOTES

[The person entitled to redeem does not lose his right when not made a party to the mortgagee's suit —(1885) 10 Bom 88 (91). As regards the relative rights of purchasers in execution of money decrees and of mortgage decrees respectively, see (1885) 12 Cal 299 (301)]

[10 Cal. 302]

APPELLATE CRIMINAL

The 24th January, 1884.

PRESENT

MR JUSTICE MITTER AND MR. JUSTICE FIELD.

In the matter of the Petition of Surat Dhobni.

Evidence Act (1 of 1872), s. 6—Statement made to third person by person injured.

The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person, immediately after the commission of the offence. The prisoner did not, when the statement was made, deny that she had done the act complained of.

Held, that the evidence was admissible under s. 6† and s. 8, Illustration (g)‡ of the Evidence Act.

IN this case the prisoner had been convicted by the Assistant Commissioner of Dibrugarh, under s. 324 of the Indian Penal Code, of having voluntarily caused hurt to her daughter-in-law by burning her with a red hot pair of tongs. The only evidence in support of the charge was a statement made in the presence of the prisoner by the daughter-in-law to a neighbour immediately after the commission of the offence. It appeared also that the prisoner did not deny that she had inflicted the injuries. The prisoner appealed to the Officiating Judge of the Assam Valley Districts, who held that the statement was so closely bound up with the occurrence itself that it was clearly a relevant fact and admissible in evidence under s. 6 of the Evidence Act and affirmed the conviction.

The prisoner preferred a petition to the High Court

Baboo Jogesh Chunder Roy for the Petitioner

No one appeared for the Crown.

[303] The following Judgments were delivered by the Court (MITTER and FIELD, JJ.).

* Criminal Motion No. 275 of 1883, against the order of C. J. Iyall, Esq., Officiating Judge of the Assam Valley Districts, dated the 4th August 1883.

Relevancy of facts forming part of same transaction.

† [Sec. 6.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.]

Motive, preparation and previous or subsequent conduct.

‡ [8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.]

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue thereon relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word “conduct” in this section does not include statement, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

(g) :—The question is, whether A owes B Rs. 10,000. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—‘I advise you not to trust A, for he owes B 10,000 rupees’—and that A went away without making any answer, are relevant facts.]

Field, J.—The additional evidence which we directed to be taken by our order of the 11th December last has now been sent up by the Sessions Judge. In consequence of my learned colleague having some doubt, I have very carefully considered the question with which we have to deal. In the case of *Res v. Osborne* (1 C. and M., 624), referred to in my learned colleague's judgment, CRESWELL, J., said "What the prosecutrix said at the time of the committing of the offence would be receivable in evidence on the ground that the prisoner was present and the violence going on but if the violence was over, and the prisoner had departed and the prosecutrix had gone on running away crying out the name of the person, it would not be evidence." That was a case of rape, and I do not understand CRESWELL, J., to have meant that in order to render the statement of the prosecutrix admissible in evidence, both the presence of the prisoner and the continuance of the violence must have co-existed with the making of the statement. I understand the learned Judge to have been speaking with reference to the circumstances of the case before him rather than to have been laying down any fixed rule which would require for its application the co-existence of the two circumstances just mentioned. In the case of *Rex v. Foster* (6 C. and P., 325), before three learned Judges—PARK and PATTESON, JJ., and GURNEY, B.—the prisoner was charged with manslaughter, in killing a certain person by driving a cabriolet over him. A waggoner was called as a witness, and he said that he was driving his waggon, and that he saw the cabriolet drive by at a very rapid rate, but did not see the accident, and then he went on to say that immediately after, on hearing the deceased groan, he went up to him and asked him what was the matter. It was objected that what the deceased said in the absence of the prisoner as to what had caused the accident was not receivable in evidence, but the three learned Judges were agreed that under the circumstances it ought to be received. This appears to me to be a case more immediately in point than that of *Rex v. Osborne*. [304] It must, however, be borne in mind that these English cases can be referred to only by way of illustration. They are not in any way binding upon us, regard being had to the provisions of cl. 1 of s. 2 of the Evidence Act. What, therefore, we have really to consider is whether the evidence is admissible under the Indian Evidence Act, and having given to the matter my most careful consideration, I have come to the conclusion that it is admissible. It is clear from the additional evidence now submitted by the Sessions Judge that the statement made by the girl was made in the presence of the prisoner and almost immediately after the infliction of the injuries by the tongs. I think, therefore, that it falls within the purview of s. 6 [see Illustration (a)] of the Indian Evidence Act. I think further that it falls within s. 8, Illustration (g), inasmuch as the accused person was present and made no answer denying that it was she who had inflicted the injuries upon the girl. The witness upon a re-examination has added certain matter which we are both agreed that we ought not to consider, but excluding this matter, the case in my opinion falls within the illustration just quoted. The occasion was certainly one upon which the prisoner, if she had not inflicted the injuries upon the girl, would, in all probability, have denied the charge made against her by the girl, and the fact that she did not do so appears to me to have been an acquiescence in the truth of the charge so made by the girl. As to the sufficiency of the evidence, it is unnecessary for us to express any opinion. We are hearing this case merely in the exercise of our revisional jurisdiction, and the point to which we are agreed to limit ourselves is whether there is legal evidence upon which the prisoner might have been convicted, and this question I feel compelled for myself to answer in the affirmative.

Mitter, J.—I concur. I had some doubt upon the point fully discussed in the judgment of my learned colleague. But after considering the authorities referred to in it, I come to the same conclusion to which he has come.

NOTES.

[See (1906) 11 C W N 266, where this case was distinguished, as to when the evidence of a bystander is admissible in evidence as part of the *res gestae*.]

[305] PRIVY COUNCIL.

The 21st, 22nd June, and 11th July, 1883.

PRESENT

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, AND
SIR R. COUCH

Balkishen Das. . . . Petitioner

versus

Run Bahadur Singh.Objector

[On appeal from the High Court at Fort William in Bengal]

Decree—Construction of decree—Penalty—Higher rate of interest upon default in payment of instalment.

A decree of which the terms had been arranged by solehnama between the parties, for payment of money by instalments with interest at six per cent, was construed to provide also for three contingencies, viz., non-payment at due date, (a) of the first instalment, two consecutive instalments being in arrear at the same time, (b) of instalments, other than the first, (c) of the first instalment, simply. Upon the occurrence of (a), or of (b), execution might issue for the whole decretal money with interest thereon at twelve per cent. Upon the occurrence of (c) execution might issue for that instalment, with interest at twelve per cent. from the date of the decree.

The decree-holder having accepted payment of the first instalment on the footing of (c), held that he had not, by any admission or settlement, precluded himself from insisting on the above construction as to (b). Held, also, that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower, in a given state of circumstances and were not in the nature of a penalty against which equitable relief might be claimed.

APPEAL from a decree (27th February 1880) of the High Court setting aside an order (16th July 1879) of the Subordinate Judge of Gya made in execution of decree and substituting another.

The questions on this appeal related to the construction of a decree founded on, and reciting, a solehnama between the parties and to the right of the appellant to execute to the extent of the provisions of that decree when properly construed.

On November 11th, 1870, Rani Ismidh Koer, since deceased, executed a security in favour of Rai Narain Das, also since deceased, and now represented by Balkishen Das, the appellant, for repayment of Rs. 1,75,000, with interest by half-yearly instalments. Default having been made in payment, Rai Narain [306] Das sued the Rani to recover the amount due, which with a further loan came to Rs. 2,15,359. To this suit the respondent, who was heir in reversion to the estate in the hands of the Rani, (a Hindu widow) was added as defendant. During the progress of the suit an arrangement was come to for pay-

ment by instalments of Rs. 30,000 each, and a decree was made on the 29th March 1873, which gave rise to the present dispute. The decree, which stated the terms of a solehnama between the parties, contained the articles set forth in their Lordships' judgment.

The due date of the first instalment payable was September 25th, 1874, but it was not paid until a short time before the second instalment fell due. The decree-holder, accepting it, gave a receipt, dated 1st September 1875, containing the following statement of the mode in which the payment of Rs. 30,000 was appropriated:—

	Rs.	A.	P.
" Rs. 30,000, half of which is	15,000	0	0
Out of the principal mentioned in the kistbundi decree for the first instalment, <i>i.e.</i> , for Bhadon 1281 Fash	21,280	0	0
Interest on Rs. 30,000 from the 29th March 1873, the date of the solehnama, to the 31st August 1875, the date of payment at the rate of 1 rupee per cent per month, which, by reason of default of instalment, became payable under the terms of the solehnama embodied in the decree, at 1 rupee per cent instead of 8 annas per cent.	8,720	0	0
Dated the 1st September 1875, corresponding with the 2nd Bhadon Sudī, 1932, Sambat, or 1282 Fashi "			

On the 19th August 1876, shortly before the third instalment became due, the respondent remitted to the decree-holder Rs. 30,000, in payment of the second instalment, making up an account as follows — "To principal Rs. 23,820, to interest Rs. 6,180." The last item of interest was apparently arrived at by calculating interest on the instalment from the 29th March 1873 to the 3rd September 1876 at 6 per cent. This the decree-holder [307] refused to accept. Afterwards, the money having been paid into Court, together with a further sum of Rs. 30,000 deposited on the 19th September 1877, on account of the third instalment, shortly before the fourth instalment became due, the decree-holder took the money out, it being understood that no special appropriation or adjustment was made or admitted.

On the 18th September 1877, the decree-holder filed the petition, out of which the present appeal arose, to realize Rs. 3,06,253, alleging that the judgment-debtor had, by failing to pay the instalments decreed, become liable to pay the balance of the decretal money with interest at twelve per cent, giving credit for the instalments received with interest at the enhanced rate deducted. To this respondent filed his petition of objection. The order made by the Subordinate Judge of Gya, and the decree on appeal made by the High Court, are stated in their Lordships' judgment.

On this appeal—

Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyme* appeared for the Appellant.

Mr. *T. H. Cowie*, Q.C., and Mr. *J. T. Woodroffe* for the Respondent.

For the appellant it was argued that the terms of the decree of 29th March 1873, followed by the actual defaults made by the judgment-debtor in paying the instalments, permitted the former to calculate the additional interest on the balance of the decretal money; on the first instalment from the date of the decree; and on the second and subsequent instalments from the dates at which each of them became due to the dates of payment.

For the respondent it was argued that the decree-holder was not, upon the true construction of the consent decree, entitled to interest at the enhanced rate upon the principal sum decreed. Moreover, independently of this construc-

tion, the general rule as to equitable relief against the operation of penalties intended to secure collateral objects, was applicable, and would prevent the recovery of interest at the rate on which the appellant insisted. The order of the High Court did substantial justice between the parties

[308] Reference was made to *Boley Dobey v. Sideswar Rao* (4 B. L. R. Ap., 92), *Bichook Nath Panday v. Ram Lochun Singh* (11 B. L. R., 135), *Paresnath Mukhopadhyaya v. Kristo Mohun Saha* (3 B. L. R. Ap., 105).

Their Lordships' **Judgment** was delivered by

Sir B. Peacock.—This is an appeal by Rai Balkishen Das, the representative of Rai Narain Das, from an order of the High Court at Calcutta, dated the 27th February 1880, by which an order of the Subordinate Judge of Gya, of the 16th July 1879, was set aside, and the order appealed from was substituted for it.

The determination of the questions which arise in the appeal depends upon what is the proper construction to be put upon the 3rd clause of a decree of the Subordinate Judge of Gya, dated 29th March 1873, in a suit in which Rai Narain Das was plaintiff, and the respondent, Raja Run Bahadoor Singh, was one of the defendants

That decree was obtained by Rai Narain Das in pursuance of a solehnama or compromise, between the parties to the suit

The amount decreed was Rs 2,38,000 principal, with interest, and by the 2nd Article it was ordered, amongst other things, that—

"The plaintiff shall get interest on the decretal money at the rate of 8 annas per cent. per mensem from defendants. That the defendants shall pay annually Rs 30,000 out of the principal and interest year after year by instalments to the plaintiff, and the plaintiff, after granting a receipt and filing a petition in the Court, shall take the said sum from defendants. Out of the annual amount of Rs 30,000 whatever may be found due on account of interest, the decree-holder shall deduct the same on account of interest, and credit the balance to the principal. The first instalment shall be in one lump, on the 30th Bhadon 1281 Fash. In future, year after year each instalment shall be so paid in a lump sum on the last day of Bhadon of each year. The money, covered by the instalment shall be sent to the decree-holder at Benares, and defendants shall pay the expenses incurred in sending the same."

The 3rd Article, which is the important one, is as follows —

"If the first instalment be not paid on the 30th Bhadon 1281 Fash. and two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree, and realize his entire decretal money, with interest at the rate of one rupee per cent. per mensem, from [309] defendants, and their properties. In case of default, the decree-holder shall be entitled to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on the 30th Bhadon 1281 Fash, then the decree-holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of this solehnama, to which your petitioners, defendants, shall have no objection. If at any time within the term defendants desire to pay any sum over and above Rs. 30,000. the plaintiff shall have no objection to receive the same."

The first instalment, which fell due on the 30th Bhadon 1281, corresponding with the 25th September 1874, was not paid on that day. It was, however, paid on the 31st of August 1875, before the second instalment became payable, and a receipt for the same, dated the 1st of September 1875, was given by the decree-holder acknowledging the payment, and stating that Rs. 8,720 were appropriated to the payment of interest on Rs. 30,000 from the 29th March 1873, the date of the solehnama, to the said 31st of August 1875, the date of payment, at the rate of one rupee per cent. per mensem, which, by

reason of the default of payment of the instalment on the due date, became payable under the terms of the solehnama or compromise embodied in the decree, at the rate of one rupee instead of eight annas per cent. per month.

Subsequently, after two instalments had been paid, and a third instalment had become due, an application was made by the decree-holder to the Subordinate Judge of Gya for execution of the full amount of the decree, with interest at the rate of one rupee per cent per month, after deducting Rs 60,000 on account of the two instalments which had been paid. That application was made upon the ground that default had been made in payment of the first instalment on due date, and of two consecutive instalments. The Subordinate Judge held that two consecutive instalments were not unpaid within the meaning of the third clause of the decree. He therefore ordered that the petition for the execution of the decree by realization of the entire decretal money in one lump, with interest at the rate of one rupee per cent. per month, should be rejected, but that for the instalment then overdue the decree should be executed.

Upon appeal the High Court, on the 29th July 1878, affirmed the decision, and no appeal to Her Majesty in Council from that [310] judgment has been preferred. It therefore stands unreversed. The Judges of the High Court stated that, in their opinion, the view taken by the Subordinate Judge of the arrangement between the parties was correct, and that the intention evidently was that no two instalments should be outstanding at the same time, and that, provided the debtor paid up the first instalment after due date, but in sufficient time to guard against a second instalment becoming overdue whilst the first remained unpaid, he was to be allowed to do so on payment of a double rate of interest as a penalty, but that, if he went further, and allowed two instalments to be actually due and unpaid at one and the same time, the arrangement would fall to the ground, and the whole amount of the decree would be realizable in a lump sum.

Independently of the fact that no appeal was preferred against that decision, their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solehnama was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others.

In a subsequent judgment, dated the 25th February 1880, to which advertence will be made presently, the High Court say —

“ It was one of the terms of the solehnama that if at any time two instalments were due at the same time, the whole of the debt should be recoverable forthwith, and the interest, which otherwise was to be calculated at 6 per cent per annum, should be calculated at 12 per cent.; and there was a further term in the solehnama that if the first instalment was not paid in due time, interest should be calculated at the rate of 12 per cent instead of 6 per cent. from the date of default until realization.

“ There is no specific mention in the solehnama of any other instalment than the first, but this being a decree of Court, we think that the language of it is capable of a more liberal construction than if it had been simply a deed between the parties, and we are of opinion that the same conditions must be considered applicable to default on every instalment which are made applicable in default of the first instalment ”

Their Lordships think it right in this place to refer to that part of the judgment, in order to point out that, in their opinion, the decree-holder could not, under the first paragraph [311] of the 3rd clause of the solehnama, issue execution for the full amount of the judgment, with 12 per cent. interest, unless both the first instalment should not be paid on the 30th

Bhadon 1281 Fasli, and two consecutive instalments should be in default and unpaid at the same time. The High Court would read the words "first instalment" as if they had been "any instalment," and the words "on the 30th Bhadon 1281 Fasli," as if they had been "on the 30th Bhadon 1281 Fasli, or on the last day of Bhadon in any year, as the case may be." Their Lordships think that the words "first instalment" must be read in their strictly literal sense, and that the word "and" in that paragraph must be read in the conjunctive and not in the disjunctive, and consequently that the non-payment of the first instalment on the due date was a material part of the contingency contemplated by the first clause, and the allowing of two instalments to be in arrear at the same time the other portion of that contingency.

The only remaining question is whether, in default of payment of any instalment other than the first on the due date, interest from the date of such default until the realization of the instalment was to be paid upon the full amount of the principal remaining unpaid at the time or only upon the amount of the instalment.

The Subordinate Judge, in his judgment of the 16th July 1879, after giving his reasons, says "Hence it clearly appears that the object aimed at by the solehnama was that in case of breach of instalment the decree-holder would get interest on the expired instalment at one rupee per cent. per month in the place of eight annas per cent., and he decreed accordingly." Both parties appealed to the High Court from that decision.

On the 25th February 1880 the High Court appear to have agreed with the Subordinate Judge in thinking that the increased rate of interest was to be paid on the amount of the instalment in default, and not upon the whole amount of the debt. Their judgment and decree are quite unintelligible. They order the decree of the Subordinate Judge to be set aside, and then they declare that the first instalment of Rs. 30,000 which had been paid, is to be treated as not having been paid, afterwards they declare that in adjusting the account between the parties it must [312] be taken that the said first instalment was duly paid on the 25th September 1854, and that all subsequent payments must be taken to have been properly made for the purposes of the subsequent instalment, and that in dealing with those instalments interest will be calculated at 6 per cent per annum on the whole debt, and the capital will be paid off by the residue of such instalments, after providing for interest at that date. Then they order the judgment debtor within six months from the date of the decree to pay to the decree-holder the said first instalment, with interest at 12 per cent., and that in default thereof the decree-holder may apply, and the Court reserves the power of reconsidering, and if necessary of altering the terms of the decree.

The reason given by the High Court for holding that, in default of payment of a second or subsequent instalment on due date interest is to be calculated upon the amount of the instalment, and not upon the amount of the whole decretal money is that in the receipt given for the first instalment a portion of it, viz., 8,720, is appropriated to the payment of interest at 12 per cent. upon the amount of the first instalment, and not upon the whole debt. It is said,—

"According to the strict construction of the solehnama, I myself have doubts whether the plaintiff would not be entitled to 12 per cent. interest upon the whole amount for the time being due between the due date of each instalment and the time it was actually paid, that is, from the date of default of payment until its realization, but inasmuch as the parties themselves, when the first instalment was paid, have put a construction upon this instrument, and have treated the interest as calculable on the Rs. 30,000 and not on the whole

sum, and as the Judge of the Court below as we understand his judgment, has decided in the same way, we think we ought not to interfere with that decision, because the effect of calculating interest only upon the instalment upon the first occasion may have misled the other side, and may very seriously prejudice them if any other construction is now put upon the instrument; for, if upon that occasion the plaintiff had claimed to be entitled to 12 per cent. upon the whole amount of the debt, and not to 12 per cent on the instalment only, it is not improbable that the defendant might have been careful to pay up what was due, and not have continued in default, as he appears to have done "

Their Lordships are of opinion that, according to article 3 of the decree of 1873, three contingencies were in the contemplation of the parties.

[313] The first is, if the first instalment be not paid on the 30th Bhadon 1281 fasli, and two consecutive instalments be not paid. The second, "in case of default." The third, if the first instalment be not paid on the 30th Bhadon 1281 fasli. The first has already been considered and dealt with. Upon the third the parties have put their own construction, and have voluntarily settled upon the basis of that construction, which their Lordships cannot say was wrong. The decree-holder is bound by it, and cannot, in the settlement of accounts, recover interest at 12 per cent in respect of the default in payment of the first instalment from the date of the solehnama to the date of realization of that instalment, except upon the amount of the instalment, interest upon the remaining portion of the debt during that period being calculated at 6 per cent. per annum.

In determining upon what amount interest at 12 per cent. per annum is to be allowed in consequence of a default in payment on the due date of the second or any subsequent instalment, the decree-holder is not bound by the construction put by him upon the 3rd clause, nor by any admission or settlement in respect of the default made in payment of the first instalment. The wordings of the second and the third contingencies, respectively, are very different. The second is clear and explicit. It declares that in case of default the decree-holder shall be entitled to take out execution and realize interest on the entire decretal money from the date of such default to the date of realization, at the rate of one rupee per cent. per mensem. The third declares that if the first instalment be not paid on the 30th Bhadon 1281 Fasli, then the decree-holder shall have the power to realize the principal, with interest at the rate of one rupee per cent. per mensem from the date of the solehnama.

It was contended that the words "in case of default" were intended to refer to the default provided against by the first contingency. But in their Lordships' opinion it cannot be construed as having that meaning, for it was declared that upon the happening of the first contingency the entire decretal money, with interest at 12 per cent., might be realized, whereas in case of default it was declared merely that interest on the entire decretal money might be realized at the rate of one rupee per cent. per mensem.

[314] The instalment itself would be of course realizable under the decree, and out of it, according to the 2nd article, interest at 6 per cent. upon the decretal money, except during the period for which interest at 12 per cent. was to be levied, would be payable.

If the words "in default, etc.," referred to the default contemplated in the first contingency, the words "the decree-holder shall be entitled to take out execution and realize, etc.," were useless and inapplicable, for words to the same effect had been previously used with reference to principal and interest; whereas in the 2nd article they apply merely to the interest.

The words "the principal" in the third contingency, viz., the non-payment of the first instalment on the due date, could not refer to the whole decretal money, otherwise the third contingency would be at variance with the first.

By the words, "in case of default," in the second contingency, their Lordships are of opinion that a default in payment on due date of any instalment, except the first, was provided for. They had no reference to the first contingency for the reasons already expressed. They did not refer to the non-payment of the first instalment, for that is specifically provided for, and to complete the first contingency it was necessary that in addition to the non-payment of the first instalment on the due date two consecutive instalments should also be unpaid at the same time.

The word "principal" in the third contingency, therefore, evidently referred to the principal of the first instalment, and not to the entire decretal money, as specified in the first and second contingencies. The parties, by putting that construction on the words of the third contingency, are clearly not bound to have the same construction put upon the clear words used with reference to the second contingency, viz., "to realize interest on the entire decretal money."

It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances.

[315] Their Lordships are of opinion that the judgment and decree of the High Court of the 25th of February 1880 ought to be reversed, and that it ought to be declared that in adjusting the accounts between the parties, for the purpose of the proceedings in execution of the decree of 1873, the defendant is to be charged with the principal sum of Rs 2,38,000 and interest at 8 annas per cent. per mensem from the date of the decree upon the said principal sum, or so much thereof as from time to time remains due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the solehnama to the payment of such instalment, and also additional interest at the same rate on the principal sum remaining unpaid for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid or realized, and that each instalment or any payment on account thereof as paid is to be credited first in discharge of the interest then due and the balance towards reduction of the principal.

Their Lordships will humbly advise Her Majesty to the above effect.
The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for appellant. Mr. T. L. Wilson.

Solicitors for the respondent. Messrs. Watkins and Lattey.

NOTES.

[I. RETROSPECTIVE INTEREST—WHETHER PENALTY WITHIN SEC. 74 OF THE INDIAN CONTRACT ACT, 1872—

This decision was for a time supposed to have overruled the rule settled by the previous case-law that a stipulation as to interest having retrospective effect was a stipulation by way of penalty.

This view was taken in (1888) 11 Mad. 294, (296), (1886) 13 Cal. 200; (1886) 14 Cal. 248; (1817) 9 All. 690 (699); (1893) 15 All. 232 F. B.; (1893) 17 Mad. 62 (66).

But the best explanation of the case is that in (1888) 12 Mad., 161 (166) which was followed in (1892) 19 Cal., 392 F. B., (1889) 3 C. P. L. R., 48 (52) according to which cases

this case has not that effect. A higher rate of interest from the date of default need not be a penalty.—(1889) 14 Bom., 200, (1901) 25 Mad., 343 (even after the Amendment in 1899). 11 M. L. J., 421.

A higher rate of interest on default from the date of the bond is a penalty.—(1889) 14 Bom., 274; (1892) 17 Bom., 106 F. B.

It may be noted that the amendment in 1899 of sec 74 of the Contract Act 1872 gives a wide scope to that section

II. NATURE OF CONSENT DECREE—

It stands on no higher footing than the agreement between the parties; and if in respect of it, one of the parties is entitled to a relief of forfeiture, the fact of its having been embodied in a decree does not preclude the Court from granting such relief.—(1906) 31 Bom., 15 F. B.; 8 Bom., L. R., 873 overruling 10 Bom., 435, (1900) 24 Mad., 265 (270) J

[10 Cal 315]

ORIGINAL CIVIL

The 4th January, 1884

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND
MR. JUSTICE CUNNINGHAM.

The Bengal Banking Corporation... .. Plaintiffs
versus
S. A. Mackertich One of the Defendants

*Registration (Act III of 1877), s. 17, cl (h)—Agreement to Mortgage—
Equitable mortgage*

Documents amounting to an equitable mortgage when creating an interest in land of the value of Rs. 100 or upwards, require registration under s 17 of the Registration Act; but documents when amounting merely to an agreement to mortgage do not require registration under that section

Such documents are, therefore, available in evidence as agreements to mortgage without registration, but for the purpose of proving an equitable mortgage they must be registered before they are available in evidence

[316] APPEAL from a decision of PIGOT, J, dated 28th January 1883

Under a power-of-attorney, dated the 1st of February 1880, Mrs Mackertich empowered one M. J. N Mackertich, her husband, to sell or mortgage a one-fifth share of a house in Calcutta, to which she was entitled in her own right. In September 1880, M J N Mackertich arranged to borrow from the Bengal Banking Corporation a sum of Rs 8,000. On the 1st October 1880, the Bengal Banking Corporation advanced that sum to M J N Mackertich and Hem Chandra Bannerjee on the security of a promissory note signed by Hem Chandra Bannerjee and J. M. Mackertich as attorney for his wife, which ran as follows—

“Four months after date, we jointly and severally promise to pay to the Bengal Banking Corporation, Limited, or order, at Calcutta, the sum of Rs. 8,000 for value received, with interest thereon at the rate of 18 per cent. per annum, and as collateral security for the said debt, I and Sarah Amelia Mackertich do hereby agree to assign, by way of mortgage to the said Bengal Banking Corporation, Limited, an undivided one-fifth share to which the said Sarah Amelia Mackertich is entitled in her own right of and in the three-storied house and premises, No. 17, Elysium Row, in the town of Calcutta.”

On the 28th January 1881, M. J. N. Mackertich (with the consent of his wife) sold his wife's one-fifth share of the house to some third person for Rs. 13,000. On the 29th January 1881, M. J. N. Mackertich died after having

received the purchase-money. The estate of M. J. N. Mackertich came into the hands of the Administrator-General of Bengal, and with it the purchase-money of the house.

The Bengal Banking Company, Limited, then brought this suit against the Administrator-General and Hem Chandra Bannerjee to recover the sum advanced to them on their promissory note, upon their personal liability, and also against Mrs. Mackertich, praying that the sum of Rs. 8,000 might be paid out of the Rs. 13,000 in the hands of the Administrator-General.

The defendant contended that, as the promissory note was not registered, it could not be used as a mortgage, or as creating any interest in the mortgaged property, although it might [317] be admissible in evidence as a promissory note, or as an agreement to execute a mortgage.

Mr. *Kennedy* and Mr. *Bannerjee* for the plaintiffs.

Mr. *T. A. Apcar* for the defendants.

Pigot, J.—I am greatly obliged to the learned counsel for his able argument on behalf of the plaintiffs.

But in my opinion the plaintiffs have not succeeded in establishing a sufficient case to make it necessary for me to call upon the defendant.

The case that has just been urged is two-fold —

First, a claim to Rs. 8,000, which is claimed by the plaintiffs against a sum of Rs. 13,000, the product of the sale of the share of a house, No. 17, Elysium Row, which Mr. *Kennedy* clearly stated is claimed in virtue of rights arising from the execution of the document, which is Exhibit B in suit, rights attaching on property, the sale of which realized the Rs. 13,000.

But s 17 of the Registration Act renders it impossible for me to give any effect whatever to this document so far as it would create an interest in immoveable property, it not having been registered according to that section, and I, therefore, hold that this cannot be done.

Mr. *Kennedy* then argued, that inasmuch as this document would give a right to seek specific performance, it bound the conscience of the lady, whose attorney executed it, so as to place the person with whom the agreement was entered into, in the same position as if the contract had been carried out. But this seems to me no more than a mode of describing the manner in which equitable considerations may operate to create an interest in immoveable property, in respect of which a contract and not a conveyance has been entered into.

The intention of the Registration Act was, I think, that it should be impossible to use an unregistered document, so that it should have directly or indirectly the effect of creating an interest in immoveable property. I admitted Exhibit B in evidence "not as affecting any immoveable property referred to in it, but merely as evidence of a contract to execute a mortgage, and of [318] the transaction recorded in it (inclusive of the obligation created by the words promising to pay) save so far as it, i.e., the transaction, affected the immoveables," and I think the document cannot be allowed directly or indirectly to have any further effect.

Secondly, it was argued that the document operated to bind Mr. Mackertich to execute the mortgage, and that such mortgage must contain the usual covenant to pay the money within the time which the mortgage deed would have stipulated: that this must be treated as having been done, and that the case must be treated as one in which a covenant to pay the money had been entered into, a breach committed, and a claim now made in this suit in respect

of the debt or obligation therein arising. I do not think that these considerations would entitle me to hold that a debt became due in respect of Exhibit B from Mrs. Mackertich to the plaintiffs.

Under these circumstances, these being the only two reliefs claimed against Mr. Mackertich, the only decree that can be made is a decree against the estate of Mr. Mackertich himself. A decree will go against his estate and against Hem Chandra Bannerjee as a matter of course with costs on scale 1.

Nothing has been urged about the Rs. 500 remitted to Mr. Mackertich, and there is nothing in this case to connect Mr. Mackertich in any way as a borrower with the plaintiffs, there is no privity between Mrs. Mackertich and the plaintiffs in respect of money borrowed. As Mr. *Kennedy* has pointed out, the power-of-attorney does not contain a power to borrow money, save by way of mortgage.

I wish it to be understood that as to the operation of the Registration Act, I follow with a complete assent, the judgment of Mr. Justice WEST in the case (I. L. R., 5 Bom., 143) which has been a good deal discussed in argument before me.

There will be a decree against Hem Chandra Bannerjee in terms of the prayer, and also against the estate of Mackertich in terms of prayer D, with costs against Hem Chandra on scale 2. The plaintiffs will pay the costs of Mrs. Mackertich and the Administrator-General on scale 2. There will be a decree for administration of Mackertich's estate.

The plaintiffs appealed against this judgment as far as it related to the defendant, Sarah Amelia Mackertich.

[319] Mr. *Kennedy*, with him Mr. *Bonnerjee* for the Appellants.

The share in the house having been sold after the promissory note was executed, the proceeds of the sale became subject to the charge in favour of the plaintiffs in the same way as the property itself was so subject before the sale. It is submitted, moreover, that the document is not one requiring registration under s. 17 of the Registration Act, it is really an equitable mortgage in the form of an agreement to mortgage, and even treating it as an agreement to mortgage, we should be entitled under it to a charge upon the Rs 13,000.

It was an instrument which we could have specifically enforced against Mrs. Mackertich if the property had not been sold, and not being in a position to specifically perform it against the purchaser, we are entitled to enforce it against the person who made the agreement. There is a personal liability on the part of Mrs. Mackertich to bring the property in, not by way of charge, but by way of compelling her to perform the agreement.

The Court here intimated to Mr. *Kennedy* that it would not be necessary for him to go into the other questions in the appeal.

Mr. *Pugh* and Mr. *T. Apcar* for the Respondent were not called upon.

The following **Judgments** were delivered by the Court (GARTH, C.J., and CUNNINGHAM, J.).

Garth, C.J.—This is an appeal by the plaintiffs against the judgment of the Court below, so far only as it concerns the defendant, Sarah Amelia Mackertich. Against the other two defendants the learned Judge made a decree, but refused to make one as against Mrs. Mackertich.

The claim against her was of this nature.

By a deed, dated the 1st of February 1880, Mrs. Mackertich gave to her husband, M. J. N. Mackertich (since deceased) a power-of-attorney to sell or mortgage a one-fifth share of a house in Elysium Row, to which she was entitled in her own right.

Being so empowered, Mr. Mackertich in the month of September in the same year, arranged to borrow from the plaintiffs' Bank a sum of Rs. 8,000, and on the 1st of October they lent him that money upon the security of a promissory note of that [320] date signed by himself, and Hem Chandra Bannerjee (the other defendant in this suit) and also signed by himself as attorney for his wife, Mrs. Mackertich. The note was in this form. (See *ante*, p. 316).

Having obtained the Rs. 8,000 upon this security, Mr. Mackertich (apparently with the plaintiffs' knowledge), sold his wife's one-fifth share of the house to some third person on the 28th of January 1881 for a sum of Rs. 13,000, and having received the purchase-money, he died on the following day, the 29th of January.

His estate then came into the hands of the Administrator General to be administered in due course of law, and with it the Rs. 13,000, and this suit was afterwards brought by the plaintiffs to recover the sum due for principal and interest upon the promissory note against the Administrator-General (as representing Mr. Mackertich's estate and Hem Chandra Bannerjee upon their personal liability, and as against Mrs. Mackertich), praying that the Rs. 8,000 and interest might be paid out of the Rs. 13,000 in the hands of the Administrator-General.

It seems clear that the power-of-attorney gave Mr. Mackertich no right to pledge his wife's personal credit by the promissory note, so that the only way in which she could be affected would be by charging her Rs. 13,000 in the hands of the Administrator-General with the amount due upon the note, as representing the one-fifth share of the property which her husband had agreed to mortgage.

Mr. *Kennedy* has contended here for the appellants (as he did in the Court below), that the one-fifth share having been sold after the note was given, the proceeds of the sale became subject to the charge in favour of the plaintiffs' Bank in the same way as the property itself was so subject before the sale.

To this Mrs. Mackertich's first answer was, that the note was not registered, and although it might be admissible in evidence as a promissory note, or even as an agreement to execute a mortgage, it was not available in any way to the plaintiffs, as a mortgage, or as creating any interest in the mortgaged property, without registration.

It is upon this point, and this point only, as we understand, that [321] the judgment of Mr. Justice PIGOT proceeds. He held that this document could not be put in evidence, or be treated as creating an interest in land, or in the Rs. 13,000, the produce of the land, inasmuch as it had not been registered.

But he considered that the document was receivable in evidence and available for another purpose, namely, that of charging the other defendants personally with the amount of the debt, and he accordingly gave the plaintiff a decree against those defendants personally.

In arriving at this conclusion the learned Judge appears to have relied upon a case decided by Mr. Justice WEST in the Bombay High Court.

In that case a suit was brought for specific performance of an agreement to purchase a house, which was to this effect:—"This day I have sold to you

my house in which I live, for Rs. 1,900 ; and on account thereof I have received from you Rs. 100 as earnest at the time of execution of this bargain. And as to the remaining Rs. 1,800 the same are duly to be paid to me within one month from this day, when you will get the deed made in your favour."

This document was not registered, and the question arose, whether, inasmuch as the transaction had been partially carried out under it, and an interest in the property created in favour of the purchaser, the document was admissible in evidence for the purposes of the suit, without being registered, and as I understand Mr. Justice WEST, his view was much the same as that taken by Mr. Justice PIGOT here.

He considered that although as *creating an interest in land* the document was not receivable in evidence, it might be used for the purposes of the suit, namely, for the purpose of obtaining a specific performance of the agreement.

This really seems the only sensible way of reconciling the provisions of clauses (b) and (h) of s. 17 of the Registration Act. By clause (b) any document which purports to create an interest in land requires registration, and if not registered, it is (by s. 49) not available as affecting the property comprised therein. But by clause (h) any document not itself creating an interest in land, [322] but merely a right to obtain another document which would create such an interest, does not require registration.

We all know that there are a great many documents coming within the description of clause (h) which may amount nevertheless to what are called equitable mortgages, and so create an interest in land. As such, they would require to be registered, though as mere agreements to mortgage, they, under clause (h), would not. The only way, therefore, of meeting the difficulty seems to be, to hold that they are available for the one purpose without registration, but not for the other.

This is only extending to that class of cases the principle which we have laid down in the Full Bench case of *Ulfutunnissa v. Hossein Khan* (1 L. R., 9 Cal, 520)

It is clear, that if we were to hold that equitable mortgages when they are in the form of agreements to mortgage, do not require registration, such instruments would be generally used instead of legal mortgages, for the very purpose of avoiding registration, whilst, on the other hand, if we hold that any document which amounts to an equitable mortgage cannot be used as an agreement to execute a mortgage, we should be defeating the clear intention of clause (h) of the Registration Act.

Mr *Kennedy* in the course of his argument reminded us of a large class of cases, which are to be found in the English Reports, in which difficult questions used formerly to arise, whether certain documents amounted to leases, or only to agreements for leases. As leases they required one kind of stamp, as agreements for leases another kind of stamp. Now these cases rather serve to illustrate the principle, upon which I think we ought to decide the present question.

After the passing of the Act 8 and 9 Vict., c. 106 (the Act to simplify the transfer of property), all doubts with regard to these documents were at an end, because by s 3 of that Act, all leases which were required by law to be in writing (that is, all leases for three years and upwards), were void unless made by deed, and the consequence was, that no document which secured to the lessee an interest for more than three years was [323] valid as a lease, unless made by deed. But from that time the Courts were in the habit of construing those documents, which under the Act were void as leases, as agreements for leases, in order to render them effectual.

So here, although we must treat a document like the present as ineffectual to create any interest in land, we may treat it as valid for any other legitimate purpose. Thus, we may deal with this instrument as a promissory note, or as an agreement to execute a mortgage.

Mr. *Kennedy* goes so far as to contend, that even treating the document as a mere agreement to mortgage, his clients would be entitled under it to a charge upon the Rs. 13,000.

But I think that is not so. Unless they can treat the note as an equitable mortgage, the plaintiffs cannot, in my opinion, claim a charge upon the Rs. 13,000.

I think, therefore, that the Court below was right, and that this appeal should be dismissed with costs on scale 2.

I should add that even supposing that this document were admissible and effectual, as Mr. *Kennedy* contends, I think that other questions of equity would probably arise, which we have now abstained from considering. The defendant, Mrs. Mackertich, has not been called upon to go into her case at all. In fact we have stopped Mr. *Kennedy* from going into any other question, except that which was decided by the Court below.

Cunningham, J.—I agree in thinking that the judgment of the Court below must stand.

Mr. Mackertich having a power-of-attorney to sell or mortgage his wife's property, signed on her behalf a joint and several promissory note for Rs. 8,000, and as collateral security agreed to assign by way of mortgage her interest in certain property.

The plaintiffs state that subsequent to this Mr. Mackertich effected a sale of the property for Rs. 13,000, and this Rs. 13,000, on Mackertich's death, passed into the hands of the Administrator-General. The plaintiffs complain that the Administrator-General refuses to recognize their claim on the specific Rs. 13,000 which they say is liable to the debt, but regards it merely as enforceable against the general property of the deceased.

[324] The question, therefore, raised in the case is the plaintiffs' right, in virtue of this document, to follow the sum of Rs. 13,000 in the hands of the Administrator-General, and render it liable for the debt which the joint and several promissory note created.

I think that what was said in the Court below, and has just been said by my lord, makes it clear that it is only by treating this document as a mortgage and investing it with all the effects of a mortgage that we could do what the plaintiffs ask, and as I think we are precluded by the Registration Act from allowing it to have this effect, I agree in thinking that the appeal must be dismissed.

Appeal dismissed.

Attorney for Appellants: Baboo *Gonesh Ch. Chunder*.

Attorney for Respondent. Mr. *Carruthers*.

NOTES.

[I. EQUITABLE MORTGAGE—REGISTRATION—

When the instrument operates as a mortgage, it requires registration if it is of the value of over Rs. 100.—10 Cal. 315, 12 Mad. 505; 10 Bom 634. But if it merely evidences a deposit of title deeds in pursuance of an equitable mortgage already made, it does not require registration.—13 Cal. 322; 83 Cal. 410.

II. AGREEMENT TO EXECUTE A MORTGAGE—

Does not require registration.—28 Mad. 54, 1889 P. R. 184.

III. UNREGISTERED DOCUMENT—ADMISSIBILITY IN EVIDENCE—

See on this point, 12 Mad., 505, 19 Bom, 36; 9 Bom., 63; 10 C P. L. R. 107; 20 Bom., 553; 5 C. P. L. R. 102.]

[10 Cal. 324]
PRIVY COUNCIL.

The 20th and 21st June and 11th July, 1883.

PRESENT

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Isri Dut Koer and others Plaintiffs

versus

Hansbutti Koerain and others. Defendants

[On appeal from the High Court at Fort William in Bengal]

*Declaratory decree, Suit for—Civil Procedure Code (Act VIII of 1859), s 15—
Hindu widow's control over savings of the income of her limited estate*

A suit brought during the life of a Hindu widow by the presumptive heir, entitled on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life, is among the exceptions to the general rule established by decision upon Act VIII of 1859, s 15, viz, that, except in certain cases, a declaratory decree is not to be made unless the plaintiff shows a title to, though he does not ask for, consequential relief *

Held, that although to grant a declaratory decree under the above section was discretionary with a Court, yet in a suit of this class, known to the law, and in many cases the only practical mode of enforcing the presumptive heir's right to interfere with the widow's alienation, the grounds for the discretionary refusal of the decree should be strong. In this case, the difficulty of the question raised, and the expense of the litigation, which had been referred to as grounds for refusing it, were insufficient reasons

[325] A widow's savings from the income of her limited estate are not her stridhan; and if she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. But it is not always possible to fix the line which separates accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. Where, however, both the family property, and property purchased by the widow out of savings from her income were alienated by her with the object of changing the succession, *held*, that accretion was clearly established, and that the after-purchases were inalienable by her for any purpose that would not justify alienation of the original estate.

A daughter, obtaining a transfer from her deceased father's widows of their interests in his estate, does not acquire thereby an estate valid against the title of the father's collateral heirs, expectant on the deaths of the widows.

APPEAL from a decree (24th June 1879) of the High Court of Bengal, reversing a decree (17th September 1877) of the First Subordinate Judge of Tirhoot.

The question raised on this appeal related to a gift made by the two widows of a deceased Hindu to the daughter of one of them, comprising

* *Kattama Natchar v. Dorasinga Tever* (L. R. 2 I A. 169, s C., 15 B. L. R. 83).

property in which the widows held their limited estate, and also property purchased by the widows out of the accumulated income from the same source. As to whether a declaratory decree, under Act VIII of 1859, s. 15, should have been made in favour of the presumptive heirs of the deceased husband, declaring that the gift operated only for the lives of the widows, the judgment of the High Court (see *Hansbutti Koerain v. Ishri Dutt Koer* I. L. R. 5 Cal. 512), differed from that of the Court of First Instance.

The appellants, the plaintiffs in the suit, were the sons of the brothers, with other near sapindas, of Budnath Koer, the husband, who died in 1857, leaving a daughter, Dyji Oghain, in whose favour the widows made the gift in question by deed dated 21st December 1873. This daughter afterwards died, herself leaving a daughter, with whom the widows were defendants in the suit, and now respondents.

By the deed of 21st December 1873, the widows gave to the daughter, with immediate possession, the property which had belonged to their deceased husband, consisting of shares in village lands specified in a schedule to the deed. Also other village lands [326] described in another schedule as "mahsoob khas," or property of which they had the entire control. A third schedule comprised other interests in land of which the owners were to retain possession during their lives without power of alienation.

The object, generally stated, of the suit brought by the presumptive heirs of Budnath Koer was to have this deed of gift, so far as it might control the inheritance after the widows' deaths, declared invalid against them. They alleged that the properties in the second schedule had been bought by the widows out of income, and were subject to the same rule of inheritance as the parent estate. The defence (amongst other things) denying that the property in the second schedule could be claimed as belonging to the estate of the deceased husband, maintained that the plaintiffs, showing no title to relief, before the deaths of the widows who were alive could obtain no such declaration.

The Subordinate Judge of Tirhoot, Mr. W. DeCosta, found that the property in the second schedule had been purchased by the widows out of the income of the family estate, to which he, therefore, held it to be an accretion. Referring to all the property, he held that there was no principle of Hindu law permitting a gift by a widow to her daughter, next in the line of succession, to defeat the rights of the presumptive heirs, and that to allow the donee's daughter to take as heir an estate of inheritance, through her mother, would be to change the legal course of descent, and was inadmissible. He, therefore, made a decree declaring that the deed of 1873 could not defeat the plaintiffs' right to succeed on the deaths of the widows, to the family estate; and that the properties purchased by the widows were an increment to the estate, and subject to the same rule of succession.

The High Court (AINSLIE and BROUGHTON, JJ.) confirmed the finding that the property in the second schedule had been acquired out of savings from the income of the widows' limited estate. But, on a review of the decided cases relating to the widows' power over accumulations, they observed that it had not been precisely determined what that power was. The authorities were rather in favour of her being able to alienate the proceeds of her own savings. If the Court had been bound to make a decree, it would have made a reference to a Full Bench in regard to the conflict

be-[327]tween the cases of *Gros v. Amirtamoyi Dasi* (4 B. L. R., O. C. 1) and *Puddamoni Dossee v. Dwarkanath Biswas* (25 W. R. 335). They held it expedient to refuse a declaratory decree, having a discretion to do so. The judgments of both Judges are reported in the Indian Law Reports, 5 Cal., p. 512.

On this appeal—

Mr. C. W. Arathoon, for the Appellants, argued that the grounds given by the High Court for withholding a declaratory decree were insufficient. In the first place, without dealing with the question of the accumulations, a suit by the reversioners would lie at once to set aside so much of the widows' transfer of the family estate as would, if undisputed, operate to deprive them of the succession. Such a suit was mentioned in Act IX of 1871, sch. II, art., 124, and in Act XV of 1877, art. 125, where the period of limitation, twelve years from the date of the alienation, was fixed for it. This class of suits was also expressly exempted in the judgment in *Katama Natchiar v. Dora Singa Tever* (L. R. 2 I. A. 169, s.c., 15 B. L. R. 83) from the general rule requiring that the plaintiff seeking a declaratory decree should be in a position to claim consequential relief, and referred to in the words of the judgment —“The right of a reversioner to bring a suit to restrain a widow, or other Hindu female, in possession, from acts of waste, although his interest during her life is future, and contingent, suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*.” Again, in *Gobindmoni Dasi v. Shamlal Baisakh* (B. L. R. Sup Vol. 48) it had been decided that the reversionary heir might, during the life of the widow who had alienated the family estate, commence his suit to protect his title to the future possession after her death. It was necessary as soon as possible, in many cases, to question the widows' act, and this class of suits was not open to objection, although brought by heirs entitled only in expectancy, whose interests might never take effect.

Secondly.—On the question whether by Hindu law the widow could dispose of the invested accumulations, and also whether she [328] could by releasing to a daughter confer an absolute estate on the latter, no such power existed.

The profits of her limited estate were not the widow's stridhan, but unless they were, she could not dispose of them in the manner attempted. The daughter could not acquire an absolute estate by taking a transfer from the widows, nor could she transmit such an estate to her heir. A daughter's estate is not stridhan, *Chotaylall v. Chunnolull* (L. R. 6 I. A. 15, s.c., I. L. R., 4 Cal., 744). The Mitakshara, which governed the parties, admitted no right on the part of women holding limited estates to make separate estate out of them.

Mr. J. H. W. Arathoon, for the Respondents, argued that the deed of gift of 1873, on its true construction, conferred only an estate for the lives of the widows in the corpus of the family estate. This the widows had power to transfer, and so far there could be no ground for claiming a declaratory decree. On the question of the accumulations, which was the second point, the judgment of the High Court, withholding the decree on grounds of discretion, was correct. He cited *Sreenarain Mitter v. Kishensundari Dasi* (11 B. L. R. 171), *Tekait Doorgapersad Singh v. Tekaitni Doorga Koonwar* (L. R. 5 I. A. 149), *Ramanand Koer v. Raghunath Koer* (I. L. R., 8 Cal. 769).

Should it, however, be necessary, in order to show that there was no ground for a declaratory decree, to rely on the widow's power to dispose of the accumulations, the inclination of the Judge's opinions, stated in the judgments, was in accordance with the Hindu law. The widow could make a gift of accumulated income. He referred to the decision in *Puddamoni Dossee v. Dwarkanath Biswas* (25 W. R. 335), that a purchase having been made by a widow out of the income of her limited estate, it was competent to her to alienate such purchase, in whole or in part, or convert it back into money. He cited also, *Soorjeemoney Dossee v. Denobundhoo Mullick* (9 Moore's I. A. 123), *Conda Kooar v. Kooar Oodey Singh* (14 B. L. R. 159).

Mr C. W. Arathoon, in reply, referred to the judgment of MITTER, J., in *Kery Kolitani v. Moneeram Kolita* (13 B. L. R. 1) at page 8 of the report [329] in 13 B. L. R., also to *Bhugwandeem Doobey v. Myna Bae* (11 Moore's I. A., 487), *Chundrabulee Debia v. Brody* (9 W. R., 584); *Nihalkhan v. Hur Churn Lal* (1 Agra H. C., 219); *Bhagbatti Dae v. Chowdry Bholanath Thakoor* (L. R., 2 I. A., 256, S.C. I. L. R., 1 Cal., 104), and *Grose v. Amirtamayi Das* (4 B. L. R., O. C., 1).

He cited the opinion of MACPHERSON, J., who said that, "although the theory of the Hindu law is that the income of the husband's estate shall go to the widow for her maintenance and for the performance of pious duties, that theory by no means necessarily embraces the large lump-sum of accumulations. According to all the older authorities on Hindu law, accumulations should be treated in the same way as the corpus, and I think they should be so treated now, in the absence of any distinct authority to the contrary."

He also cited Elberling on Inheritance, Chapter V, Strange's Hindu law, Vol. I, Chap. I, paras. 2 and 3, Dayabhaga, Chap. IV, s. 1, Mitakshara, Chap. II, s. 11, Vayavastha Darpana, 44, Vivada Chintamani, on separate property of women

Their Lordships' **Judgment** was delivered on a subsequent day (July 11th) by

Sir A. Hobhouse.—This is a litigation concerning the succession to the estate of one Budnath Koer, a Hindu who died towards the end of the year 1857. He left two widows, Hansbutti and Chunderbutti, who are still living, and one child, the daughter of Chunderbutti, who was named Dyji Ojhain, and who has since died, leaving only a daughter. On the death of Dyji the collateral male relatives of Budnath became his presumptive heirs, subject to the interest of the widows. They are the plaintiffs and the appellants. The defendants and respondents are the two widows, and Bachni the daughter of Dyji.

On the 21st December 1873 the widows executed a deed, whereby, after stating that with the exception of Dyji, there was no heir of their husband or of themselves, they made a gift to her of certain lands and villages, only retaining to themselves a life interest in part of them. Some of the property is described as mouzahs exclusively acquired by the widows out of their own fund, and the rest is described as having been left by their husband Budnath.

Dyji died in the year 1875, and in the course of the next year the plaintiffs brought their suit. The material parts of the prayer are for a decision

that the deed of December 1873 is null and void as regards the reversionary interests of the plaintiffs, and for a declaration that the properties acquired by the widows are part and parcel of their husband's estate.

By their written statements, and by the mouth of their pleader, the three defendants set up in substance the same defence. They say first, that the plaintiffs having only a contingent interest cannot maintain the suit; secondly, that if a widow releases her interest to her husband's heir presumptive, which Dyji was, the absolute interests becomes at once vested in such heir, and therefore the inheritance devolved on Bachni; thirdly, that at least the properties which were purchased by their own money either received from their parents or given to them by Budnath during his lifetime formed no part of Budnath's estate.

In the month of September 1877 the case was heard and decided by the Subordinate Judge of Tirhoot. He found that the properties purchased by the widows were so purchased out of the profits of Budnath's estate, and were accretions to that estate. He held that the conveyance to Dyji did not vest the inheritance in her, because she was heir only to a woman's estate, and the prescribed course of inheritance would be changed if she took an estate transmissible to her own heirs. And he gave the plaintiffs the decree they asked.

The defendants appealed to the High Court, and in June 1879 the case was heard by a Divisional Bench, consisting of Justices AINSLIE and BROUGHTON, who reversed the decree below and dismissed the suit with costs. From that decree the plaintiffs bring the present appeal.

The learned Judges think that the first part of the plaintiff's prayer cannot be entertained, because it is clearly competent to the widows to convey their own interest, because as regards Budnath's original property it is not necessary to construe the deed of 1873 as doing more, and because as regards the after-purchases [331] the widows only convey such legal interest as they believe themselves to hold. Their Lordships are unable to follow this reasoning, even when confined to Budnath's original estate. The defendants have not met the plaintiffs by saying that by the conveyance Dyji got nothing more than the widows' interest; they have contended that by coalition with Dyji's inheritance it gave her an estate transmissible to her own heirs. If then the true construction of this transaction be that it passes only the widows' interest, it materially concerns the plaintiffs to have that construction established. In this part of their prayer they ask nothing more favourable to themselves, and as between themselves and the defendants who allege an adverse construction, they are clearly entitled to as much, unless they are excluded by the rules relating to declaratory decrees.

The after-purchases fall under the same observations, and with respect to them two other substantial questions are raised, one of fact and one of law. First, the defendants deny that they were made out of the proceeds of Budnath's property, and this issue has been decided against them in both Courts, and is no longer a matter of dispute. Secondly, they contend that such purchases are not to be treated as accretions to the property from the proceeds of which they were made, but belong to the widows who made them.

The learned Judges below do not treat the latter question as unimportant to the plaintiffs; but they consider it to be one of great difficulty, unsettled by

authority, and requiring reference by a Full Bench. In their judgment therefore the case is not a proper one for a declaratory decree. Mr. Justice AINSLIE states the principle of their decision as follows :—

“ It seems to me that we ought not to allow this suit to be protracted and great additional expense to be incurred, when it is quite possible that the widows or one of them may survive the plaintiffs, so that the estate may never vest in them and the decision arrived at may prove no bar to further litigation.

“ For the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be be-[332]fore the Court some person entitled to immediate relief (if the decision is in favour of the plaintiff) will not prejudice his rights in any way. ”

This suit was instituted before the passing of the Specific Relief Act, and its propriety must be tried by the law as it stood under s. 15 of the Procedure Code of 1859. That section does not confer any right to declaratory relief in any given case, but merely enacts that no suit shall be liable to objection on the ground that a merely declaratory decree is sought, and that it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.

It is true that the apparently wide door here opened for declaratory suits is greatly narrowed by the decision that, as a general rule, the Court shall not make a declaration except in cases in which the plaintiff could if he chose seek some consequential relief. That doctrine was clearly laid down in the case of *Kattama Natchiar* (L. R. 2 I. A., 169, s.c. 15 B. L. R., 83), but it was there stated to be subject to exceptions. Their Lordships think, and here they agree with the learned Judges below, that such a suit as the present falls among the exceptions.

It is laid down, and in their Lordships' opinion correctly, in *Shama Churn Sircar's Vayavastha Darpana*, that “ if a widow, without consent of her husband's heirs, dispose of his property for purposes not sanctioned by law, they are entitled to interfere and prevent any such wrongful alienation by her ” (*Vayavastha Darpana*, *Vayavastha* 44). Yet it is clear that a widow may alien her own interest. If then she executes a conveyance valid for her own interest but purporting to convey a larger interest to the grantee, it is difficult to see how the reversioner can get any relief except a declaration that the conveyance is void *pro tanto*. He cannot set the deed aside, because it is partly valid, nor can he affect the possession, which the widow has a right to keep or to give up to another. Such suits as the present one would seem to be, at least in many cases, the only practical mode of enforcing the heirs' right to interfere with a widow's alienation. That they are known to the law is clear, for Act IX of 1871, art. 124, prescribes the time for bringing a “ suit during the life of a Hindu widow by a Hindu entitled to the posses-[333]sion of land on her death, to have an alienation made by the widow declared to be void except for her life.” That is precisely the first part of the plaintiffs' prayer in this suit. And the person “ entitled ” must mean the presumptive heir who would be entitled if the widow died at that moment.

It is true that the foregoing considerations do not settle the case, for there remains a discretion in the Court, which may find it, as the High Court has found it, inexpedient to grant the relief asked. But their Lordships think that a strong case of inexpediency should be shown for refusing declaratory relief.

to classes of persons expressly recognized by the law as suitors for such relief. They do not say that there may not be such a case, but they cannot find it here.

The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of Budnath, as to which the plaintiffs are clearly right and the defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless; because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it.

Moreover, it is to be observed that objections resting on the difficulties of the dispute are of much more weight in a preliminary stage than in a Court of Appeal. If the defendants had in the first instance objected to declaratory relief and had taken the opinion of the Subordinate Judge on that point, there would then have been more ground for refusing relief in order to save expense and litigation. But they did not do that. They disputed the whole case of the plaintiff. An important issue of fact, and two important issues of law, were decided by the first Court in the plaintiffs' favour. After all this it comes very late for the Court above to reverse the action of the Court below on the ground of discretion and in order to save further litigation and expense.

[334] For the above reasons their Lordships think that they are bound to decide the issues raised in this case.

So far as regards the contention of the defendants that Dyi could by the conveyance take an absolute estate transmissible to her heirs, the High Court have not expressed any opinion adverse to that of the Subordinate Judge, and their Lordships need do no more than express agreement with him.

The difficult question of the after-purchases is very ably discussed by the learned Judges below, who would probably, if compelled to decide, have decided against the plaintiffs. The difficulty is enhanced, if not created by the later current of decision, which gives to the widow a more free and complete usufruct of her husband's property than is accorded to her by the texts and earlier decisions, a modification of the law which is strongly illustrated by the conflicting opinions of Mr. Justice DWARKANATH MITTER and his colleagues in the case of *Kery Kolitani* (13 B. L. R., 1).

The question was argued at the bar as though it were necessary to divide all the property of a widow into two classes, one being her *stridhan*, and the other her husband's estate over which she has the widow's right and no more. But the very question is, whether, having regard to the widow's freedom in enjoying her husband's property, and to her established right to alienate her own interest in it, she has not a kind of property the nature of which must remain undecided till her disposal of it or her death. It is impossible to read Mr. Justice AINSLIE's forcible argument, without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may

save and spend again may she not place her savings so as to get some income from them ? And so on through all the steps of the *sortes*.

To decide this question it is necessary to examine the authorities, which are by no means in accord. But their Lordships do not treat as authorities on this question the numerous cases cited at the bar, to show that a widow's savings from her husband's [335] estate are not her *stridhan*. If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. The dispute arises when the widow, who might have spent the income as it accrued, has in fact saved it and afterwards attempts to alienate it. And the existing conflict of opinion upon it makes it desirable to pass the authorities briefly under review.

The earliest case which is relied on as an authority for the widow's power of alienation was decided by this Board in the year 1862, viz., *Soorjeemoney Dossee v. Dinobundho Mullick* (9 Moore's I A. 123) The case, however, was of a different sort. A Hindu testator's estate was under administration, and there was dispute as to interests taken by some of the parties. One of them died during the litigation, leaving a widow. He was ultimately declared to be entitled to an absolute interest in a share of the property, and the question then arose, how the income which had accrued from his share should be disposed of. The Supreme Court held that both the income which accrued during his life and that which accrued after his death should be held by his widow in that character. On appeal that decree was varied, and it was declared that, so far as regarded the accumulations after the death of the legatee, his widow was entitled to them absolutely in her own right. Here, then, the widow had not saved the income in question, she had never had the option of saving or spending it, and all that was done was to recognize her right to the full usufruct and control over it.

In the year 1866 the High Court of Agra expressly decided the point in question. A Hindu widow purchased property and afterwards alienated it. The Court first found that it was purchased with the proceeds of her husband's property, and then held that it was ancestral and the alienation invalid (*Nihal Khan v. Hur Churn Lal*, 1 Agra H. C. 219)

In the case of *Grose v. Amritamayi Das* (4 B. L. R. O., 1) Mr. Justice MACPHERSON held, while saying that he had formerly thought the contrary, that accumulations ought to follow the corpus. In that case, however, the accumulations accrued before the widow recovered the estate, and the opinion expressed by Mr. Justice MACPHERSON [336] seems to be at variance with the decision in *Sorjeemoney Dossee v. Dinobundho Mullick*.

In the case of *Bholanath v. Bhagabathi* (7 B. L. R., 93) decided in 1871 the Calcutta High Court (JACKSON and AINSLIE, JJ) held that a Hindu widow could not alienate property acquired by her out of the income of the husband's estate, but that she could make valid gifts to her daughter and grand-daughter by buying property in their names. This case came before the Privy Council in 1875, when it was held that the widow held the husband's estate not in her capacity of widow but as taker of a life interest under a settlement. But in their judgment the Board said : " If she took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate " (*Bhabut Dase v. Chowdhry Bholanath Thakoor*, L. R. 2 I. A., 256).

In the year 1874, before the appeal in the last case was heard, another case in which the point was discussed had come before the Board, *Gonda Koer v. Oodey Singh* (14 B. L. R., 159). In that case there was no alienation

by the widow, and the Board treated the point thus : " It, therefore, becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself and to sever from the bulk of the estate such purchases as she had made with the view of conferring them on her adopted son." As the case stood, the widow's purchases accrued to her husband's estate.

In 1876 the point came again before the Calcutta High Court. The Division Bench, consisting of Judges JACKSON and MACDONELL, thought that their decision might be rested on other grounds, but expressed themselves as prepared to base their decision on the ground that a Hindu widow, having purchased land with the money derived from the income of her husband's estate, is competent afterwards to alienate her right and interest in whole or in part to reconvert the land into money, and to spend it if she chooses *Puddomonee Dossee v. Dwarkanath Biswas* (25 W. R., 335).

[337] This is the state of the authorities, and their Lordships, differing from the learned Judges below, think it must be taken as adverse to the claim made on behalf of the widow. They do not rest on what was said by them in *Bholanath's case* as decisive of this case, for the observation must be taken as applied to the then pending case, and it was, moreover, extra-judicial, and is fairly open to the qualifications with which Mr. Justice AINSLIE reads it. Nor do they think it possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it. As before said, they feel the force of Mr. Justice AINSLIE'S reasoning on this point.

In this case the properties in question consist of shares of lands, in which the husband was a shareholder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after-purchases. Parts of both are conveyed to Dyji immediately, and parts of both are retained by the widows for life. These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purpose which would not justify alienation of that original estate.

The result is that, in their Lordships' opinion, the decree of the High Court should be reversed, and that of the Subordinate Judge restored, and that the respondents should pay the costs incurred in the High Court and the costs of this appeal. They will humbly advise Her Majesty in accordance with this opinion.

Appeal allowed

Solicitor for the Appellants. Mr. T. L. Wilson.

Solicitors for the Respondents. Messrs. Henderson & Co

NOTES.

[1. INCOME, THOUGH ABSOLUTE PROPERTY, WHEN BECOMES ACCRETION TO THE ESTATE—

This is the leading case on the subject; and there have been two subsequent Privy Council decisions :—In (1887) 14 Cal. 337 at 393, there are observations as to such income being *prima facie* part of the estate but in *Saodamm Das v. The Administrator-General of Bengal* (1892) 20 Cal., 433 P. C. (in the High Court (1889) 16 Cal., 574 ; 14 Cal., 861) these observations occur.—

" She did nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate which was in other hands or to justify the inference that she

wished it to revert to her husband's heirs. It was said she had placed it in investment of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the funds to the estate devolving on her husband's heirs."

Sir I' Bhashyam Ayyangar J. in (1901) 25 Mad. 351 after discussing and explaining these three cases observed that the *prima facie* presumption in the case of purchases from income which are at one's absolute disposal, though the corpus is not, is in favour of the acquirer retaining dominion over it, and that the mere fact of the properties thus acquired by her being managed and enjoyed by the widow without any distinction, along with properties inherited from her husband, can in no way affect this presumption, since, being sole and separate owner of the two sets of properties so long as she enjoys the same, and being absolutely entitled to the income derived from both sets of properties, she cannot but manage and enjoy both sets of properties alike, and that purchasers from her can be expected to deal with her upon this presumption.

SIR S. SUBRAMANIA AYYAR approved of the above and held that properties purchased out of maintenance paid under a decree were *stidhan* — (1904) 28 Mad. 1.

The points brought out in these cases as pertinent evidences of intention were (1) attempts to keep the two together in *one line of succession*, 10 Cal., 324, 14 Cal., 387, (2) there being no estate to which the income would be accretion, (20 Cal., 493, 28 Mad., 1) etc.

The Madras case was not followed in (1910) 7 I. C., 27 (Cal.); where purchases of immovable property were held to stand on a different footing, and income undisposed of and remaining in agent's hands at the death of the widow was held to be part of the corpus — (1911) 16 C. W. N., 106, (1911) 16 C. W. N., 834 distinguishing 10 Bom., 478. House built on husband's site from debts on security of husband's estate which were paid off from income, it was held, formed part of the estate — (1902) 4 Bom., L. R., 555.

Property of husband saved out of income was held to go with his estate — (1911) 16 C. W. N., 834.

II. ALIENATION—NEXT HEIR—CONSENT—

In this case of 10 Cal., 324 it was held that by the alienation of a limited owner to the next heir, when the latter person is by the law of succession entitled to a life estate only, the latter does not take a higher interest by the alienation—because the alienor alone drops out. See also 14 All., 377, 11 All., 253.

Similar is the result when the alienation is made conjointly with such 'limited' next heir—14 M. I. A., 176, 5 Bom., 563, 25 Bom., 129, 32 Cal., 62, 29 All., 341 P.C.—because only the alienor's interest passes. The result is different when the next heir is a male — 30 All., 1, 10 Cal., 1102.

Likewise, the consent given by a limited owner to such an alienation is utterly ineffectual and it has been held to be not even *prima facie* evidence of legal necessity — (1908) 35 Cal., 1086, 12 C. W. N., 914, 8 C. L. J., 120 unlike the consent given by males.

III. DECLARATORY DECREE—WHEN GRANTED—

Though no consequential relief is claimable, it has been held that a declaratory decree may be passed in suits by presumptive reversioners, on the ground of perpetuation of testimony, 10 Cal., 324.

But this is not the only exception. Allowing property to be wasted, e. g. letting it to be barred by limitation, or acting contrary to will, has been held sufficient ground to maintain a declaratory suit — (1906) 3 C. L. J., 224 at 230.

A widow being entitled to alienate her life interest, the mere fact of her alienation is not ground for a declaratory suit — (1910) 8 M. L. T. 320 where the deed, being a deed of relinquishment, did not affect the reversionary interest, (1901) 5 C. W. N., 445 where the deed was a mortgage for a small portion of the debt which might be paid off from the income.

But where the alienee's name was allowed to be entered in the landlord's sherista, (1884) 10 Cal., 1003, or where the life-interest was sought to be enlarged (1894) 22 Cal., 354, the suit was allowed.

IV. DECLARATORY DECREE GRANTED BY LOWER COURT—APPELLATE COURT'S POWERS—

Such decree should not be lightly interfered with — 10 Cal., 324, 26 All., 288; 28 Mad. 57.

V. RES JUDICATA BY DECISIONS IN DECLARATORY SUITS OF PRESUMPTIVE REVERSIONERS—

In this case which related to alienation, the Privy Council, in dealing with the use of declaratory decrees in such suits, observed that the decree would have a deterrent effect, *even if it be not binding on the actual reversioners*. The Madras High Court, having regard to certain observations of the Privy Council in suits relating to adoption, has invested decisions in declaratory suits relating to adoption with the effect of *res judicata* and confined the observations here to suits relating to alienations — (1906) 29 Mad. 390 (F.B.); 16 M. L. J. 307; 1 M.L.T. 183; *contra* (1902) 13 M. L. J. 359.

See also the following cases — 27 Mad., 588, 22 All., 33; 382; 14 Bom. 51; 22 Cal., 354; 3 C.L.J. 224 at 231.]

[338] APPELLATE CRIMINAL.*The 22nd September, 1883.**

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE PIGOT.

Brae

versus

The Queen-Empress.

Rioting—Penal Code, s. 156—Manager of indigo factory.

In order to convict the manager of an indigo factory under s. 156 of the Penal Code, it must be shown by legal evidence (1) that a riot was committed, (2) that the riot, if committed, was committed for the benefit of the accused, and (3) that the accused had reason to believe that a riot was likely to be committed.

THIS was a prosecution under s. 155 of the Penal Code against the manager of an indigo factory, by which he was charged with not having used all lawful means to prevent a certain riot, which it was alleged had taken place between his servants on the one side and some other parties, tenants of an adjacent landowner, on the other, the same having been committed for his benefit, and he having had reason to believe that it was likely to occur.

The case for the prosecution was, that for a considerable time a dispute had been going on between the factory people and certain ryots, concerning some lands, which the former had taken by force from the latter, and on which they had sown indigo, that suits had been brought in respect of these lands by the ryots; that decrees had been obtained, and that finally they had been put in possession of them two days before the alleged occurrence took place. That several of the servants of the factory were present when possession was given by the nazir of the Civil Court, and that there was indigo six inches high growing on the lands at this time. That on the morning of the 9th March, at about 7 A.M., Brae, the manager of the factory, had been seen riding in the direction of the lands in dispute, and that latter in the morning he, together with some of his own men, had passed close to, and inspected the indigo growing on them. That at about 10-30 or 11 A.M., a large body of factory servants armed with *lathies*, and [339] one of them with a gun, went to the lands where the decree-holders were commencing to plough up the indigo, that a riot occurred, and that one of the tenant's party was killed, having been shot by the jaj-ameen of the factory. That Brae was at his house two miles off when the riot occurred, and that he had taken no steps whatever to prevent it.

Mr. *Dunne* for the appellant. A manager can only be charged under s. 156 and not 155, and in order to make him liable, it must be shown that the acts committed were either directly or indirectly instigated by him, and were for the benefit of the owner or occupier of the land.

In this case there is nothing to show that a riot did actually take place, as no facts have been spoken to from which a common object can be inferred, except the death of the man who is said to have been shot. But it cannot be suggested that Brae instigated such a proceeding as this, nor can it be said to have been for the benefit of the owner or occupier. The prosecution have also failed to show that the manager had any reason to anticipate a riot, for the fact of possession having been given to the decree-holders would not of itself be sufficient to raise a presumption to that effect. Further there is nothing to show that Brae had any means at his command to prevent a riot of the kind alleged.

* Criminal Appeal No. 538 of 1883, against the order of Mr. W. G. Deane, Sub-Divisional Magistrate and Justice of the Peace of Jhenidah, dated the 28th August 1883.

The Deputy Legal Remembrancer Officiating (Mr. White) for the Crown. These sections are intended to put a stop to riots committed or abetted by managers of indigo factories, and as regards the evidence to be given in prosecutions under them, nothing more than a *prima facie* case need be made out in the Magistrate's Court. The Legislature, when framing these sections, evidently contemplated that a trial of the original riot case should have taken place, and that the offenders had been punished by the Sessions Court, where the evidence would be of a minute and voluminous nature, and that after that case had been decided, a proceeding of this kind should be taken to bring the manager to book. There is abundant evidence to show that a riot was committed. We show that a man was killed, and by one of the factory servants who was provided with a gun. We show that Brae passed and inspected the lands in the morning with some of his men, that a little after a number of his people went out in a body armed, and that they went to the [340] decree-holders' land, and whatever the dispute was, a man was killed. The indigo on the land was of great value to Brae, the object that these men had in view was to prevent its being ploughed up, and if they had done so, it would have been a decided benefit to the owner. O'Kinealy's Penal Code, p. 54, and the case of *The Queen v. Hurnath Roy* (3 W. R. Cr., 54) were referred to.

The following **Judgments** were delivered by the Court (MITTER and PIGOT, JJ.) —

Mitter, J.—The appellant in this case has been convicted by the Sub-Divisional Magistrate of Jhemidah under s. 155 of the Indian Penal Code. It is quite clear, and it is not disputed that that is not the right section under which he should have been convicted. The appellant was simply the manager and not the owner of the land respecting which the alleged riot took place. The section under which he should have been charged is s. 156, but it appears to me that on three essential points the evidence that has been adduced is not sufficient to establish an offence under s. 156.

The first point that is necessary to be established is that a riot was committed, but there is no evidence to prove that a riot, as defined in the Penal Code, was committed. It is necessary to show that there was an assembly of more than five persons, who had a common object in view, but in this case there is no evidence to show that the servants of the factory, who are alleged to have constituted the unlawful assembly, had any such common object. It is said that their object was to prevent the indigo plants being uprooted, but no evidence of this has been adduced on behalf of the prosecution. Therefore, there is no legal evidence to establish that a riot was committed.

The second point upon which evidence for the prosecution is wanting is that it is not shown, supposing that a riot was committed, that it was committed for the benefit or on behalf of the person who was the owner or occupier of the land respecting which such riot took place. If the common object was to prevent the indigo plants being uprooted, then in that case no doubt it could have been reasonably inferred that the riot was [341] committed for the benefit or on behalf of the owner of the land, but that being not established, it follows that it is not shown that the riot, if it was committed, was committed for the benefit or on behalf of the owner or occupier of the land.

The third point is that it is not shown that the appellant before us had reason to believe that any riot was likely to be committed. No doubt this fact can very seldom be established by direct evidence, but there must be circumstances from which it may be reasonably inferred. In this case the only circumstances that have been established are, that Mr. Brae was in

the factory at the time that the alleged riot took place, and that amongst the rioters were some servants of the factory; but these facts are not sufficient to give rise to the inference that before the riot took place—if any riot at all took place—the appellant had reason to believe that it was likely to take place.

Upon all these three points it seems to me that the evidence is not sufficient. Therefore the conviction and sentence will be set aside, and the fine, if realized, will be refunded

Pigot, J.—I entirely agree I would only add that in applying the sections which give the Magistracy powers of such startling magnitude, it is, in my opinion, incumbent upon those entrusted with the exercise of such powers to act not upon inferences or suspicions but upon evidence. Whatever may have been the object of the Legislature, whether as explained by the learned counsel for the prosecution or not, whatever may have been the occasion of the insertion in the Code of these most formidable sections, we must hold that the law thereby enacted is not intended to be applied upon surmise but upon proof.

Conviction set aside.

NOTES

[This case was in (1900) 4 C. W. N., 691 referred to with approval as regards the caution to 90 by proof and not by surmises.]

[342] ORIGINAL CIVIL.

The 19th February, 1884

PRESENT:

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND
MR. JUSTICE CUNNINGHAM.

Punchoo Money Dossee.....Plaintiff
versus
Troylucko Mohiney Dossee.....Defendant.

Hindu law—Will—Construction of will—"Malik."

N had two wives, one of whom died in his lifetime, leaving a daughter (the plaintiff), and K, who survived him, the mother of another daughter (the defendant). N died having, in February 1844, made his will which contained the following passage.—

"Whatever I have of moveable and immoveable property, my wife K is the *malik* thereof. she will pay whatever debts there exist and receive whatever dues there are receivable, and I have given commandment (permission) to my wife to adopt a son. When the adopted son attains his age he will become the *malik* of the whole of my property and will perform the *shrad* and *tarpan* of my father and father's father, and in the event of any good or evil befalling the said adopted son, she will again adopt a son * * * and upon the adopted son attaining his age, he will become 'the *malik*' of the whole of the property."

K, who survived the testator, did not adopt, but took possession of the property and remained in possession till she died in 1875, and after her death the testator's children held the properties in equal shares, with the exception of a house, which the defendant had taken sole possession of. The plaintiff brought this suit for partition, and for an account of that part of the property which had been in sole possession of the defendant. The defendant contended that her mother took an absolute estate under the will, and that she as her heir was entitled to the whole estate.

I held, that the use of the word "*malik*" as applied to the widow did not necessarily mean that she should take an absolute estate, and that the directions in the will to adopt, and that the adopted son should become *malik* rather indicated an intention on the part of

the testator that the widow should only take a limited estate, and that the word "malik" as applied to the widow could not therefore be interpreted as giving her a larger interest.

APPEAL from a decision of WILKINSON, J., dated 9th July 1883.

This was a suit practically for the construction of the will of one Narain Dutt (although partition and an account were asked for also), who died on the 1st February 1844, having made his last will and testament on the same date. The testator left him sur-[343]viving a widow, Kristo Kaminey Dossee, and by her a daughter (the defendant) Troylucko Mohiney Dossee, and two daughters by a wife who predeceased him, viz., Punchoo Money Dossee (the plaintiff) and Nemoye Money Dossee. The portion of the will material for the purpose of this report ran as follows :—" Whatever I have of immoveable and moveable property and ready money anywhere, my wife Sreemutty Kristo Kaminey Dossee is the malik or proprietress thereof. She will deal with my debts and dues agreeably to the particulars below, she will pay whatever debts exist and recover and receive whatever dues there are receivable, and I have given commandment (permission) to my wife she will adopt a son, when the adopted son attains his age he will become the malik or proprietor of the whole of my property, and will perform the shrad and tarpan of my father and father's father, and in the event of any good or evil befalling the said adopted son, in that case she will again adopt a son." Kristo Kaminey Dossee died in 1875 without having adopted a son, having taken possession of the property of the testator, and after her death her two daughters, the plaintiff and defendant, had been in possession of the properties in equal shares, with the exception of the house in question, and some moveable property which the defendant had taken sole possession of.

Mr. *Bommerjee* and Mr. *Beeby* for the plaintiff.

Mr. *Mitter* for the defendant.

Wilkinson, J. (after setting out the facts) continued.—

I am asked to say whether under these words Kaminey Dossee took an absolute interest in the immoveable property, or whether she only took the ordinary interest of a Hindu widow. The word "malik" means "absolute owner," "malik" applied to a man means "absolute owner," and Mr. *Mitter* points out the same word is used to the son to be adopted, and contends that the same meaning should be attached to the word when applied to Kaminey Dossee. If the will stopped with the direction to pay the debts, it would clearly indicate that she was to receive the absolute interest in the property, and I think if she took that interest, she retained it till her death as no son was adopted. Although the word "commandment" is used, it is not a correct translation. [344] The Bengali word is "anoowrutty" which means "permission" and implies discretion on the part of the two widows to adopt or not. Mr. *Beeby* supports the contention that she took only a life-interest, and quotes the case of *Koony Behari Dhu v. Prem Chand Dutt* (1 L. R., 5 Cal., 684) and *Soorjeemoney Dossee v. Denobundo Mullick* (6 Moore's L. A., 526, at p. 550) in which the canon of interpretation was laid down viz. "Primarily the words of the will are to be considered; they convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and when this is the case, no doubt these circumstances must be regarded, and amongst these circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out."

Here taking the words it seems to me when a man leaves property and says he or she shall be malik it means absolute owner, and the only meaning which the language bears must be put upon it. As regards the law a widow would take a life-interest, but though the law is against her taking other than

a life-interest, it seems to me the words are not dubious and give her an absolute interest. The words in the will are not mandatory but permissive. There is nothing to compel her to adopt, and as she died without adopting a son, that property descends to her daughter, that being my opinion in the case, there is no necessity to give any directions and the suit will be dismissed with costs on scale No. 2.

The plaintiff appealed.

Mr. *Bonnerjee* (with him Mr. *Beeby*) for the appellant. The question raised is whether in default of the adoption there is an absolute estate to the wife. The lower Court has ordered us to pay the costs, notwithstanding that it was a suit for the construction of the will. We also offered to go into evidence to prove that the property was joint, and that we were in possession of a portion of the property and had a right to possession, but we were not allowed to do so. I submit there are no words used in the will which would give the widow anything more than an ordinary widow's estate. The lower Court has decided that "malik" means "absolute owner," as to this [343] it is unnecessary to make use of any special words for a Hindu to give an heritable and alienable interest. Unless a husband in a gift to his wife makes it clear that the estate which he gives is an heritable and alienable estate, the widow only takes the estate that the law gives her. The intention of the testator here was that an adoption should be made, this intention is shown very strongly, and it seems, therefore, that he had no intention that the property should go to a person (viz., to his widow) who could not perform his shrad, and if the widow had an absolute estate, she could have given it away and defeated the intention of the testator altogether.

As to the word "malik," in *Moulvi Mahomed Shumsool Hooda v. Shewukram* (14 B. L. R., 226, L. R., 2 I A, 7) a statement was made in a document of a testamentary character that his "widow was and none other should be his heir and malik," the Privy Council held that the widow did not take an absolute estate, but only a life estate.

[CUNNINGHAM, J. - That case seems on all fours with the present case, except that there, there were actual persons who were in existence to become heirs and malik, whereas in this case the gift is contingent as it were, as the widow was only permitted to adopt, and might not call the future malik into existence.] Yes, but we have the testator's intention.

In *Raj Lukhee Dabhu v. Gookool Chunder Chowdhry* (13 Moore's I. A., 210; 3 B. L. R. P. C., 57) a testator gave all his property to his widow by testamentary deed of gift (disqualifying her from selling or alienating it) in trust for his sons when they came of age, the sons died before attaining majority: the Court held that the widow did not take an absolute estate.

The case of *Mussamat Kollany Koer v. Luchmee Pershad* (24 W. R., 395), mentioned in Mayne, p 398 (3rd edition), may be relied on by the other side: The testator says "that his widow and daughters are his heirs, and maliks and that all his property will devolve on them." Mr. Justice MITTER held that the widow took an absolute estate, but the decision did not depend on the word "malik" alone, but the whole of the will was taken into consideration.

[346] In the case of *Prosonno Coomar Ghose v. Taraknath Sircar* (10 B. L. R., 267) a testator used the words, "I give to my wife, her heirs and assigns my estate for ever," and Mr. Justice PHEAR held that the wife took only an estate for life, this, however, was overruled by the Appellate Court.

In an unreported case decided by GARTH, C.J., and BOSE, J., Regular Appeal 340 of 1880, a widow mortgaged her proprietary right ("hakiut and

milkiut") and the Court held that the word meant an absolute estate; the word "milkiut" is the same as "malik," but in that case two words were used, viz., "hakiut milkiut : " we only have one.

I submit that "malik" simply means "executrix according to the tenor of the will ; " the testator clearly defines what the widow's duties as malik would be, viz., to pay his debts, and then says, the adopted son on attaining full age shall be "malik" of the whole estate.

In *Koonj Behari Dhur v. Prem Chand Dutt* (I. L. R., 5 Cal., 684) JACKSON, J., held that a Hindu widow takes no more right by will over property of her husband than she would get by a gift in her husband's lifetime. There is always a presumption where an estate is given to a Hindu widow that the estate given is that only of a Hindu widow, and that presumption is strengthened when the widow has power to adopt.

Mr. *Kennedy* (with him Mr. *Hill*) for the respondent, contended that the Court could not speculate as to what the intention of the testator was and as to what the effect of the will would be, but the will must be looked at and read and its direction followed out, and that the lady had no power of alienation under the circumstances. He referred to *Dyabagha*, ch. IV, V, I, s 3, to the effect that the property became *stridhan*; and cited the cases of *Mussamat Kollany Koer v. Luchmee Pershad* (24 W. R., 395) and *Sreemutty Pabitra Dossee v. Damoodur Jana* (7 B. L. R., 697, 24 W. R., 397, note), to show that the widow took an absolute estate.

The **Judgment** of the Court (GARTH, C.J., and CUNNINGHAM, J.) was delivered by

Garth, C.J.—The question in this case is, whether under [347] the will of Narain Dutt, his widow Kristo Kamney Dossee took an absolute interest in his property, or only the ordinary estate of a Hindu widow.

Narain had two wives. His first wife died in his lifetime, leaving one daughter, the plaintiff. His second wife, Kristo Kamney Dossee, was the mother of the defendant.

Narain made a will, dated the 1st of February 1844, which was in these terms :—(Reads the passage set out, *ante* p. 343).

After the testator's death his widow Kristo Kamney Dossee did not adopt a son. She took possession of his property, and remained in possession till she died in the year 1875.

One of the daughters mentioned in the will died, and only the plaintiff and the defendant were alive at the time of the widow's death; and they have ever since enjoyed the larger portion of the testator's property in equal shares.

But there is a house in Neemoo Khansamah's Lane, and some moveable property, of which the defendant, it appears, has been in sole possession, and the plaintiff has brought this suit for a partition of the testator's estate, and for an account of that part of the property which has been in the sole possession of the defendant.

This suit induced the defendant to raise the question, whether she as her mother's heir is not entitled to the whole estate as against the plaintiff, on the ground that under the will her mother took an absolute interest, and the Court below decided in her favour.

The learned Judge appears to have considered that the words of the will, describing the defendant's mother as "the malik" of the property, were sufficient to show that he intended her to take an absolute interest.

From this decision the plaintiff has appealed; and having heard the case argued on both sides, we expressed an opinion in the course of Mr. *Kennedy's* address to us on the part of respondent, that the view which had been taken by the learned Judge could not be upheld.

It appears to us that he attached too much weight to the meaning of the word "malik." It is true that in some cases the use of that word in a will or other instrument has, coupled [348] with other expressions, been considered as evincing an intention to pass an absolute or proprietary interest. But the word by no means necessarily imports that intention. There are other cases, where, although that word was used, it has been held that an absolute interest did not pass. In *Moulvi Mahomed Shumsool Hoda v. Shewukram* (14 B. L. R., 226, L. R. 2 I. A., 7), a Hindu testator, after reciting the deaths of his son and others, declared "only *D K*, widow of my son (who, too, excepting her two daughters, *S* and *D*, has no other heirs), is my heir. Except *D K* none other is or shall be my heir and malik. Furthermore to the said *D K* these very two daughters, together with their children who shall be born to them, are and shall be heir and malik."

In holding that this disposition did not give the widow more than a life interest in the estate, *COUCH, C J*, referred to the rule laid down in *Soorjeemoney Dossee v. Denobundo Mullick* (6 Moore's I. A., 526), that in construing a will one of the circumstances to be regarded is "the law of the country in which the will is made and its dispositions are to be carried out, that the intention of the testator was that the estate should be kept in his own family, and that malik meant merely 'immediate heir.'" This view was affirmed in the Privy Council, their Lordships observing that "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to devolution of property, and that having regard to these considerations, they ought not to hold that the widow took an absolute estate, which she was at liberty to alienate."

Much reliance has been placed on the observations of *MITTER, J.*, in *Mussamat Kollany Koer v. Luchmee Persad* (24 W. R., 395), but that case does not appear to govern the present, because it was held that the language of the will imported a distinct intention on the part of the testator that his widow and daughter should immediately on his death take a joint interest in his estate, and the contention which the Court had to consider, and which it disallowed, was that according to Hindu Law a gift to a female, though absolute in terms, conveyed merely a limited interest similar to that of [349] a Hindu widow. In the present case we do not consider that the words of the will indicate an intention on the testator's part that his widow should take an absolute estate. The direction to the widow to adopt a son, to adopt a second son in case of the first dying, and that on attaining majority the adopted son should become malik indicate, in our opinion, very clearly the limited nature of the widow's interest. Nor again does our present ruling in any way conflict with that of *COUCH, C.J.*, in *Prosonno Coommar Ghose v. Taraknath Sircar* (10 B. L. R., 267), because there the words of the will, in the opinion of the Court, "unequivocally showed that it was the testator's intention that his wife should become the absolute mistress of his estate," and, there being nothing in the will to displace that intention, the mere fact of there being two sons of the testator, who were thus disinherited, was not considered to justify the construction of the will according to which the widow merely took as trustee for the sons.

In each case we must endeavour to ascertain the true meaning of the instrument, and here it appears to us that the testator did not intend his

widow to take an absolute interest in the property. It seems evident that he intended her to adopt a son ; and in the event of that son's death, to adopt another ; and he provides that in either case, when the son comes of age, he should become the *malik* of the property.

This fact of itself seems to indicate that, so far as his wishes and intentions were concerned, they were opposed to his widow taking an absolute interest. He evidently only intended her to hold the property until his adopted son came of age ; she would then, in the ordinary course of law, take the estate of a Hindu widow until a son was adopted, and under the provisions of the will she would also be a trustee for her son until he came of age ; but in either case, so long as she was possessed of the property and had the management of it, she might properly be described in the will, and called in common parlance, the *malik* or *proprietress*.

In point of fact the widow did not adopt a son ; and in point [350] of law, whatever her husband's intention may have been, she was at liberty to disregard them in that respect.

So far as the costs are concerned, we find that the parties have proposed an arrangement amongst themselves, which we are quite prepared to confirm ; namely, that the costs on both sides shall be paid out of the estate. A decree will therefore be made for partition of the property in accordance with the prayer of the plaint, it being declared that the plaintiff and defendant are entitled, for the reasons we have given, to the whole of the testator's estate as his co-heirs, and we direct, with the consent of the parties, that the costs on either side in both Courts shall be paid out of the estate.

Appcal allowed.

Attorney for appellant : Baboo P. N. Bose.

Attorney for respondent : Baboo K. D. Bhunjjo.

NOTES.

[MEANING OF MALIK—

Prima facie, this word operates to convey a full estate.—(1897) 24 Cal 834 (839); (1896) 19 All , 16 , (1885) 9 Bom , 491 ; 30 All., 84 ; 14 C. W. N , 458 ; (1901) 28 Cal., 499 (502) ; (1899) 27 Cal., 44 (51) ; unless the context or the surrounding circumstances should point to a different conclusion —11 Bom , 69; 285, 14 Bom., 1. 27 All., 364, 35 Bom., 279 ; 10 Cal., 342 , 9 C. W. N , 309 ; 17 Bom , 503 : 24 Cal. 646 (652) ; 9 C. P. L. R , 95 ; 9 O. C. 119.]

[10 Cal. 350]

APPELLATE CIVIL.

The 29th January, 1884.

PRESENT:

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Omunissa Bibee and others.....Defendants

versus

Dilawar Ally Khan.....Plaintiff.*

Land Registration Act (Beng. Act VII of 1876), ss. 52, 55—Declaratory decree—Specific Relief Act (I of 1877), s. 42—Jurisdiction of Civil Courts—Possession, Confirmation of.

The Civil Courts have no jurisdiction to make a decree reversing an order for the registration of the name of any person made by a registering officer under Beng Act VII of 1876.

All that the Civil Courts can do is to declare the title of an individual, or to give him a decree for possession, and then the registration officers would, as a matter of course, proceed to amend their registers in accordance with the rights of the parties as settled by the Civil Courts.

An order made under s. 55 of Beng Act VII of 1876, prevents the person against whom it is made, from relying on his previous possession, in a subsequently instituted suit for confirmation of possession. An order made under s. 52 of the same Act has not that effect.

[351] THIS was a suit for confirmation of possession on the following title: The plaintiff alleged that he had bought 8 annas of the property some time previously to the year 1870, and that his father at the same time purchased the remaining 8 annas share. That the father died in May 1870 when 1 anna 11 gundas 1 krant and 1 dunt share of the father's 8 annas share came to the plaintiff under the Mahomedan law of inheritance. The plaintiff made an application to the Deputy Collector of Patna for registration of his name in respect of the share claimed by him under Beng Act VII of 1876. This application was opposed by the defendants, on the ground that the plaintiff's story as to his purchase of 8 annas was false, that the father was the real purchaser of the whole 16 annas; and that the plaintiff was only entitled to the share which, on the death of the father, devolved upon him under the Mahomedan law of succession. The Deputy Collector disbelieved the plaintiff's story and, on the 28th of February 1878, ordered that the names should be registered in accordance with the defendants' contention, and this order was affirmed on appeal to the Collector on the 31st of July 1879. On the 24th July of 1880 the plaintiff brought the present suit, claiming confirmation of possession, and asking that the Collector's order of the 31st of July 1879 should be set aside.

The Court of First Instance found in favour of the plaintiff on the question of title, and also found that the plaintiff was in possession under that title at the date of the institution of the suit. He therefore gave the plaintiff a decree as claimed by him, and this decision was upheld on appeal to the Subordinate Judge of Rajshahye. The defendants appealed to the High Court on the

* Appeal from Appellate Decree No. 931 of 1882, against the decree of Baboo Jebun Kristo Chatterjee, Subordinate Judge of Pubna and Bograh, dated the 7th March 1882, affirming the decree of Baboo Nogendro Nath Roy, Munsif of Shayadpore, dated the 26th March 1881.

ground that "there being no finding as to the plaintiff's present possession, this suit for mere confirmation of title in the face of, and after the decision in, 'the Land Registration Act, should have been dismissed as not tenable."

Baboo *Hari Mohun Chuckerbutty* for the appellants.

Baboo *Kishory Mohun Roy* for the respondent.

The **Judgment** of the Court (FIELD and O'KINEALY, JJ.) was delivered by

[352] Field, J.—This case arises out of a proceeding under the Land Registration Act (Beng. Act VII of 1876). The plaintiff alleges that he is entitled to a 9 annas 11 gundas 1 krant 1 dunt share in kismut Dariapur, and he makes title to this share, as to 8 annas by purchase out of his private funds, and as to 1 anna 11 gundas 1 krant 1 dunt share by inheritance.

The contention on the other side is, that he is entitled by inheritance alone and not by purchase, and that his proper share is therefore twice 1 anna 11 gundas 1 krant 1 dunt. The plaint, after setting out the registration proceedings, proceeds as follows "I pray that the Court will be pleased to pass a decree reversing the order for registration of names in respect of the 8 annas share purchased and held by me exclusively out of 9 annas 11 gundas 1 krant and 1 dunt share of the above talook, amending the said order as regards the remaining share, directing my name to be registered with respect to the aforesaid 9 annas 11 gundas 1 krant and 1 dunt share and awarding me my costs. I beg to bring this suit by paying a Court-fee stamp of the value of Rs. 10."

It has been pointed out on more than one occasion that the Civil Courts have no jurisdiction to make a decree, reversing an order for the registration of the name of any person made by a registering officer appointed under Beng. Act VII of 1876. All that the Civil Courts can do is to declare the title of an individual, or to give him a decree for possession, and the registration officers, as a matter of course, would then proceed to amend their registers in accordance with the rights of the parties as settled by the Civil Courts. The present plaint does not ask in so many words for confirmation of title, but the suit has been treated in the Courts below as a declaratory suit; and the Court-fee stamp has been paid accordingly.

It is now contended before us that the plaintiff was not entitled to maintain this suit. It is said that the effect of the registration proceedings was to put him out of possession, and that, not being in possession, he is not at liberty to bring a suit under the provisions of s. 42 of the Specific Relief Act having for its object the declaration of his title merely. There can be no doubt that *if the result of the registration proceedings was* **[353]** *to put plaintiff out of possession, this contention must be successful.* But after examining those proceedings, we come to the conclusion that it is not possible in the present case to give any such effect to what was done by the registering officer. Under the provisions of s. 52 of Beng. Act VII of 1876, "the Collector shall consider any objections which may be advanced, and make such further enquiry as appears necessary to ascertain the truth of the alleged possession of succession to, or transfer of the estate, revenue-free property, or interest therein in respect of which registration is applied for, and if it appears to the Collector that the possession exists, or that the succession or transfer has taken place, and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise, the Collector shall order the name of the applicant to be registered." Under the provisions of s. 55. "If the applicant's possession of succession to, or acquisition by transfer of, the extent of interest in respect of which he has applied to be registered is disputed by or on behalf of any person making a conflicting claim

in respect thereof, and if the possession of the applicant in accordance with his application is not proved to the satisfaction of the Collector, the Collector shall determine summarily *the right to possession* in respect of the interest in dispute, *and shall deliver possession accordingly*, and shall make the necessary entry in the registers." Under s. 55 there is also an alternative proceeding providing for a reference to the Civil Court. No such reference was made in the present case, and therefore it is unnecessary to consider the effect of this provision. We now turn to s. 57, which provides that every order of a Collector passed under the first clause of s. 55 shall be of the same force and effect as an order passed by the Judge under s. 4 of Act XIX of 1841, determining summarily the right to possession and delivering possession accordingly." It is to be observed that no such effect is given to an order made under the provisions of s. 52. Now, if the order in the present case had been made under the provisions of s. 55, we would be compelled to say that the result of that order in accordance with the provisions of s. 57 would be to put the plaintiff out of possession," and if this were so, he certainly could not [354] maintain the present suit, regard being had to the provisions of s. 42 of the Specific Relief Act. If, however, the order were made under the provisions of s. 52, the Act gives to the order no such force. We think that although an order made under this section may be some evidence of possession, yet in the absence of any express provision of the Legislature, we cannot say that it is conclusive on the question of possession. In the present case it does not appear on the face of the order under what section it was made, and we think we should not be justified in presuming against the plaintiff that it was made under s. 55 rather than under s. 52. We must therefore regard the Collector's order merely as evidence of possession, which the Courts below were at liberty to consider along with the other evidence in the case. The Subordinate Judge has found, as a matter of fact, that the plaintiff is in possession of the share which he claims, and having so found it certainly was competent to him to make the declaratory decree against which the present appeal has been preferred. We come, therefore, to the conclusion that there are no grounds upon which we can interfere with the decision of the Court below, and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

NOTES

[It was held in (1907) 9 C L J , 91 that a suit for a declaration of title to immoveable property is not governed by Art. 14 of the Limitation Act, 1877, although the ultimate object case of success is to set aside an order made by the revenue authorities. See also (1899) 26 Cal., 845 (850).]

[10 Cal. 354]

APPELLATE CIVIL.

The 30th January, 1884.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Poromanand Khasnabish.....Defendant

versus

Khepoo Paramanick.....Plaintiff.*

Execution of decree—Payment not certified in Court—Fraud—Cause of action—Regular suit—Code of Civil Procedure (Act XIV of 1882), s. 258.

The holder of a money decree, agreed to accept in satisfaction of the amount thereof. a part payment in cash, and a lease of certain lands for five years, rent free. The judgment debtor made the payment, and gave the lease agreed on. Afterwards the decree-holder executed the decree against the judgment-debtor, and then the judgment-debtor brought the present suit for a declaration that the money decree was satisfied, and for damages against the decree-holder. *Held* that such a suit would lie.

Gunamani Das v Prankshori Das (5 B. L. R., 223), *Viraraghava Reddi v [385]* *Subbaka* (I L. R., 5 Mad., 397), *Chembrakandi Musuthi v Themdyal Puthalath Shekharam Nayar* (I L. R., 6 Mad., 41); *Sita Ram v. Mahipal* (I. L. R., 3 All. 533), *Shadi v. Gunga Sahar* (I L. R., 3 All., 538), and *Ishan Chunder Bundopadhyay v Indro Narai Gossami* (I. L. R., 9 Cal, 788) followed; *Patankar v. Debn* (I L. R., 6 Bom., 146) not followed.

IN this case the plaintiff stated that, having been indebted to the defendant on a bond,* the latter instituted a suit against him in 1874 for the recovery of the amount: that on the 20th of February 1875 he entered into an arrangement with the defendant for the satisfaction of the claim, and a decree on the basis of the arrangement was passed on the same day. That that arrangement was that the plaintiff should pay a portion of the claim in cash, and that in satisfaction of the remainder, the plaintiff should give to the defendant a lease of certain lands for the years 1283, 1284, 1285, 1286 and 1287 (1876—1880). That the plaintiff made the cash payment agreed on, and delivered over possession of the lands to the defendant, who kept possession of them for the five years agreed on. That, notwithstanding the plaintiff carried out the agreement, the defendant afterwards executed his decree against the plaintiff, the latter's objections having been overruled by the Court. The plaintiff then instituted the present suit for a declaration that the decree of 1871 was satisfied, and for Rs. 186-14 as damages.

It appears that no mention was made of the arrangement relied on by the plaintiff in the decree of 1874, which, in form, was an ordinary money decree.

The Court of First Instance disbelieved the plaintiff's story and dismissed the suit with costs. On appeal, this decision was reversed and the claim decreed. The defendant appealed to the High Court, on the ground "that the Courts below ought to have held that the present suit, as brought, does not lie, and that the plaintiff had no cause of action to bring it."

* Appeal from Appellate Decree No. 994 of 1882, against the decree of Baboo Jibun Kristo Chatterjee, Subordinate Judge of Pubna and Bogra, dated the 3rd April 1882, reversing the decree of Baboo Annoda Prosoud Chatterjee, Munsiff of Shahajadpore, dated the 18th July 1881.

Baboo *Srinath Banerjee* for the Appellant.

Baboo *Grija Sunker Mozoomdar* for the Respondent.

The Judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

[356] **Field, J.**—This was a suit brought to recover Rs. 186-14, alleged to have been paid by the plaintiff in satisfaction of a previous decree obtained by the defendant against him

The question which has been argued before us is whether a suit of this nature will lie. The old law under the Code of 1859, as settled by the Full Bench decision in *Gunamani Das v. Prankishori Das* (5 B. L. R., 223) was that such a suit will lie. Upon the Code of 1877, as unamended by the Act of 1879, there are two Madras decisions to be found in *Viraraghava Reddi v. Subbaka* (I. L. R. 5 Mad., 397), a Full Bench case, and *Chembrakandi Mussutti v. Themdyal Puthalath Shekharan Nayar* (I. L. R. 6 Mad 41) following the Full Bench decision, that the suit is maintainable. Immediately after the Madras Full Bench decision, s. 258 of the Code was altered and amended. The last paragraph of the section, as amended by the Act of 1879, and as it stands in the Code of 1882 now in force, is "No such payment or adjustment shall be recognized by any Court, unless it has been certified as aforesaid." It might be contended that the Legislature meant by this provision to overrule the decision of the Full Bench of the Madras High Court just referred to, but, as was pointed out by Mr. Justice O'KINEALY in the course of the argument in this case, it is a very proper answer to this contention to say that if the Legislature meant to overrule the decision of the Madras High Court, it would have been very easy to say in express language, admitting of no doubt, that no separate suit will lie. Upon the amended section in this present shape, there are two decisions of the Allahabad High Court—*Sita Ram v. Mahipal* (I. L. R., 3 All., 533), and *Shadi v. Gunga Sahar* (I. L. R., 3 All., 538)—in which it has been held that a separate suit will lie.

There is also a decision of this High Court, *Ishan Chundra Bundopadhya v. Indro Narain Gossami* (I. L. R., 9 Cal., 788), in which it has been held that a separate suit is maintainable. On the other hand, there is a decision of the Bombay High Court—*Patankar v. Dey* (I. L. R., 6 Bom., 146)—in which it has been decided that a separate suit is not maintainable. In this conflict of authority it appears to us that we ought to follow the previous decision of this Court, especially as [357] no grounds have been advanced to induce us to suppose that that decision is not correct. Speaking for myself I desire to say, with reference to certain observations made in the decision of this Court and in the decision of the Allahabad Court (*Sitaram v. Mahipal*, I. L. R., 3 All., 533), that it does not appear to me necessary, in order to arrive at the conclusion that a separate suit will lie, to limit the meaning of the words "any Court" in the last paragraph of s. 258, to any Court executing the decree. I think that if this had been the intention of the Legislature, the expression "the Court" would probably have been used for "any Court." It is quite possible to suppose cases, other than those concerned with the satisfaction of the decree by a money-payment, or other form of satisfaction, in which the question whether the decree had been satisfied might involve questions relating to title or other matters either as between parties to the suit, or as between other parties, and it may be quite possible (it is unnecessary to decide the point, which does not arise in the present case) that in using the expression "any Court" the Legislature had in its mind, cases of this description. The conclusion at which we arrive is that the suit was maintainable, and that this appeal must therefore be dismissed with costs.

Appeal dismissed.

NOTES.

[UNCERTIFIED ADJUSTMENTS OF DECREES—

In consequence of the conflicting rulings as to the meaning of the expression, 'any Court,' in section 258, C. P. C., 1882; 1877, (see 10 Cal., 354, 10 Bom., 155; 11 Bom., 6), the Legislature by sec 27 of VII of 1888 amplified it into, 'any Court executing the decree.'

The scope and limits of sections 244 and 258 of the C. P. C., 1882 (=sec. 47 and O. 21 r. 2 of the C. P. C., 1908) were fully discussed in the case of *Arizan v. Matuk Lal Sahu*, (1893) 21 Cal. 437 according to which, "sec. 244 is not limited by section 258 and where a decree is satisfied by an agreement out of Court and such satisfaction is not certified to the Court, a subsequent suit is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement."

See also (1911) 16 C. W. N., 923 where it is pointed out that the fact of the decree-holder having acted fraudulently in not certifying to the Court does not make any difference; 24 M. L. J., 541.

This rule does not affect the Criminal Law —(1886) 10 Bom., 288; (1888) 16 Cal., 126; (1881) 4 Mad., 325, (1885) 9 Mad., 101;

As regards the maintainability of a suit to recover payments made to satisfy a decree, when they were not certified to the Court and the decree-holder applied for execution, see (1905) 16 M. L. J. 54, where this was answered in the negative.

An uncertified arrangement to pay the decretal amount by instalments, will not be recognised for preventing execution.—(1899) 20 Cal. 32.

A separate suit would lie when the payment and consequential satisfaction of the decree is in question —(1887) 15 Cal. 187, 11 Bom. 6

"By a consensus of opinion of all the High Courts it was held that where a judgment creditor without certifying had received money or property in satisfaction of a decree from his judgment-debtor, and then executed his decree, he was liable to restore the money or property so recovered in the first instance".—11 Bom. 6]

[10 Cal. 357]

ORIGINAL CIVIL.

The 5th February, 1884

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE CUNNINGHAM.

Eshan Chundra Safooi.....Plaintiff

versus

Nundamoni Dasse and others..... Defendants.

Withdrawal of suit—Suit on behalf of a minor—Civil Procedure Code (Act VIII of 1859), s. 97—Withdrawal of suit by next friend—Fraud.

Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, any withdrawal of the suit by that party would have precisely the same effect as the withdrawal of a suit by a person of full age.

But where a person acting for a minor has fraudulently withdrawn the minor's suit under s. 97 of Act VIII of 1859, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it is open to the minor [358] to relieve himself from the consequences of the fraud in one of three ways, viz, (1) by an application to the Court in the suit in which the withdrawal took place, (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.

APPEAL from a decision of NORRIS, J., dated 16th July 1883.

The suit was brought to have it declared that the plaintiff had been duly adopted, and for the construction of the will of one Mohesh Chundra Safooi.

The plaintiff stated that Mohesh Chundra Safooi died on the 5th June 1867, leaving him surviving his widow Matiscondari Dasse, and a daughter by her, Pullamoni Dasse, and two other daughters, Nundamoni and

Bemola, by a wife who predeceased him, Bemola, one of the daughters abovementioned, having since married one Khetter Mohun Biswas. Mohesh Chundra made his will on the 27th May 1867, and appointed Nundamoni Dassee executrix thereof, and after giving certain specific legacies, he directed and empowered Matisoondari Dassee to adopt a son who should be chosen by Nundamoni Dassee, such adoption to be consented to by Nundamoni, and that after the death of Nundamoni Dassee, the said adopted son, or if no such adoption should be made, his son-in-law, Khetter Mohun Biswas, should have and enjoy the residue of his property on certain trusts as in the will appeared. On the 27th June 1867, Nundamoni obtained probate of the will, and took possession of the property of the testator.

The plaintiff then alleged that he had, when at the age of five years in the year 1867, been duly adopted by Matisoondari with the consent of Nundamoni, and that subsequently to such adoption disputes regarding the property had arisen between Matisoondari and Nundamoni, and that the former in the year 1870, on her own behalf and as next friend of himself (the present plaintiff), had instituted a suit numbered 432 of 1870 against Nundamoni, in which she originally, amongst other things, had asked for a declaration that he (the present plaintiff) was the duly adopted son of Mohesh Chundra Safooi, but that the Court having refused to admit the plaint with such prayer [359] included therein, she abandoned the same, and prayed for the construction of the will of the testator and for other relief.

That suit came on for hearing on the 13th June 1871, and was then withdrawn by Matisoondari, no leave to bring a fresh suit being granted.

[In the Chief Clerk's Minute Book the note ran as follows *S. M. M. Dassee v. S. M. N. Dassee*. Mr. *Lowe* and Mr. *Phillips* for plaintiff. Mr. *Marindin* and Mr. *Evans* for defendant. Mr. *Lowe* states plaintiff's case. Mr. *Lowe* gives up the case. *The Court*.—This is really a very discreditable suit. There is not a particle of foundation for saying the infant is the adopted son of the deceased. Mr. *Lowe* asks to withdraw the suit. Mr. *Marindin contra*. *The Court*.—Withdraw on payment of costs No. 2, including costs of commission. No leave granted to bring fresh suit.]

The plaintiff further alleged that at the time the said suit was withdrawn, he was an infant, and he had been informed, and believed that the withdrawal of the suit had been brought about by the fraud and misconduct of a person named Nobin Chundra (deceased), who had managed the suit on behalf of Matisoondari, and that such withdrawal was not, therefore, binding upon him, and he, therefore, brought this suit having now attained full age, against Nundamoni, Khetter Mohun Biswas, and Matisoondari for the purposes abovementioned.

The defendant, Nundamoni, contended that the suit No. 432 of 1870 was a bar to this present suit, and denied that she had either chosen or consented to the plaintiff's adoption. The defendant, Khetter Mohun, contended that the plaintiff was not adopted according to the terms of the will of the testator. *Mati*-[360]*soondari* stated that being a *purdahnashin*, she had been unable to

* The prayer in suit No. 432 of 1870 ran as follows. That the will of the said testator may be construed, and that such of the trusts as are not contrary to law may be carried out, that the rights of all parties be ascertained and declared and given to them, and should any of the testator's property be found undisposed of, then that the present lawful heir of the said testator be declared entitled at once, and that the same be secured for the benefit of the persons entitled thereto, that accounts should be taken and a receiver appointed, and for an injunction restraining Nundamoni from preventing Matisoondari residing in the family dwelling house, and for further and other relief.

attend personally to the conduct of suit No. 432 of 1870, and that she had entrusted the management thereof to one Nobin Chundra Shaw, who, from fraudulent and corrupt motives, and without authority from her, or having spoken to her on the subject, and without her knowledge, obtained the withdrawal of the suit

The correspondence set out in suit No. 432 of 1870 showed that Nundamoni had never given her consent to the adoption of the plaintiff.

Mr. Phillips, Mr. Bonnerjee and Mr. Trevelyan for the Plaintiff.

Mr. Jackson, and Mr. Hill for Nundamoni.

Mr. J. G. Apcar for Khetter Mohun.

Mr. O'Kinealy for Matisoondari.

Mr. Jackson submitted that the question of adoption was *res judicata*, and put in the decree, plaint and written statement in suit No. 432 of 1870, and read the Registrar's minute of the 13th June 1871, and submitted the case should be dismissed with costs

Mr. Trevelyan admitted the entry in the minute book, and the Court refused to hear evidence.

Norris, J.—I must hold that this is *res judicata*, and the suit must be dismissed with costs on scale No. 2.

The plaintiff appealed.

Mr. Phillips and Mr. Bonnerjee for the Appellant.

Mr. Phillips.—The old suit was more comprehensive than the present one; the mother was a party, and had an interest herself, and at the same time was the next friend of the present plaintiff. It is not a question of *res judicata*, it depends upon s. 97 of Act VIII of 1859.

I submit that that which is called *res judicata* was a fraud; it was not, however, a question merely of fraud, there was no reason to withdraw the suit on that ground, the then plaintiff was asking for a relief which she was clearly entitled to, she asked for the construction of the will. We set up fraud in our plaint, but the Court refused to raise an issue on it, and dismissed the [361] suit as *res judicata*. but even supposing there to have been a *res judicata*, the question of fraud ought still to have been tried.

The devise in the will was of the residue to Nundamoni for life on trust to keep the *shrad*, and invest the surplus in Government securities, and to adopt a son, the residue to go to such adopted son, and if there was no adoption, to Khetter Mohun

The infant cannot be bound by his next friend withdrawing the suit, more especially where the next friend has an interest adverse to the infant. It is not intended by s. 97 that an infant should be precluded from bringing a fresh suit.

[GARTH, C. J.—The fraud you set up is shadowy, but the defendants do not answer it in any way.] We pressed for an issue, but the Court would not allow it. Nundamoni states that her manager withdrew the suit without her knowledge.

Act VIII of 1859 did not extend to the original side of this Court; the Court was directed by the Charter to adopt certain rules, and these rules were the sections of Act VIII of 1859. The Charter, however, expressly took away from these rules the force of law.

Under Act VIII of 1859 any person could bring a suit for a minor; and would it not be a monstrous thing that any person should be able to bring a

suit for a minor and then withdraw it, and so prevent him from bringing a fresh suit? So I say, apart from fraud, we should be entitled to bring a fresh suit. It may be supposed that Matisoondari is colluding with us, but the defendants have not answered our allegation as to fraud.

There was no decision in the old suit; it was withdrawn. Nothing was decided as to the question of fraud, and as there was no power under Act VIII of 1859 for a next friend to bring a suit, so there was no power to withdraw it. Even if the withdrawal could affect the minor, we say that the withdrawal was brought about by fraud. The plaintiff obtained his majority in March 1882.

[GARTH, C. J.—Although there may have been fraud, can you raise the question in another suit, and not in the one in which the fraud is alleged to have taken place, where the Act prohibits a fresh suit being brought?] It seems material whether the [362] bar is by statute or otherwise; either the plaint is the case, or there is no case, then how was the mother justified in putting forward a case which was no case, which would have the effect of barring us. We say in our suit that there was a case to have been made out in the former suit, because we allege that Nundamoni did give consent to the adoption. As to our not having raised the question of the mother not being the proper person to bring the suit, it was not for us to show that it was improperly brought; it is their bar to the suit and not our bar, and it was for them to make it out.

[The Court desired Mr. *Phillips* to obtain an affidavit, stating whether or no he was prepared with witnesses to prove at the hearing of the last suit that no one ordered the plaintiff's agent to withdraw the suit on her behalf. An affidavit was obtained and sworn to by the plaintiff, but was considered insufficient by the Court, as the plaintiff only spoke from information and belief, he being at that time a child of six years old.]

Mr. *Bommerjee* on the same side.—As to whether the plaintiff who was an infant is bound by the withdrawal of the suit by his next friend, I submit that cl. 37 of the Charter of 1862 directs that civil suits should be regulated by Act VIII of 1859. At the time when the High Courts were first established, Act VIII of 1859 and its amending Acts governed the procedure of the Courts. Now Act VIII made no provision for proceedings by minors and other persons under other disabilities, and therefore when the Charter was renewed in 1865, cl. 37 of the renewed Charter provided that the High Court should make rules, and in making such rules that the High Court should be guided by the Procedure Code. Section 97 is not purely procedure, for it refers to persons who are *sui juris*. the penalty laid down in that section is so heavy that it must be taken to be alone applicable to persons who are *sui juris*. Compare s. 97 with s. 2 of the same Code. Under s. 2, the case could not be *res judicata*, because the infant's claims were not laid before the Court.

The decree in the last suit actually orders the infant himself to pay the costs of the defendant; if the case had been dismissed [363] under s. 2 we could have appealed. Moreover, there is nothing to show that the old suit was withdrawn under s. 97; the old rules of the Supreme Court were in force then. *Res judicata* is not a matter of procedure, but of jurisdiction. Section 260 of Act VIII of 1859 has been held not to be a question of procedure, and I submit s. 97 cannot apply to an infant at all, as Act VIII never contemplated a suit being brought by an infant.

The prayer in the first suit makes no claim to have the adoption declared legal.

Mr. *Kennedy* (with him Mr. *Hill*) for the respondent, Nundamoni.

There was no allegation of fraud raised at the hearing of the former suit, the Court makes no mention whatever of any fraud. [GARTH, C. J.—The Court, of course, was unaware of the fraud; the allegation of fraud is not in connection with the case, but the allegation is that the suit was fraudulently withdrawn. How did you Mr. *Phillips* show your case of fraud in the Court below?]

Mr. *Phillips* —We could not go into evidence at the stage the suit reached, but we showed the fraud from Nundamoni Dasse's written statement.

Mr. *Kennedy* —The letters in the old suit clearly show that no consent was ever given by Nundamoni to the adoption of the plaintiff, who was eventually adopted in utter disregard of the will of the testator. I submit the suit is barred by the first case.

The following **Judgments** were delivered by the Court (GARTH, C. J., and CUNNINGHAM, J.).

Garth, C. J. --I think that the learned Judge was quite right and that what occurred at the trial of the former suit estops the plaintiff from bringing this suit.

This suit was brought for the purpose of establishing the plaintiff's adoption, and of having the trusts of the will of the late Mohesh Chundra Safooi declared. The former suit was brought, so far as the plaintiff was concerned, with the same object, namely to have his rights declared as the adopted son of Mohesh Chundra. His adoptive mother sued on her own behalf to have her rights declared under her husband's will, and also as the next friend of the present plaintiff, to establish his [364] rights as the adopted son, and one point raised in the pleadings was as to the validity of his adoption.

Then what occurred at the trial was this. We understand that no evidence was offered, but that the question of the validity of the adoption was argued by the Counsel for the plaintiff upon the plaint as it stood. The statements in the plaint were very full, and it seems to have been admitted on the part of the plaintiff that the consent of the sister, Nundamoni Dasse, was necessary to the validity of the adoption.

A long correspondence was set out in the plaint, which, so far from showing any consent on the part of the sister, rather tended to prove the contrary, and after the point had been fully argued, it seems that Mr. *Lowe*, the plaintiff's Counsel, seeing that the opinion of the Court was against him, asked leave to withdraw the suit, and, I think, we must presume that he applied to do so under s. 97 of Act VIII of 1859, because in the note of what took place, we find that the Judge, though he allowed the suit to be withdrawn, refused leave to bring a fresh suit. The rule laid down by that section has always, as far as we are aware, been acted upon as law on the Original Side of this Court, and there is no other rule under which Mr. *Lowe* could have asked to withdraw the suit and bring a fresh one.

That being so, it appears to me that the withdrawal of the suit under s. 97 operated (not strictly speaking, as a *res judicata*), but as a bar to prevent the plaintiff bringing any fresh suit to establish his adoption.

Mr. *Bonnerjee* has argued that, although the Judge might have acted on that occasion upon the rule as laid down in s. 97, and although the withdrawal of the suit under that rule might, in the case of an adult person, have had the effect of barring any fresh suit for the same cause, that would not be so in the

case of a suit brought on behalf of a minor, because the minor could have had no means of judging for himself, whether the withdrawal was a prudent or proper course to take.

But it seems to me that there is no force in that argument.

As long as we have reason to believe, that the suit is lawfully brought by a party who has a right to bring it on behalf of the minor, it seems to me that any withdrawal of the suit by that [365] party has precisely the same effect as the withdrawal of a suit by a person of full age. It is difficult to see why a suit properly brought on behalf of any other person, who cannot act for himself, should be subject (so far as the present question is concerned) to other rules, than those which are applicable to suits brought by parties in their own names.

Mr. *Bonnerjee*, by way of illustrating his argument, asks us to suppose the case of a person, who had nothing to do with a minor, and no right to sue on his behalf, bringing an action of trespass in the minor's behalf, and then, finding that the defendant had a good defence, withdrawing the suit on no better authority than he brought it. But that would be a totally different case from the present, simply because the person bringing the suit would not be the proper person to bring it.

If Mr. *Bonnerjee* could have shown in this case that there had been any impropriety in the minor's mother bringing the former suit, and that the minor, for that or some other reason, was not bound by her acts or the acts of the person who managed the suit for her, that would have been a different thing. But here it is conceded that the mother was the proper person to bring the former suit, and no objection was taken on that score, either in the former suit or in the Court below, or in this appeal.

We must, therefore, take it that the former suit was properly brought, and that being so, it seems to me that the withdrawal of the suit had the same effect as the withdrawal of a suit by an adult person.

That disposes of the first contention.

But there was another point raised by the appellant, which, if there had been any facts to support it, would have been perfectly good in point of law, namely, that the person who managed the suit on behalf of the plaintiff and his mother, withdrew it in fraud of the plaintiff, and in collusion with the defendant Nundamoni Dossee.

Of course, if there had been any ground for this contention, and if we were satisfied that it had been properly presented to the Court below, and the Court had refused to frame an issue [366] to try it, I should consider that we ought to remand the case for the trial of such an issue.

But I am satisfied that this point, although it might have been mentioned, was not really pressed upon the attention of the Judge. I think if it had been refused, the Judge would have said something about it in his judgment, and some mention would have been made of it in the grounds of appeal. I am, therefore, not prepared to say that the learned Judge was wrong in not framing an issue upon that point.

At the same time, having regard to the plaintiff's position, if I were even now satisfied that the plaintiff had any real ground for contending that the withdrawal of the suit was brought about by fraud, I should certainly have been disposed to allow him, on proper terms, an opportunity of trying that issue in the Court below.

But I think, before we allow any party to raise an issue of fraud at this stage of the proceedings, we ought to be satisfied that there is some real ground

for the contention ; and it was for this reason that we required Mr. *Phillips*, when the Court rose yesterday, to produce an affidavit showing in detail what grounds his client had to support the contention.

An affidavit has accordingly been produced, made by the plaintiff himself, and I am satisfied from that affidavit that he has no sufficient ground to justify us in allowing such an issue to be raised.

The affidavit only states that the mother's consent was neither asked nor granted for the withdrawal of the former suit, and that the person who was managing the suit received certain sums of money (not stating any amount) from the defendant Nundamoni Dasse, both before and after the withdrawal. But it does not appear that those sums were paid for any improper purpose.

The only suggestion of any fraud is made by the plaintiff himself in these words. "I allege that these payments were made as a consideration to the manager for withdrawing the suit." But he gives us no reason for supposing that the allegation is well founded. It is only made in this general form by the plaintiff, who, at the time when the suit was withdrawn, [367] was a child of some five or six years old, and could, of course, have known nothing of the matter.

We should do very wrong to allow an issue of fraud to be tried at this stage of the cause upon no better grounds than are disclosed in the affidavit.

There is only one other point upon which I think it right to say a few words

We had some doubt during the argument whether, assuming that the withdrawal of the former suit to have been brought about by fraud, the plaintiff could bring the present suit without having taken some steps to set aside the former judgment ; because this is not the case of *res judicata*, properly so called but an absolute statutory prohibition imposed upon a party who has withdrawn a former suit without leave to bring a fresh one.

But it seems to me, on consideration, that the rules which apply to cases of *res judicata* must apply generally to a statutory bar of this kind.

It was said in the *Duchess of Kingston's case*, quoting the opinion of Lord COKE, that "fraud vitiates the most solemn proceeding of Courts of Justice," and I think that, if in a case like the present it could be shown that the withdrawal of the former suit was brought about by fraud and collusion between the party managing the suit and the defendants, the minor plaintiff might relieve himself from the consequences of the fraud in one of three ways : *1st*, by an application to the Court in the suit in which the withdrawal took place, *2ndly*, by a regular suit to set aside the judgment founded upon the withdrawal, or, *3rdly*, by bringing a fresh suit for the same cause, and setting up the fraud as an answer to the statutory bar.

In this case, as there is no sufficient ground for raising the question of fraud, the appeal must be dismissed, and the appellant must pay the costs on scale No. 2.

Cunningham, J.—I concur on both points with what has just fallen from my lord.

The principal point urged in the appeal, namely, that s. 97 of Act VIII of 1859 did not contemplate the case of a minor represented by a next friend, is one which is of great importance as regards the position of minors who are brought into the case, [368] and it is well that we have had the advantage of two learned arguments upon it, but I confess that the result of that argument is that, however reluctant we may be to accept a state of things which is calculated in some instances to work hardship to minors, I think that we must take it

to have been the law, that where a minor is represented in the manner sanctioned by the law, and the person so representing him adopts a procedure to which particular consequences attach by the Code, then those consequences must affect the minor. For this reason I think that s. 97 must be regarded as precluding the minor from re-opening the matter involved in a former suit from which the person acting for him has withdrawn. I also think that there are no grounds on which we can allow the issue of fraud to be raised at this stage of the proceedings.

Appeal dismissed.

Attorneys for appellant : Messrs. *Watkins & Co.*

Attorney for respondents Khetter Mohun and Nundamoni : Mr. *Hart.*

Attorney for respondent Matisoondari. Baboo *Ukhoy Chund Dutt.*

NOTES.

["Where a decree is regular in itself and on the face of it correct, it can only be set aside by suit. Where a plaintiff seeks to set aside a decree based on a compromise entered into by his guardian when he was a minor, merely on the ground that the compromise was fraudulent, his only remedy lies in a fresh suit, and he cannot revive the previous suit by an application for review," (dissenting from observations in 6 Cal., 687, 10 Cal., 357; 13 B. L. R., Ap. 11., following 15 Bom. 594;) "but where it is clear upon the face of the judgment or the decree which is impugned that it is irregular and incorrect, or not in compliance with the provisions of the law, the plaintiff can proceed by way of review," **3 C. L. J. 119** per Ameer Ali and Pratt JJ.

See **10 C. L. J. 420 : 43. C. W. N. 1197**, where the question is discussed as to which is the appropriate procedure—review or a regular suit—to set aside a consent decree for fraud etc.; also 26 Cal., 891; 22 Cal., 8; 21 Cal., 605, 19 Bom. 571 10 Bom. 338 (340), 12 Mad., 503 (504)

As regards the effect of default of the next friend or guardian in prosecuting the suit, see 10 Mad., 272.]

[**10 Cal. 368**]

APPELLATE CIVIL.

The 14th December, 1883.

PRESENT ·

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND

MR JUSTICE O'KINEALY.

Durga Sundari Devi, widow of Monoranjn Das.. . . . Auction-purchaser

versus

Govinda Chandra Addy (Decree-holder) and others.... . Judgment-debtors.*

Sale in execution of decree—Application to set aside sale—Appeal from order rejecting application—Civil Procedure Code (Act XIV of 1882), s. 313—"Saleable interest."

There is no appeal to the High Court from an order refusing to set aside a sale, unless such order is made under ss. 294, 312, or 313 of the Civil Procedure Code.

* Appeal from Order No. 91 of 1883, against the order of W. MacPherson, Esq., Additional Judge of 24-Pergunnahs, dated the 26th March 1882.

A misrepresentation or concealment in the sale notification which induces a purchaser to buy a property for much more than it is really worth (although that misrepresentation or concealment may be fraudulent), is no ground for setting aside a sale under s. 313 of the Civil Procedure Code.

The meaning of s. 313 is, that when a purchaser under an execution sale buys a property which turns out to have no existence at all, or to be [369] of no saleable value whatever, the Court may then set aside the sale under s. 313.

IN this case one Monoranjan Das, at an execution sale, purchased certain immoveable properties described as lots 2 and 3 in the proclamation of sale, for the price of Rs 7,100 and Rs 23,550 respectively. The decree under which the purchase was made was passed on a mortgage bond, and directed the realization of the decretal amount from the mortgaged properties.

In pursuance of that decree the lots were advertised for sale, and it was admitted at the hearing, that the description in the sale proclamation tallied exactly with the description of the property as given in the mortgage deed. The sale proclamation was published in accordance with s. 289 of the Civil Procedure Code, and in addition a translation of the same was published in the *Calcutta Gazette* of the 4th January 1882.

The auction-purchaser applied to the Court to have the above-mentioned sale set aside on the ground of fraud and misrepresentation, and on the ground that the decree-holder had no "saleable interest" in the property within the meaning of s. 313 of the Code.

The allegations of fraud were—(1) The making of a false affidavit by the decree-holder suppressing all mention of incumbrances on the property, (the incumbrances being, alienation of portions of a taluk, and the existence of certain *mourasi* *mokarari* leases at permanently fixed but low rentals). (2) Publishing in the *Calcutta Gazette* an incorrect translation of the sale proclamation, thereby misleading the auction-purchaser. (3) Advertising the same land twice over in two or more lots. (4) Declaring in the sale proclamation that lot 2 was *lakhtaraj*, whereas it was not.

As regards the absence of any saleable interest, it was contended that the assets were insufficient to pay the Government revenue, and that all that was purchased was a liability to pay so much out of pocket every year.

The Additional Judge before whom the application came on for hearing, found that the leases which were omitted to be mentioned in the affidavit of the decree-holder did not constitute "incumbrances" within the contemplation of s. 287, and that [370] the decree-holder was not bound to disclose them, that the purchaser at the time of the sale had been correctly informed as to what was being sold, and that if he had been misled by the advertisement in the *Calcutta Gazette*, he had only himself to blame, and found that as regards the two last grounds of fraud the purchaser had failed to make out his case, and further, holding that "saleable interest" in the property itself, apart from all consideration of profit and loss, rejected the application.

The auction-purchaser appealed.

The Advocate General (Mr Paul), Mr Bell, Bahoo Kali Mohun Das, Baboo Chundra Madhub Ghose and Bahoo Doorga Mohun Das for the appellants.

The Advocate General contended that the lower Court had passed the order under s. 313 of the Code, and that, inasmuch as the property had been lowered in value by reason of the putni leases, which were not set out in the proclamation, it was not the same property which was put up for sale, and that the sale should be set aside.

Baboo *Ambica Churn Bose*, and Baboo *Bhowani Churn Dutt* for the Respondents.

The **Judgment** of the Court (GARTH, C.J. and O'KINEALY, J.) was delivered by

Garth, C.J.—This is an appeal from an order of the District Judge, confirming a sale in execution.

The circumstances were these—

One Monoranjan Das became the purchaser at the sale of certain immoveable property described as lots 2 and 3. and he petitioned the Court that the sale should be set aside, and his deposit returned to him, upon the ground that there had been a fraudulent misrepresentation in the sale notification, and that consequently he had bought a property very different in its nature and value from that which purported to be sold. There is no doubt that he purchased *the same property* which was mentioned in the notification, but it was far less valuable than he had [371] reason to believe it to be on account of certain putni leases of which no notice was given, and for certain other reasons, which he alleges to have been known to the execution creditor, and fraudulently concealed by the way in which the property was described in the sale notification

The subject-matter of the petition appears to have been gone into very carefully by the District Judge, who made an order rejecting the application, and confirming the sale.

The purchaser now appeals to us upon the ground, that the order was one refusing to set aside the sale under s 313 of the Code of Civil Procedure; (*see* clause (16), s. 588), that is to say, he contends that the application to the Court below was made upon the ground, that the judgment debtor had virtually no saleable interest in the property which purported to be sold

Unless the order confirming the sale was made under s. 313, or under ss. 294 and 312, there would be no appeal to this Court. And it is not pretended that the order was made under either of the two last mentioned sections.

The question, therefore, which we have to decide is this. Having regard to the nature of the appellant's contention in the Court below, and assuming, as we do, for the purposes of this question, that there was a fraudulent misrepresentation and concealment on the part of the decree-holder with respect to certain encumbrances and other disadvantages attaching to the property sold, which rendered that property of much less value to the purchaser than it would otherwise have been, was that misrepresentation and concealment any ground for setting aside the sale under s 313? This question has been argued at great length and with much ability by the learned *Advocate-General*, who has contended, that if the property sold was substantially and to any considerable extent of less value to the purchaser, by reason of the existence of the putni leases and other disadvantages which we have mentioned, it was in fact *not the same property*, which was put up for sale, and that the sale should, therefore, be set aside under s. 313

We are unable to construe the section in this way. We think that what it really means is this; that if a purchaser under an execution sale buys a property, which turns out to [372] have no existence at all, or to be of no saleable value whatever, the Court may then set the sale aside under s 313. But we think that any misrepresentation or concealment in the sale notification, which induces a purchaser to buy a property for much more than it is really worth (although that misrepresentation or concealment may be fraudulent), would be no ground for setting aside the sale under s 313.

Such misrepresentation or concealment may be very good ground for an application to the Court below to set aside the sale, and we do not doubt that the District Judge acted very properly in entertaining the application in this case; but as we consider that the application was not one under s. 313, we think there is no appeal to this Court from his decision. The only remedy for the applicant, as far as we can see, is a regular suit.

The learned *Advocate-General* has very properly called our attention to two cases decided by this Court, which he admits are directly opposed to his contention; one a case of *Protab Chunder Chuckerbutty v. Pamoty* (I. L. R., 9 Cal., 506) decided by Mr. Justice WILSON and Mr. Justice MACLEAN, and the other *Ram Coomarr Dey v. Shushee Bhoosan Ghose* (I. L. R., 9 Cal., 627), decided by Mr. Justice CUNNINGHAM and Mr. Justice MACLEAN.

In both these cases it was held that an incumbrance upon a property sold in execution, by way of mortgage or otherwise, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property, and unless we are disposed to differ from those cases, and to refer the question to a Full Bench, which we are not, their authority is of course binding upon us.

It is said, however, that in the case of *Narharmal Marwari v. Sadut Ali* (8 C. L. R., 486), Mr. Justice PONTIFEX and Mr. Justice FIELD took a different view of the section; and we are asked to adopt their ruling.

But as we understand that case, the learned Judges then took precisely the same view of the law as was taken in the other two cases.

The facts were these. On the 21st of February 1880, three bighas of land were purchased by the appellant at an execution sale under a rent decree. At the time of that sale a decree had [373] been obtained by the mortgagee of the same (amongst other) property, by which that property was ordered to be, and was subsequently, sold on the 11th of March 1880, under which sale the purchaser obtained possession.

Under these circumstances the appellant, who purchased under the 1st sale in February 1880, applied to set aside the sale upon the ground that the execution debtor had no saleable interest in the three bighas, and the Court appeared to be of that opinion.

Mr. Justice PONTIFEX in giving judgment explains his view of the case in this way.

“Whether there was a saleable interest would depend upon whether these three bighas were included in the mortgage, and were affected by the decree made on the 7th October 1879 by the Subordinate Judge of Hooghly. If these three bighas of land were included in the mortgage, and the decree was a mortgage decree, directing a sale of the mortgaged property, then it is clear, that on the 7th October 1879, when that decree was made, being previous to the attachment under the rent decree, the mortgagor would no longer have a saleable interest in the property in specie, because the mortgage decree binding the land, the sale of the 21st February 1880 by the Howrah Court would not carry the property itself, but could only carry a right in the surplus proceeds of sale under the mortgage decree.”

Whether the learned Judge was right in that case in saying, that the mortgagor had no saleable interest in the three bighas sold to the appellant, may, perhaps, be open to doubt; but it is clear, that the principle of the Court's decision was, that if the three bighas were included in the mortgage, the mortgagor had no saleable interest in them at the time of the sale to the appellant. We

think, therefore, that this case does not assist the present appellant in any way ; and it was certainly not treated by the learned Judges in the other two cases as in any way opposed to their view.

The *Advocate-General* has very properly abstained from going into the facts of the present case, seeing that we are against him upon the point of law. It is not pretended here, that the judgment-debtor had not some interest in the property sold, or that the appellant has not bought, in one sense, the property [374] which was described in the sale notification. All that is contended for is, that the property was so misdescribed, or that there was that concealment of the incumbrances upon it, that the purchaser has bought a totally different thing from that which he intended to buy, or in other words, that he has bought a property charged with heavy incumbrances, instead of a property free from incumbrances.

Then Mr. *Bell* has further argued, that although we may have no power to entertain the question on appeal, we may do so under s 622 of the Code of Civil Procedure.

The answer is, that we have not before us any application under s. 622, but an appeal against the District Judge's order. And even if this were such an application, I, for one, should not be disposed to grant it. The Judge in the Court below has not acted without jurisdiction, and, so far as I can see, he has been guilty of no irregularity.

We think, therefore, that there is no ground for this appeal, and that it should be dismissed with costs, which we assess at Rs. 150.

Appeal dismissed.

NOTES

[See also (1889) 9 All , 167 ; (1910) 35 Bom , 29]

[10 Cal. 374]

ORIGINAL CIVIL

The 11th January, 1884.

PRESENT .

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE CUNNINGHAM.

Gopaul Chunder Chuckerbutty..... Plaintiff

versus

Nilmoney Mitter and others..... Defendants .

Onus Probandi—*Ejectment, Suit for.*

When a plaintiff seeks to eject persons from premises claimed by him, on the ground that they are in wrongful possession of the premises, he is bound to show that he or some of the persons under whom he claims have been in possession of the property within twelve

* Appeal from a decision of FIGOT, J , dated 8th February 1883.

years before suit. A mere allegation in the plaint that the persons sought to be ejected were the tenants of the person through whom the plaintiff claims, will not shift the burden of proof.

Rao Karan Singh v Bakar Ali Khan (L. R. 9 I. A. 99) explained and distinguished.

THE plaintiff stated that in 1865 the house and premises known as No. 150, Chitpore Road, Sobabazaar, belonged to one Mittunjoy [375] Chuckerbutty, and that in that year Messrs. Dodd & Co. obtained a decree against Mittunjoy for Rs. 23,000, but shortly afterwards became insolvent, the decree then vested in the Official Assignee, who attached the house, No. 150, Chitpore Road, in execution of that decree. In September 1869, one Sreenarain Chuckerbutty (defendant No. 8) the surviving brother of Mittunjoy, put in a claim to the property attached, but the claim was rejected, whereupon Sreenarain brought a suit against the Official Assignee asking for a declaration of his right to the property, and for an injunction to stop the sale, but on July 11th, 1870, his suit was dismissed, and on the 24th March 1871 his appeal against the judgment of the 10th July 1870 was also dismissed, and on the 25th February 1881 the Official Assignee sold the houses, and premises, to the plaintiff. The latter, on 19th December 1881, brought this suit against the defendants 1 to 7, who were alleged to be the tenants of Mittunjoy, for possession of the premises. And on the 16th March 1882, he amended his plaint, and made defendant No. 8 abovementioned a party to the suit.

Defendants Nos. 2, 5, 6 and 7 contended that they were the monthly tenants of Sreenarain Chuckerbutty, who they stated to be the owner, if not of the whole, of a greater portion of the premises, and in possession thereof. Defendant No. 2 asserted that he had paid rent to Sreenarain for the last 20 years. And the defendants 5, 6 and 7 asserted that they had paid rent to Sreenarain for the last three years, and contended that even if the plaintiff was the owner of the premises, which they denied, they were entitled to notice to quit.

Sreenarain (defendant No. 8) contended that he had been in possession of the premises by purchase since 1241 (1834-35), and that defendants 1 to 7 were his tenants, and submitted that supposing Mittunjoy ever to have been in possession of the property, his right and interest was barred by limitation.

At the hearing of the case on the 8th February 1883, the plaintiff put in the deed of sale of the 25th February 1881, the order in the claim made by Sreenarain against the Official Assignee and the decrees in the suit of *Sreenarain v. The Official Assignee*. He also called one Tariny Churn Banerjee, who stated that he had been a servant of Mittunjoy, that he entered his service when he [376] (the witness) was fourteen or fifteen years old, and that he was now 51 years old, and that Mittunjoy died eight or nine years ago; that during this service he had collected rents of the premises in dispute for Mittunjoy, but could not specify any particular dates of such collections.

Mr. T. A. Apcar and Mr. M. P. Gasper for the Plaintiff.

Mr. Bonnerjee and Mr. Palit for the Defendants.

PIGOT, J.—Dismissed the suit with costs, observing that though the plaintiff's witnesses seemed reliable, they proved no title, or at all events not sufficient to justify a decree for ejectment.

The plaintiff appealed.

Mr. Phillips (with him Mr. T. A. Apcar) for the Appellant.—The onus was on the defendants to show that they have been in possession for twelve years. We allege in our plaint that the defendants were the tenants of Mittunjoy. The

case of *Karan Singh v. Bakar Ali Khan* (L. R., 9 I. A., 99) overrules the decision of the Full Bench in *Mahomed Ali Khan v. Khaja Abdul Gunny* (I. L. R., 9 Cal., 744 ; 12 C. L. R., 257).

Mr. *Trevelyan* for the Respondents was not called upon.

The following **Judgments** were delivered by the Court (GARTH, C.J., and CUNNINGHAM, J.).

Garth, C. J.—I entirely agree with the learned Judge in the Court below that the plaintiff has made out no case, and the only reason, why I think it necessary to say a few words, is to explain my view of the argument, which has been addressed to us by Mr. *Phillips*, upon the plea of limitation. I think it very desirable that there should be no misunderstanding upon that subject.

The suit is brought to recover possession of a house and premises in Calcutta. The plaintiff claims the property, having purchased it, as he contends, from the Official Assignee, as belonging to a person named Mittunjoy Chuckerbutty (deceased), who is said to have been the absolute owner. The plaintiff's case is that the defendants Nos 1 to 7, who are now in possession, were tenants on sufferance of Mittunjoy, and consequently that he, claiming through Mittunjoy, is entitled to eject them.

[377] These defendants say, that they do not hold under Mittunjoy at all, that they are the tenants of the defendant Sreenarain Chuckerbutty, who is a brother of Mittunjoy, and all the defendants contend that Mittunjoy had never any title to, or possession of, the property.

This being the nature of the case, the plaintiff, in order to prove a title and possession in Mittunjoy, has called a witness named Tarney Churn Bannerjee, who professes to have been Mittunjoy's servant for a great many years. He says that Mittunjoy and his brothers had no ancestral property, but that he (the witness) and Mittunjoy used to come to Calcutta, and when there that they used to collect the rent of certain houses, and among them, of the house in question. But his evidence in this respect is of the vaguest character; he cannot say when it was that he received the rents, he certainly never received them from the defendants Nos 1 to 7, and the utmost that his evidence amounts to is, that he received some rent for his house at some time or other, but when, he cannot say.

Under these circumstances, Mr. *Phillips* has contended that the onus is upon the defendants to show that they have been in possession for upwards of twelve years.

It seems to me that there is no ground for that contention. The suit, as I take it, is brought to recover possession of property as upon a dispossession. The plaintiff claims under Mittunjoy; his case is, that Mittunjoy was the owner in possession, that he has bought Mittunjoy's right and title, and that consequently he is entitled to treat the defendants 1 to 7, who were Mittunjoy's tenants, as trespassers.

Of course, if the plaintiff could have shown that these people (the defendants 1 to 7) were really Mittunjoy's tenants, he would have had the same rights against them that Mittunjoy had. But he has not attempted to prove, and certainly he has not succeeded in proving, that they were Mittunjoy's tenants. They are, therefore, holding adversely to the plaintiff, and the plaintiff is seeking to eject them upon the ground that they are in wrongful possession of his (the plaintiff's) property.

That being so, I consider that the plaintiff is bound to show [378] that he or some or one of the persons under whom he claims, have been in possession of the property within twelve years before suit.

Mr. *Phillips* contends that this is not so, because the plaintiff has alleged in his plaint that the defendants Nos 1 to 7 were the tenants of Mittunjoy. But if a mere allegation of that kind could relieve a plaintiff from the burthen of proving that he or those under whom he claims had been in possession within twelve years, that device might always be resorted to for the purpose of evading the law of limitation.

Then, again, Mr. *Phillips*, in support of his argument, has referred us to the case of *Rao Karan Singh v. Bakar Ali Khan* (L. R., 9 I. A., 99) decided by the Privy Council, the effect of which he contends, is to overrule the law laid down by the Full Bench of this Court in *Mahomed Ali Khan v. Khaja Abdul Gunny* (I. L. R., 9 Cal., 744, s.c., 12 C. L. R., 257).

In this it seems to me he is in error. That decision of the Privy Council was duly considered by this Court in the Full Bench case, but we did not notice it in our judgment, because we thought it did not apply.

That suit in point of fact was not for possession at all. It was brought by the plaintiff, a mortgagee, to recover the principal and interest due upon two mortgage bonds; and to enforce that claim, by a sale of the mortgaged property. The plaintiff, so far as appears, had never been in possession, nor did he ask for possession of that property. If he had, article 138^c of the Limitation Act would have applied.

The defendant's answer was, that the mortgagee (the plaintiff) could not enforce his right as against him, because he had been in possession of the property adversely to the plaintiff, and those under whom he claimed for upwards of twelve years before suit.

Under these circumstances, it was contended before the Privy Council that the plaintiff was bound to prove that he had been in possession within twelve years before suit, and this (as it would seem from the report) upon some general principle of law.

[379] But their Lordships held that the suit was not brought (under article 143^d of the Act of 1871) to recover possession as upon a dispossession, and they, therefore, considered that the plaintiff was not bound to prove a possession within twelve years before suit; but that it lay on the defendant to prove an adverse possession for that period in order to establish his defence.

* [Art. 138.—

Description of suit	Period of limitation.	Time from which period begins to run.
By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale	Twelve years...	The date of the sale.]

† [Art. 143.—

For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years...	The date of the dispossession or discontinuance.]
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I have said thus much in order to explain why in my opinion the Privy Council decision is not applicable here, and why that decision does not conflict in any way with the Full Bench judgment of this Court. But in point of fact there is no evidence in the case which would justify any Court in finding in the plaintiff's favour.

The appeal must be dismissed with costs on scale 2.

Cunningham, J. —I concur in thinking that the ruling of the Judicial Committee in *Rao Karan Singh v. Bakar Ali Khan* (L. R., 9 I. A., 99) cannot be regarded as modifying the law which has been repeatedly laid down in this Court on the subject of limitation in suits for possession of immoveable property.

The plaintiff in that case sued for the amount secured on two mortgage bonds, and for sale of the mortgaged property. The defendant pleaded twelve years' adverse possession, and all that appears to have been decided was that the defendant was not, for the reasons set forth in the judgment, entitled to add to the period during which he had himself been in adverse possession, the period during which the Collector had been in possession on behalf of Government. I agree in dismissing the appeal with costs.

Appeal dismissed.

Attorney for the Appellant Baboo A. T. Dhur.

Attorney for the Respondents Baboo G. C. Chunder.

NOTES

[See the Notes to 9 Cal , 39 , 125 , in THE LAW REPORTS REPRINTS , also (1890) 14 Bom., 458 (461) , 20 M L. J 306]

[380] APPELLATE CIVIL.

The 6th December, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

Mohamed Masik.Defendant

versus

Malkai Mukhadrai Uzwa Badshah Mehal Saheba.....Plaintiff.*

Court Fees Act (VII of 1870), s. 7, cl. (c)—Suit to set aside a trust deed and to recover trust money—Appeal by trustee—Duty payable on memorandum of appeal.

A brought a suit against B, a trustee, and others to set aside a trust deed and to recover Rs. 2,50,000, the amount of the trust money, and valued his suit at Rs 2,50,000 A obtained

* Reference under s. 5 of Act VII of 1870.

a decree, B appealed and sought to affix to his memorandum of appeal a ten-rupee stamp, under art. 17, cl. (6)* of sch. II of Act VII of 1870.

Held, that the duty payable on the memorandum of appeal was the same as that paid on the plaint in the suit

THE suit to which this appeal relates was instituted to set aside a deed of endowment, whereby the plaintiff made over certain Government promissory notes of the value of Rs. 2,50,000, to the first defendant, and appointed him and his co-defendants in the suit, trustees for her (the plaintiff) during her lifetime, and after her death for the management of certain charities, and also to recover the promissory notes in question

The plaint was accordingly valued at the above amount, *viz* , Rs. 2,50,000, and an *ad valorem* Court-fee of Rs. 2,175 was paid thereon.

The suit having been decreed, the defendant No. 1 sought to prefer an appeal against the decree paying a Court Fee of Rs. 10 only under art. 6 of No. 17 of sch. II of the Court Fees Act (VII) of 1870, as for an appeal "where it is not possible to estimate at a money value the subject-matter in dispute."

The Deputy Registrar was of opinion that, as the suit was instituted for the purpose of having a deed of endowment declared invalid, and for the recovery of the Government promissory notes, as above stated, it evidently fell under cl. (c) of s. 7 of the Court Fees Act, and that the appellant should, therefore, value the appeal [381] in the same way as the suit was valued, *viz*., with reference to the subject-matter [see *Joy Narain Giree v. Greesh Chunder Mytee* (15 B. L. R., 172; 22 W. R., 438).]

The matter then came before the Taxing Officer for orders, and he gave the following opinion —

"The object sought to be attained in bringing the original suit was the actual recovery of Government promissory notes to the value of Rs. 2,50,000, which had been endorsed to the defendant under the terms of the deed. The plaintiff's interest in the suit amounted, therefore, to 2½ lakhs of rupees, and she correctly affixed an *ad valorem* stamp on her plaint in the lower Court

"In appealing against the judgment of the lower Court, the defendant seeks to change the nature of the suit and to determine its value, not according to the property in dispute, but according to his interest (or alleged interest) in it.

"The first question, therefore, for decision is, whether the appellant can change the nature of the suit in appeal for the purposes of determining the Court-fees payable. I know of no instance where this course has been allowed. I have never known it to be seriously contended. It is certainly a point of general importance, and as such must be referred for the decision of the Chief Justice under s. 5 of the Court Fees Act VII of 1870.

"The next point to be determined is the extent of the defendant's interest in the suit. His vakeel urges that he has no present interest, for he gets nothing until the plaintiff dies, and then merely a stipend of Rs. 50 a month.

* [Art. 17, Cl. 6 -

Number.

Proper fee.

Plaint or memorandum of appeal in each of the following suits —

Cl. 6 — Every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act

Ten rupees]

This may be the case if the defendant is to be regarded as an individual and not as a trustee. In the latter capacity, it seems to me that his interest extends to the retention of the principal entrusted to his care, and it is as a trustee, and not as an individual member of society, that he appeals. If this be the correct view, then, even granting that he may change the nature of the suit in appeal, his interest in it is equal to that of the plaintiff, and is represented by a money value of 2½ lakhs

"In connection with this point it should be observed that the Government promissory notes for 2½ lakhs are endorsed to defendant [382] *by name*, and that he is entitled, therefore, to draw the whole interest thereon

"I think that the first question should be answered in the negative. The Court Fees Act does not distinguish between a 'plaint' and a 'memorandum of appeal' when the latter is from a decree. If, therefore, the fee was correct in the lower Court—and this is not denied—then the same fee is leviable in the Appellate Court.

"As to the second point, I am of opinion that the interest of the appellant is equivalent to that of the plaintiff so far as regards the subject-matter of this suit; and that such interest amounts to a money value of 2½ lakhs, and is possessed by defendant in his capacity of trustee"

The Taxing Officer, therefore, referred the two questions above mentioned to the Chief Justice under s 5 of Act VII of 1870

Baboo *Pran Nuth Palit* for the Appellant

No one appeared on the other side

Garth, C.J.—I have no doubt whatever that in this case the nature of the appeal is the same as the value of the suit, namely, Rs 2,50,000

The question is not what is the defendant's personal interest in the subject-matter of the suit. He may have no personal interest at all, and yet the subject-matter of the appeal may be as valuable as the subject-matter of the suit. There is nothing, as far as I can see, in the defendant's objection

[383] APPELLATE CIVIL.*The 28th January, 1884.*

PRESENT:

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Jarfan Khan . . . One of the Defendants

versus

Jabbar Meah . . . Plaintiff.

Mahomedan law—Pre-emption—Ceremonies.

In order to sustain a claim for pre-emption in Mahomedan law, it is essential that the ceremony of *Tulub-i-mowashibat* should be properly performed

THE case is thus stated in the judgment of the lower Appellate Court.—

The suit was to enforce a right of pre-emption. Plaintiff alleged that he was entitled to preference to defendant No. 2 in purchasing a certain plot which defendant No. 2 purchased from defendant No. 1, and that defendant No. 1 gave him no opportunity. The plaintiff on the 13th July 1880 having been away elsewhere returned home, and was informed of the sale. On hearing of the sale, he took all needful steps and offered to return to the defendant No. 2 the money paid, defendant, however, refused to hand over the land to plaintiff.

The plaint states that on hearing of the sale, in the presence of the public, the plaintiff stated his wish to buy, and then, very shortly afterwards, taking with him the price, Rs. 47-4, went with suitable witnesses to defendant No. 1's residence to offer the money. He states that he is ready now to pay whatever price the Court may direct. Defendant No. 1, in her written statement, alleged that the plaintiff had not performed the ceremonies of *Tulub-i-mowashibat* and *Tulub-i-shad* as he stated, and had not deposited the purchase-money with the plaintiff, and therefore plaintiff could not maintain the suit, the defendant No. 1 before selling the land frequently offered plaintiff and his brother Abdul Meah and his nephew Macfaruddi opportunities of exercising the right of pre-emption which they refused; also that the defendant No. 2 had a superior right of pre-emption to plaintiff, and consequently defendant No. 1 sold him the property on the 23rd December 1879 by *kabala*. The *kabala* is filed. It is admitted that Rs. 47-4 was the price. The defendant No. 2 supported these allegations. He, in his written statement, set forth that, after her husband's death, defendant No. 1 had gone to her father's; subsequently she desired to sell this property, and therefore informed defendant No. 2, and he desired to buy. Consequently "in a public place in the presence of several persons, on giving defendant a proper price, she executed a *kabala* [384] in his favour. Plaintiff or his brother or his nephew at no time wished to buy the land."

The Munsif found at the outset that plaintiff was not entitled to maintain this suit for the following reasons, on his own evidence without going into any other issues. Plaintiff's evidence, he held, showed that one day in Pous, when plaintiff came home, his wife told him that the land had been sold by defendant No. 1 to defendant No. 2; plaintiff thereupon entered his house, opened his chest, took out Rs. 47-4, called the witnesses, proceeded to the premises and there cried aloud that he had a right of pre-emption, and would exercise that right; and then and there offered to defendant No. 2 the refund of the purchase-

* Appeal from Appellate Decree No. 2044 of 1882, against the decree of T. M. Kirkwood, Esq., Judge of Mymensing, dated the 1st of July 1882, reversing the decree of Baboo Nilmony Nag, First Munsif of Atia, dated the 28th December 1880.

money, which tender defendant No. 2 refused. Plaintiff then went with the witnesses to defendant No. 1's house, and there also plaintiff went through the same formal declaration of his rights. The Munsif held that, while all this was right enough, yet plaintiff had omitted to shout out his demand for the land the instant he heard about it from his wife's lips. This omission the Munsif held to be fatal, and so dismissed the suit.

The evidence shows that there are two huts with a common compound (part used by plaintiff and part used by defendant No. 1), and a common well and drainage. That one hut was the property of the widow, the defendant No. 1, and that the other was the property of the plaintiff. That the plaintiff, coming home, was in the common yard when his wife told him, that he then entered his house, opened his chest, and came back into the yard with money, Rs. 47-4, and in the presence of three neighbours, one of whom was already sitting there (the two others, whose *baris* adjoin, came up on hearing plaintiff commence the proclamation of his rights), went to the widow's hut, proclaimed his right of pre-emption, and called on the defendant No. 2 who was not present, but in his own *bari* hard by, to give it up to him and take the purchase-money. The defendant No. 2 refused, answering from his *bari*. Plaintiff then went with witnesses to the defendant No. 1's father's house where the defendant No. 1 lived (a mile or so distant), and claimed his right, and offered to pay the price for it. She then refused, saying she had sold it to the defendant No. 2. The defendant No. 1 is the widow of the plaintiff's cousin. The hut in question had belonged to that cousin, the *bari* being the ancestral *bari* of both plaintiff and that cousin. The plaintiff had come home on this day at noon and went to the claimed hut and proclaimed his rights before 1 P.M., and went to the defendant No. 1's father's house, and returned therefrom before 2 P.M. Defendant No. 2's *bari* is two *baris* off to the north of plaintiff's *bari*. The defendant No. 2 is plaintiff's cousin on his mother's side.

The plaintiff's allegation that he did return home on the 13th Pous is not traversed by the defence, nor is there any evidence on the part of the defence (save the statement of a witness who is quite unreliable, and denies [385] plaintiff's having gone to defendant No. 1's residence with the money) contradictory of the evidence adduced by plaintiff to show the manner in which he went through the formalities. The evidence for the defence is almost entirely confined to plaintiff's refusal to purchase before the sale and his permission to defendant No. 1 to sell to any one.

The lower Court has dismissed the suit even on the assumption that the facts are as above given by the plaintiff because it is not shown that plaintiff *at once* at the very moment of receiving the information from his wife, proclaimed his right and his intention to insist on it. If plaintiff has any right at all in the matter, such a *dictum*, if supported, would appear to me to be going as nearly as possible to a negation of that right. I cannot conceive that the law is as the Munsif has interpreted it. I turn to the authorities.

Jamalan v. Latif Hossein (8 B. L. R., 160, 16 W. R. F. B., 13) states. "The *Tulub-i-mowashibat* may be, and constantly is, a private act which the purchaser against whom the right is claimed has no power of questioning or refusing; and the *Tulub-i-shad* is the only public act connected with the claim to pre-emption of which the purchaser has necessarily any cognizance." The *Tulub-i-shad* must take place with the least practicable delay. It has clearly taken place in the present instance with the least practicable delay. Baillie's Digest states, page 484: "The *Tulub-i-mowashibat*, or immediate demand, is first necessary, then the *Tulub-i-shad* or demand with invocation, if, at the

time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest his immediate demand, it would suffice for both demands, and there would be no necessity for the other." It appears to me that the above quotation covers the present case, and that the demand made in the presence of witnesses and of the premises within some minutes, perhaps half an hour at the outside, after hearing of the sale, is the sort of *Tulub-i-mowashibat* which renders unnecessary any subsequent *Tulub-i-shad*. It seems to me that plaintiff not only made this demand in the presence of witnesses on the premises, but his demand was answered by the purchaser from a neighbouring *bari*, and that plaintiff then promptly went off to the vendor's residence (some distance off), and in the presence of witnesses made demand of her. It seems that all the necessary formalities have been gone through, the question is, were they commenced and concluded with sufficient promptitude? I think the commencement is the only really debatable point, it cannot be contended that, when once commenced all the necessary formalities were not promptly and continuously gone through.

[386] *Mona Singh v. Mosrad Singh* (5 W. R., 203) lays down that the act of going into one's house to get the money before making demand is a delay which forfeits the pre-emptor's title. The words used by MACNAGHTEN are: "It is necessary that the person claiming this right should declare his intention of becoming purchaser immediately on hearing of the sale." In a ruling, *Jadu Singh v. Ragkumar* (4 B. L. R. A. C., 171, 13 W. R., 177) KEMP, J., remarks: "There is no absolute necessity for the pre-emptor to make the *Tulub-i-mowashibat* in the presence of witnesses. It is usually done in the presence of witnesses, in order that the pre-emptor may be provided with proof in case the purchaser should deny the demand." This seems to me to indicate as permissible a reasonable delay for the purpose of getting witnesses before the demand is made.

But in *Ram Charan v. Nabu Mahton* (4 B. L. R. A. C., 216, 13 W. R., 259), it has been held that where the pre-emptor heard the news of the sale at his own house, which was adjacent to the lands whereof pre-emption was claimed, and then went from his own to the land in dispute, and then made the demand, the delay, though very short, forfeited the right.

Page 569, Vol. III, of the *Hedaya*, states: "If the man claim his *shuffa* in the presence of the company amongst whom he may be sitting when he received the intelligence, he is the *shuffee*, his right not being invalidated unless he delay asserting it till after the company have broken up, because the power of accepting or rejecting the *shuffa* being established, a short time should necessarily be allowed for reflection in the same manner as time is allowed to a woman to whom her husband has given the power of choosing to be divorced or not." This passage was quoted with approval in *Amjad Hossein v. Kharaj Sen Sahu* (4 B. L. R. A. C., 203, 13 W. R., 299).

It seems to me that if this is a correct statement of the law then the plaintiffs are well within the law in the present case. I think the above opinion is not in conflict with the ruling in *Ali Muhammad v. Tuj Muhammad* (1 L. R., 1 All., 283) where twelve hours delay in making the first demand was considered excessive. I must hold that in the present case the formalities required by law have been commenced and gone through with sufficient expedition.

The second defendant appealed to the High Court on the ground that the Judge was wrong in holding that formalities prescribed by Mahomedan law had been complied with.

Baboo Jogesh Chunder Dey for the Appellant.

Baboo Juggut Chunder Banerjee for the Respondent.

[387] The Judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.—This is a case of pre-emption. The Munsiff held that the plaintiff was not entitled to succeed because he had not, in compliance with the requirements of Mahomedan law, performed the ceremony of *Tulub-i-mowashibat*. The Munsiff says in his judgment "The plaintiff on hearing this," that is, on hearing the fact of the sale from his wife, "entered his house, opened his chest, took Rs. 47-4, called the witnesses, proceeded to the premises, the subject of sale, and there cried aloud the following words 'That he has the right of pre-emption to purchase the said land, and he shall exercise the said right, let the defendant No. 2 receive the refund of the consideration money and make over the land to him (the plaintiff).' The defendant No. 2 refused to accept the offer, on which the plaintiff went with the witnesses to the place where the defendant No. 1 was residing, and there also the plaintiff performed the said ceremony, that is ceremony of *Tulub-i-shad*. Now, it is clear that immediately upon hearing of the sale of the property the plaintiff did not make the demand or perform the ceremony of *Tulub-i-mowashibat*. At page 481 of Baillie's Digest of Mahomedan Law, there is the following passage, in which the law on the subject is stated "By *Tulub-i-mowashibat* is meant that when a person who is entitled to pre-emption has heard of a sale he ought to claim his right immediately on the instant (whether there is any one by him or not), and when he remains silent without claiming the right, it is lost", and then is given the instance of a person reading a letter in the beginning or middle of which the information as to the sale is contained. If he wait till he finish the whole letter without making the *Tulub-i-mowashibat* the right of pre-emption is lost. The Judge quotes and relies upon a passage from the same work, p. 484, which is as follows "The *Tulub-i-mowashibat* or immediate demand is first necessary, then the *Tulub-i-shad*, or demand with invocation, if at the time of making the former there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands [388] and there would be no necessity for the other." Now, the facts of the present case do not fall within the meaning of the passage last quoted. The plaintiff did not, on hearing of the sale, immediately call witnesses to attest the immediate demand. He made a delay, went into the house, got the money, and then called the witnesses, and this being so it is clear that the case is not one to which the second quotation from Mr. Baillie's work would apply. We may refer to the cases of *Mona Singh v Mostad Singh* (5 W. R., 203), and *Ram Charan v. Nurbir Mahton* (4 B. L. R. A. C., 216, 13 W. R. 259), which have been cited by the vakeel for the appellant, as instances of what is required by the law in conformity with the first of the above extracts from Mr. Baillie's work. We think that in the present case the requirements of the law have not been complied with.

The decision of the District Judge must, therefore, be set aside and that of the Munsiff restored with costs of both Courts.

Appeal allowed

[10 Cal. 388]

APPELLATE CIVIL.

The 31st January, 1884.

PRESENT

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Ram Coomar Sen and another..... Plaintiffs

versus

Ram Comul Sen... Defendant.

Small Cause Court—Proceeds of immoveable property—Jurisdiction—

Act XI of 1865, s. 6—Money had and received—Sale of tenure—

Co-sharers—Arrears of rent

The plaintiff and the defendant were co-owners of a certain taluq. The zamindar brought a suit for arrears of rent of the taluq against the defendant, obtained a decree, and in execution of that decree sold the tenure. The proceeds of the sale, after satisfying the zamindar's decree, were taken by the defendant, and the plaintiff instituted the present suit to recover an 8-annas share thereof.

Held, that the plaintiff was entitled to recover, and held, further, that such a suit was not cognizable by a Small Cause Court.

On the 5th of May 1871, the plaintiff Ram Coomar Sen brought a suit in the Court of the Munsiff of Kooshtea against the defendant Ram Comul Sen for possession and mesne profits of [389] an 8-annas share of a certain taluq held under the Maharajah of Tipperah on the allegation that the defendant had dispossessed the plaintiff from the said 8-annas share on the 12th of March 1871. The final decree in this case was passed in the plaintiffs' favour in the High Court, and in execution of that decree the plaintiffs obtained possession on the 3rd of August 1878.

In the meantime, the Maharajah of Tipperah brought a suit for arrears of rent of the same taluq against the defendant Ram Comul Sen, who was the only person recorded in his sherista as proprietor, and obtained a decree on the 25th of June 1878. In execution of that decree the taluq was sold for Rs. 800. Out of this sum Rs. 61-5-3 were paid to the Maharajah in satisfaction of his decree, the balance being paid over to the defendant Ram Comul Sen. The plaintiffs presented a petition in the execution case claiming half the proceeds of the taluq, but their claim was rejected. They thereupon brought the present suit.

* Appeal from Appellate Decree No. 963 of 1882, against the decree of Baboo Uma Churn Kastogiri, First Subordinate Judge of Tipperah, dated the 13th March 1882, affirming the decree of Baboo Ram Judub Talapatra, Second Munsiff of Kooshtea, dated the 31st January 1881.

The plaintiffs' suit was dismissed with costs, chiefly on the ground that, as they were not parties to the rent suit of 1878, their interest in the taluq was unaffected by the sale, the lower Appellate Court finding it not proved that Ram Comul Sen was the only recorded proprietor. The plaintiffs appealed to the High Court.

Baboo Aukhil Chunder Sen for the Appellants.

Baboo Doorga Mohun Dass and Munshi Serajul Islam for the Respondent.

The **Judgment** of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.—In this case the plaintiffs sued to recover the value of a moiety of a taluq under the following circumstances. The landlord, who is the Maharajah of Tipperah, brought a suit for the rent of the taluq against Ram Comul Sen. He obtained a decree for Rs. 44-8, being the amount of rent in arrears; and, in execution of that decree, he brought the taluq to sale. It was purchased by one Nobo Coomar Roy for the sum of Rs. 800. The plaintiffs' contention is that, although they were not made parties to the rent suit, nevertheless they had a half share in the taluq, and that they are therefore entitled to Rs. 400, the value of the half share.

[390] A preliminary objection was taken to the hearing of the appeal, it being contended that this is a suit of the Small Cause Court class, and therefore the amount in dispute being less than Rs. 500, no second appeal lies to the High Court.

We have considered this preliminary objection, and the conclusion at which we arrive is, that this is not a suit of the Small Cause Court class, in other words, that it is not a suit coming within the purview of s. 6 of Act XI of 1865. According to that section the following suits are cognizable by a Court of Small Causes, viz., "claims for money due on a bond or other contract, or for rent or for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of Rs. 500." We think it impossible to say that the present suit is a suit for money due on a "contract," having regard to the meaning of the term as expounded in a number of decisions of this Court. We may further observe that the words "bond or other contract" seem to indicate that the "contract" here spoken of must be *ejusdem generis* with a bond, in other words, a true contract as opposed to a *quasi-contract* or an obligation in the nature of a contract. Then that the words "personal property" are not applicable would appear from the words which immediately follow "for the value of such property," for if money was intended to be included in personal property, it would have been unnecessary to insert the words "for the value of such property" immediately after the words "personal property." Then we think it impossible to say that this suit is a suit for *damages* within the meaning of the section, and there is a further consideration. The suit is clearly for the value of immoveable property, and while the section distinctly enumerates "the value of personal property" as a subject matter of a suit which may be brought under the section, there is nothing about the value of immoveable property. The reasonable construction, therefore, is that the value of immoveable property was not intended to be within the purview of the section. The conclusion at which we arrive then is that the suit is not a suit of the Small Cause Court class, and that a second appeal does lie. We have been referred [391] to the case of *Mata Prasad v. Gauri* (I. L. R., 3 All., 59), but we are unable to concur with the conclusion arrived at by the learned Judges who decided that case.

Turning now to the facts, it appears that, on a previous occasion, the Maharajah brought this very taluq to sale in execution of a decree for rent obtained in a suit to which the present plaintiffs were not parties; and that they successfully asserted their right to a moiety of the taluq in a suit which came up in appeal to the High Court. In that suit the defendant in the present case was a party, and therefore he is estopped from saying that the plaintiffs have not a moiety of the taluq. The decision in that case is, we think, of no value to show what was sold in the present case, a purpose for which it has been, to some extent, used in the Court below. But upon referring to the sale certificate it appears to us clear that what was sold on the present occasion was the whole of the taluq, and as the defendant has adopted that sale by taking away the whole of the surplus purchase-money, notwithstanding that the plaintiffs gave him notice to abandon his right to one moiety, and allow them (plaintiffs) to take out this moiety from the Civil Court, we think it inequitable that the defendant should be allowed to retain the whole value of the taluq, when it has been already decided between the parties that the plaintiffs have title to a moiety of the taluq itself. Under these circumstances, we think that the decree of the Court below must be set aside, and this appeal decreed. The plaintiffs will have a decree for one moiety, not of the Rs. 800 for which the taluq was sold in the execution sale, but of the surplus sale proceeds, Rs 738-10-9. As the plaintiffs have elected to adopt the sale, they cannot equitably claim more than a moiety of the sale proceeds which remain after satisfying the rent decree.

The plaintiffs will have their costs in all the Courts.

Appeal allowed

[392] APPELLATE CIVIL

The 11th January, 1884

PRESENT

MR JUSTICE MITTER AND MR JUSTICE FIELD.

Birajun Koer. . . . One of the Defendants

versus

Luchmi Narain Mahata and others . . . Plaintiffs.

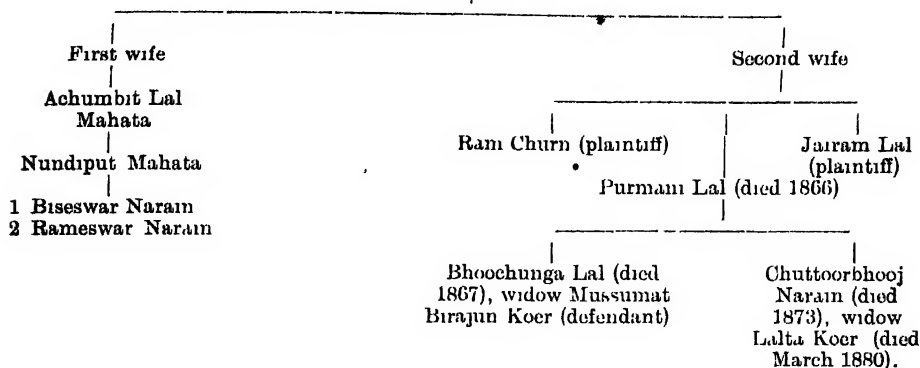
Hindu law, Widow—Right of childless widow to alienate moveable property—Mithila law—Inheritance.

Under the Mithila law a childless Hindu widow, although she cannot alienate the immoveable property, has an absolute right over the moveable property inherited from her husband and can alienate it in any manner she pleases, and she has also an absolute power to dispose of the profits of the estate during her lifetime

* Appeal from Original Decree No 96 of 1882, against the decree of Baboo Mohendra Nath Bose, Rai Bahadoor, First Subordinate Judge of Tirhoot, dated the 22nd December 1881.

THIS was a case in which the plaintiffs laid claim to certain property by way of inheritance under the Mithila law. The following table shows the state of the family at the time the suit was filed :—

GURU BUKSH LAL MAHATA



The original plaintiffs died after the institution of the suit, and the principal respondents were their legal representatives

The plaintiffs as the uncles of Chuttoorbhooj Narain brought the suit on the death of his widow Lalta Koer for a declaration of their title to, and for possession of, the estate, consisting of moveable and immoveable property left by him, as being his next heirs under the Mithila law. They alleged that the entire share of his father Purman Lal came to be acquired by him as being the surviving son, his brother Bhoochunga Lal having died while in a joint estate with him, thereby precluding his widow, the defendant Birajun Koer, from inheriting any share therein.

In answer to the suit Birajun Koer alleged that her husband was living in a state of separation from his brother Chuttoorbhooj [393] Narain, and that she therefore succeeded him as heiress under the Hindu law. She admitted that after the death of her husband the entire estate remained in the hands of Chuttoorbhooj Narain so long as he lived, but alleged that he was acting as pure trustee on her behalf. She further alleged that on the death of Chuttoorbhooj his widow Lalta Koer and she, the defendant, jointly took out letters of administration, and remained in possession of the whole estate as heiresses-at-law until the death of Lalta Koer, and she further set up a verbal gift from the latter in regard to her portion of the property. She further contended that even if she were not the heiress to her husband she was still the heiress of Chuttoorbhooj as being the nearest *sapinda gotraja*, and this contention was also raised in the appeal, but was not pressed. She also contended that by Lalta Koer joining her in the administration, it was to be presumed that she had made a gift of one moiety of the estate to her, and by virtue of such gift she was entitled to retain that moiety under the Hindu law, which she maintained authorises a widow to deal with the moveable portion of her husband's estate in any manner she pleases. She also claimed the other moiety under the alleged gift above alluded to.

The nature of the properties claimed, together with the evidence offered on either side in support of the above contentions and the findings of the lower Court, are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. *Evans*, Baboo *Chunder Madhub Ghose* and Baboo *Abinash Chunder Banerjee* for the appellant.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerjee* and Baboo *Taruck Nath Palit* for the Respondents.

The **Judgment** of the Court (MITTER and FIELD, JJ) was delivered by

Mitter, J.—This is an appeal against a decree in favour of the plaintiffs passed by the Subordinate Judge of Tirhoot. The claim of the plaintiffs was for the recovery of the estate of one Chuttoorbhooj Narain. The (defendant) appellant is the widow of Bhoochungal Lal, brother of Chuttoorbhooj. Purmani Lal, [394] father of Bhoochungal Lal, and Chuttoorbhooj Narain, was a uterine brother of the original plaintiffs, viz, Ram Churn and Jairam Lal. The original plaintiffs died after the institution of the suit, and the principal respondents are their legal representatives. Purmani Lal died in the year 1273 F.S. (1866), Bhoochungal Lal in the year 1274 F.S. (1867), and Chuttoorbhooj Narain in the month of Baisack 1280 F.S. (April 1873).

The plaintiffs alleged that the three brothers, Ram Churn, Purmani and Jairam were joint in food and estate, that Ram Churn separated from the joint family in the month of Baisack 1275 F.S. (April 1868), and that after the death of Bhoochungal Lal, Chuttoorbhooj separated from Jairam in the year 1279 F.S. (1872). That the entire estate left by Purmani became vested in Chuttoorbhooj, the appellant. Birajun the widow of his brother, who lived with him jointly, receiving maintenance from the estate. That on the death of Chuttoorbhooj Narain, the estate in question devolved under the Mithila law which governs the family upon his widow Lalta Koer, who out of affection for the appellant, and with a view to please her, caused her name to be associated with her "in the village and Court papers," but that she (Lalta) alone remained in possession of the estate, the appellant living jointly with her and receiving maintenance as before. That there was a Banking Kotee at Bettea, which, on partition of the family property, fell to Jairam Lal and Chuttoorbhooj Narain in equal shares. That the Maharajah of Bettea was a debtor of this Banking Kotee, and that as security for this debt he executed on the 18th Bhadur 1288 (22nd August 1876) a bond in favour of Jairam as well as Lalta Koer, and the appellant, representing the deceased Chuttoorbhooj Narain, for the amount of Rs. 2,08,275. That out of the money left by Chuttoorbhooj Narain, Lalta Koer purchased several immoveable properties in the names of Gopi Lal, Jugger Nath Pershad and Ram Sahi Lal. That Lalta Koer died on the 2nd Falgoon 1287 (March 1880), and that on her death under the Mithila law of inheritance the original plaintiffs as next heirs-at-law became entitled to the entire estate which was in the possession of Lalta Koer as Hindu widow. That after the death of Lalta Koer the Maharajah of Bettea, notwithstanding the plaintiff's right being notified to him, paid Rs. 30,000 [395] to the appellant out of the money due under the bond dated the 22nd August 1876, and that out of the aforesaid Rs. 30,000 the appellant advanced Rs. 15,000 as a loan to one Mr. Hudson under a bond executed by him. Upon these allegations the plaintiffs sought to establish their right in the properties, moveable and immoveable, left by Chuttoorbhooj as well as the bonds executed by the Maharaja of Bettea and Mr. Hudson, and in the properties purchased after the death of Chuttoorbhooj Narain in the names of Gopi Lal, Jugger Nath Pershad and Ram Sahi, and for the recovery of possession of such of them as are capable of being reduced to possession, making these persons defendants along with Birajun Koer, the appellant before us. The plaintiffs further prayed that the maintenance of the appellant be fixed by the Court.

The appellant, who was the principal defendant, alleged in her written statement that her husband was separate from his brother Chuttoorbhooj Narain, and that on her husband's death she allowed her brother-in-law to manage the entire property, as she had confidence in him and lived with him jointly. That after the death of Chuttoorbhooj she and the widow of Chuttoorbhooj, viz., Lalta Koer, remained in joint possession of the said estate. That Lalta Koer before her death made a gift of her share of the estate in question to the appellant. That certain shares of mouzahs Chattopore and of Sadipore were purchased by the appellant and Lalta Koer in the names of Jugger Nath Pershad and Gopi Lal respectively out of the profits of their joint estate. That even if the gift made by Lalta Koer be not established, and if it be proved that her husband was joint with Chuttoorbhooj, the appellant is entitled to a moiety of the moveable property under the arrangement between herself and Lalta Koer.

The lower Court finds that Bhoochunga Lal at the time of his death was joint in food and estate with his brother Chuttoorbhooj, that the act of Lalta Koer in the matter of associating the name of the appellant in the village and Court papers does not amount to a gift of any interest in the property, that the said act is not binding upon the respondents, that the verbal gift set up by the appellant is not established, that the properties purchased out of the profits of the estate left by Chuttoorbhooj [396] would pass to the (plaintiffs) respondents with the *corpus*, that the Rs 30,000 paid by the Maharajah of Bettea to the appellant represent a portion of the saving by Lalta from the profits of her husband's estate; and that the (plaintiffs) respondents as the heirs-at-law of Chuttoorbhooj are entitled to the said money, and that mouzah Madhopore is not proved to have been purchased by Lalta Koer, but is the property of the defendant Ram Sahi. As regards houses Nos 88 and 89 of the schedule to the plaint the plaintiffs gave up their claim to them. The lower Court fixed Rs. 4,800 annually as the maintenance of the appellant, and declared that the Rs. 15,000 out of the Rs 30,000 paid by the Maharajah of Bettea and appropriated by the appellant should be considered as a charge upon this maintenance. In accordance with these findings a decree has been made in favour of the respondents. The defendant Birajun Koer has preferred this appeal against the said decree, and the respondents have taken certain objections to it under s 561 of the Civil Procedure Code.

The appellant contended in the lower Court that, taking all the facts stated in the plaint as correct, she as a nearer *sapinda* to Chuttoorbhooj Narain than the original plaintiffs had under the Hindu law of inheritance a preferential right to his estate. But the lower Court decided this question in favour of the plaintiffs. This ground of defence has also been taken in the petition of appeal. The learned counsel for the appellant, without giving it up, intimated to the Court that he would not repeat the arguments in support of his contention upon this point, as they were advanced on more than one occasion in recent cases and were considered and disposed of by the Court adversely to the contention.

Upon the evidence on the record there is not the slightest doubt that the findings of the lower Court that Bhoochunga Lal was separate from Chuttoorbhooj Narain, and that the alleged verbal gift by Lalta Koer to the appellant is not established, are correct. The principal question that has been discussed in appeal is the nature and the effect of the arrangement under which the name of the appellant was associated with that of Lalta Koer in respect of the properties in dispute after the death of Chuttoorbhooj Narain.

[397] The evidence upon this point is meagre and has left on my mind the impression that for some reason or other, which is not apparent, the parties have not placed before the Court all the circumstances relating to this arrangement.

Biseswar Narain, witness No. 1 for the plaintiffs, says upon this point, that after the death of Chuttoorbhooj Narain, Lalta Koer and Birajun Koer entered upon the possession of the property left by him; Lalta consented to this arrangement out of "generous affection" for Birajun Koer. In cross-examination the witness thus explains what this "generous affection" means. He says that in consequence of Birajun Koer's lamentations and cries, Lalta Koer associated her in the management of the affairs of the estate left by her husband. Gobind Lal, witness No. 2 for the plaintiffs, similarly says that it was in consequence of Birajun Koer's weeping and crying for her share that this arrangement was come to, but the witness is unable to say why Lalta assented to it. According to Gobind Dyal, the witness No. 3 for the plaintiffs, Birajun Koer's name was associated because he and the other well-wishers and the old servants of the family considered that this should be done with a view that Lalta might not maltreat her and refuse to maintain her. But this witness admits that Birajun Koer does not appear before him, and it is therefore probable that he was not aware of her lamentations and weepings for her share, if there were such "lamentations and weepings." Plaintiff's witness No. 4, Sriksissen Lal, deposes to Birajun Koer and Lalta Koer being in joint possession of the estate left by Chuttoorbhooj Narain. The witness No. 5, Parmes-suri Sahi, says that the name of Birajun Koer was jointly used along with that of Lalta Koer in consequence of the former claiming her share as the heiress of her husband. To the same effect is the deposition of Jugger Nath Pershad, the witness No. 1 for the defendant. Upon this point, the above is a summary of the oral evidence on the record.

The documentary evidence begins with the joint application of Birajun Koer and Lalta Koer, dated the 26th June 1873, for obtaining a certificate under Act XXVII of 1860 to collect the debts due to the estate of Chuttoorbhooj Narain. It is stated in this application "that these two ladies with mutual [398] consent have been in possession of all properties left by Chuttoorbhooj Narain by right of heirship." The rest of the documentary evidence consists of petitions, &c., in which these two ladies join with the co-sharers in various matters connected with the family properties, they being treated as jointly in possession of the property left by Chuttoorbhooj Narain as joint heiresses.

Upon this evidence it is clear to me that upon the death of Chuttoorbhooj Narain, Birajun Koer claimed a right in the property left by him. Whether that claim was based upon a right of inheritance to her husband's share, or upon her own right of maintenance, or upon a supposed right which, as the senior widow in the family, she might have thought that she was entitled to claim, it is not clear upon the evidence. But the evidence leaves no doubt in my mind that she put forward a claim with some degree of earnestness, and that with the advice of relatives, friends and servants of the family, Lalta agreed to settle this matter with her sister by making her a joint owner of the estate. As this estate had been hitherto treated as the sole property of Chuttoorbhooj Narain, it was thought that the best way of carrying out the arrangement would be to treat both these ladies as joint heiresses of Chuttoorbhooj Narain, although it was well known that Lalta alone was his heiress-at-law. The nature of the arrangement in question was therefore that Birajun was to remain in joint possession of the estate along with Lalta Koer as a Hindu widow.

The plaintiffs in this suit, as well as other co-sharers in the family estate, recognized this arrangement, but there is nothing on the record from which I can say that they *agreed* that this arrangement was to remain in force till the death of the (defendant) appellant.

This being the nature of the arrangement, the next question is, what is its effect as regards the right under the law of inheritance which accrued to the plaintiffs upon the death of Lalta Koer, the widow of Chuttoorbhoj Narain.

The plaintiffs claim through Chuttoorbhoj Narain, and therefore they are not bound by the arrangement made by Lalta Koei. As I have already remarked their recognition of the arrangement does not amount to a relinquishment of their right and [399] title on the death of the appellant. Upon the death of Lalta therefore the arrangement must be considered to have come to an end, unless she had the power under the Mithila law to alienate absolutely or for a definite period, even after her life, any portion of the property left by Chuttoorbhoj Narain. There is not the slightest doubt that she had no such power, so far as immoveable property is concerned. As regards the moveable property, the Subordinate Judge says that it is a settled law in Mithila that she has that power. It seems to me that, although the Subordinate Judge is in error in thinking that the law upon this point has been settled, yet his conclusion is right.

This case comes from Tirhoot, and is therefore to be decided in accordance with the *Vivada Chintamani* and *Itinaker* works of paramount authority in the countries governed by the Mithila law. It seems to me that according to these two *Nibandhas*, a Hindu widow succeeding to her husband's estate has the power of disposing absolutely of moveable properties inherited by her. The following passages from the *Vivada Chintamani* support this view —

“Katiyana says that a woman on the death of her husband may enjoy his estate according to her pleasure, but in his lifetime she should carefully preserve it. If he leave no estate, let her remain with his family.

“A childless widow, preserving her chastity, shall enjoy her husband's property with moderation, as long as she lives. After her death, the heirs shall take it.”

This admits of two meanings. The one is that, on the death of the husband, his property devolves on his wife and becomes her own in default of other heirs. The other is that the property which she enjoys with the consent of her husband in his lifetime is to be regarded as her peculiar property.

Katiyana says as to the first of these: “Let a woman on the death of her husband enjoy her husband's property at her discretion.”

This refers to property other than immoveable.

The following provision is made for immoveable property “Let a woman enjoy it with moderation as long as she lives. After her death, let the heirs take it.”

[400] “Moderation” means without much expenditure.

“Childless widow” means one who has no heir of her own.

On the second it is said that “while he lives she should carefully preserve it,” or, in other words, the property shall be protected in the lifetime of the husband. If her husband have left no wealth the widow should live with his family. Hence the immoveable property, which a woman gets after the death

of her husband, cannot be disposed of at her pleasure. The meaning of this is consonant with that of the husband's donation (which can only be enjoyed but not spent).

The texts of *Katiyana* do not refer to the peculiar property of a woman. The inconsistency owing to this is removed by the similarity of meaning. "As a woman cannot make a present of or at pleasure dispose of moveable property, given to her by her husband in his lifetime, so she cannot dispose of any immoveable property which she inherits on his death." (*Vivada Chintamani*, p. 263)

On the other hand, the following passage may be cited in support of the contrary view. Thus it is said in the *Mahabharata* "for women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth." Here *waste* means sale and gift at their own choice, p. 292.

It seems to me that the general rule laid down thus is subject to the exception mentioned at page 262, viz., that a widow has the power of alienating absolutely the moveable property inherited by her from her husband.

Of these passages the same view was taken by the pundits who were consulted in *Sreenarain Rai v. Bhya Jha* (2 Sel. Rep., 23). The same view is expressed in *Colebrooke's Digest*, Vol. III, p. 468 (London edition of 1801). "But the authors of the *Retnakar* and *Vivada Chintamani*," says the compiler of the *Digest*, "contend that a wife cannot give away the immoveable property of her husband which has devolved on her by the failure of male issue. but she may give away moveable effects. They expound the text of *Katiyana* as relating to the personal estate of her husband which has devolved upon her." In *Doorga Dayee v. Poorun* [401] *Dayee* (5 W. R., 141, 1 I. J. N. S., 128), which is a Tirhoot case, the same view of the law was taken, although the learned Judges to a great extent relied upon the *Mitakshara* law which, however, as decided by the Judicial Committee of the Privy Council in *Bhugwandeo Doobey v. Myna Bae* (11 Moore's I. A., 487), does not authorize the widow to alienate absolutely the moveable property inherited by her from her husband. But the learned Judges also refer to the *Vivada Chintamani*.

There being then in the *Mithila* law this distinction as to the disposing power of the widow between the moveable and immoveable property, the arrangement by which *Lalta Koer* made the appellant her co-parcener in the estate left by *Chuttoorbhooj* is binding upon the respondents so far as the moveable property is concerned, but is not binding upon them so far as the immoveable property is concerned. Upon this point, therefore, the decree of the lower Court must be varied.

The next point that was urged before us is that the decision of the lower Court as regards the properties acquired out of the profits of the estate of *Chuttoorbhooj* after his death is erroneous. It seems to me that as regards these properties, the appellant is entitled to retain a moiety share. By the arrangement already referred to, she became a joint owner with *Lalta* in the estate in question, and consequently the respondents cannot claim the whole of these properties. According to *Hindu* law, *Lalta Koer* had full power to dispose of the profits of the estate during her lifetime, and by the arrangement in question she allowed a moiety share in these profits to the appellant. The respondents cannot, therefore, lay claim to the whole of the after-acquired properties, but only to a share to the extent of one-half. Upon this point also the decree of the lower Court must be modified.

The respondents object to the decree of the lower Court, fixing Rs. 400 as the monthly maintenance of the appellant, as too exorbitant. Having regard to the value of the estate in dispute, I should have considerably reduced the amount, even if the decree of the lower Court had remained unaltered. But as that decree will be modified in favour of the appellant by dismissing the plaintiffs' claim to the extent of a half share, in respect of the [402] personal properties and the properties purchased after the death of Chuttoorbhooj, the amount of maintenance must be still more considerably reduced. Having regard to the status of the parties and the value of the immoveable property of the appellant's husband for which the respondents will obtain a decree, and taking into consideration that under our decree the appellant will be entitled to not an inconsiderable portion of the estate left by Chuttoorbhooj, I am of opinion that Rs. 25 should be fixed as the monthly maintenance to be allowed to the appellant out of the estate of her husband which has devolved upon the respondent.

We accordingly modify the decree of the lower Court. The respondents will get a decree for the properties claimed with the exception of a moiety of the personal properties and the properties purchased in the benami of Jugger Nath Pershad and Gopi Lal, the suit must also fail as regards the money (Rs. 30,000) paid by the Maharajah of Bettea, and consequently the money covered by the bond executed by Mr Hudson. The maintenance of Burajun Koer will be fixed at the rate of Rs. 25 per month. Costs of all the parties to this appeal will come out of the estate. The order as to costs in the decree of the lower Court will stand.

Appeal allowed and decree modified.

[10 Cal. 402]

The 4th February, 1884.

PRESENT.

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS

Krishna Lall Dutt.Plaintiff

versus

Radha Krishna Surkhel and othersDefendants.*

Limitation Act (XV of 1877), sch. II, art. 138—Possession, Suit for—Auction purchaser, Suit by, for possession.

Where it was shown in a suit by an auction-purchaser at an execution sale that the formal possession obtained by him through the Court had not been followed by any act of

* Appeal from Appellate Decree No 145 of 1883, against the decree of S H C. Tayler, Esq., Judge of Beerbhoom, dated the 10th October 1882, affirming the decree of Baboo Manu Lall Chatterjee, Subordinate Judge of that district, dated the 7th June 1882.

possession, and consequently that it had been infructuous, *Held*, that the purchaser was entitled to bring a suit to obtain actual possession, but was bound to bring it within twelve years from the date of the sale, the period prescribed by art. 138, sch. II of the Limitation Act (Act XV of 1877).

[403] The decisions in *Kristo Gobindo Kur v. Gunga Pershad Surma* (25 W. R., 372) and *Lalit Coomur Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258) require such purchaser to obtain possession through the Court before bringing his suit, but they do not preclude him from enforcing his right by suit, when the formal possession given by the Court has failed to put him in actual possession.

THIS was a suit by a purchaser at an execution sale for a declaration of his title to the property, for ejectment of the defendants, and for *khas* possession to be given him.

The property in suit had been the subject of three separate sales, *viz.*, one on the 25th January 1864, the second on the 30th March 1864, and the third on the 11th February 1869. The plaint was filed in the first instance on the 1st July 1881 in the Court of the Munsiff of Bolepur, but the subject-matter being undervalued, it was returned to the plaintiff on the 10th February 1882 for want of jurisdiction. The plaintiff then filed the plaint on the 11th February 1882 in the Court of the Subordinate Judge, and amongst other matters contended that the time during which the suit was on the file of the Munsiff should be excluded from the period during which limitation was to be calculated. He further alleged that after having obtained symbolical possession through the Court of the properties purchased by him, he had given the defendants permission to reside on the properties, and he claimed that the period during which the defendants so held under his permission should also be deducted from the period during which the limitation was running.

Both the lower Courts, however, found that the fact of the plaintiff having given the defendants permission to reside on the properties had not been proved, and as both plaintiff and defendants relied on art. 138, sch. II of Act XV of 1877, as the one which governed the case, they held that the suit was barred even when it was instituted in the Munsiff's Court, and consequently the suit was dismissed with costs.

Against the decision of the lower Appellate Court, the plaintiff appealed to the High Court, and contended that the lower Courts were wrong in holding that the possession taken by him had no bearing upon the time allowed by limitation, and that [404] the suit being brought within twelve years from the date on which such possession was taken it was not barred. It was further contended that art. 138 of sch. II of Act XV of 1877 had no application to the suit.

Baboo *Mohany Mohun Roy* appeared for the Appellant.

Baboo *Troyluckho Nath Mitter* for the Respondent.

The **Judgment** of the Court (TOTTENHAM and NORRIS, JJ.) was delivered by

Tottenham, J.—At the hearing of this appeal we were disposed to think that the Courts below had committed an error in applying to the case art. 138 of the Limitation Act, although both parties had admitted that the case must be governed by it. And if it had been shown that the formal possession awarded to the plaintiff on the 2nd of July 1869 had been followed by any act of possession, such as the grant of permission to the defendants which is alleged in the plaint, we should hold that this took the case out of the scope of art. 138. But we observe that the Court has negatived the plaintiff's allegation in this respect; and has found that there was nothing but the

formal publication of plaintiff's possession. It seems to us, therefore, that the formal possession obtained through the Court having been infructuous, the plaintiff was entitled to bring a suit to obtain actual possession, but was bound to bring it within the period prescribed by Art. 138, viz., twelve years from the date of purchase.

The rulings cited, viz., *Kristo Gobindo Kun v. Gunga Pershad Surma* (25 W. R., 372) and *Lalit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258) would require a purchaser to obtain possession through the Court before bringing such a suit as the present one, but would not, we think, preclude him from enforcing his right by suit when the formal possession given by the Court has failed to put him in absolute possession.

But we think the suit was out of time, and this appeal must be consequently dismissed with costs.

Appeal dismissed.

NOTES

[SUMMARY REMEDY AND REGULAR SUIT—

Although a speedy and summary remedy may be open to the execution-purchaser under sec., 318 of the C. P. C. 1882, his right to bring a regular suit for possession is not affected thereby, (14 Cal., 644, 9 Cal., 602, 10 Mad. 53, but see 25 W. R. 372, 10 C. L. R. 258). The two remedies are concurrent. If the decree-holder himself purchases the property, the case is otherwise (sec., 47 of the C. P. C. 1908).

In 10 Cal., 402 it was held that in cases where the execution-purchaser had formal possession which proved subsequently to be infructuous, limitation ran from the date of sale. This point was **overruled** in 16 Cal., 530 F. B. See also 25 Bom., 275 at 278 where it was held that limitation ran from the date of possession (formal though infructuous) under the sale.

See also 19 All., 499 (501) 17 A. W. N. 127 24 Cal., 715 16 Bom., 722 (727), 12 Cal., 169 (172).]

[405] APPELLATE CRIMINAL

The 7th February, 1884

PRESENT

MR JUSTICE McDONELL AND MR JUSTICE FIELD.

Nathu Sheikh and others

versus

The Queen-Empress *

False evidence—Separate trial—Procedure when more than one person is charged with having given false evidence in the same proceeding—

Criminal Procedure Code (Act X of 1882), s. 161—Penal

Code (Act XLV of 1860), s. 193.

In order to sustain any conviction for giving false evidence upon an alternative charge when no evidence is offered to prove the falsity of either statement in particular, it must be clear that the two statements are contradictory.

* Criminal Appeal No 731 of 1883 against the order of F. H. McLaughlin, Esq., Sessions Judge of Pubna and Bogra, dated 11th December 1883.

The law laid down by the Full Bench in the case of the *Empress v. Kassim Khan* (I. L. R., 7 Cal., 121) has been altered by the provisions of s. 161 of the Code of Criminal Procedure (Act X of 1892), and a witness who makes a false statement to a police officer in reply to a question which he is bound to answer, would be guilty of intentionally giving false evidence.

When four persons were accused of having given false evidence in the same proceeding, and the Sessions Judge, while professing to try each accused separately, heard the evidence of the witnesses only once *held*, that this was substantially trying the four prisoners together, and was an improper mode of procedure

THIS was an appeal against a conviction under s. 193 of the Penal Code. The appellant with three other accused were charged with similar offences arising out of the same enquiry and were each convicted and sentenced to six months' rigorous imprisonment. The offence charged in each case was based upon statements made to the police during the enquiry instituted with reference to the death of one Abuchi Biswas and another, and contradictory statements made when the cases came before the Joint Magistrate for enquiry.

At the trial the four accused were, to use the words of the District Judge, tried separately, though the evidence of the witnesses was heard only once, and the Sessions Judge in his judgment stated that this course had been taken to prevent any possible allegation of illegality, though he considered that it was by no means clear that under s. 239 of the Criminal [408] Procedure Code the accused might not have been tried together. The nature of the statement upon which the conviction was based and sought to be upheld, sufficiently appear in the judgment of the High Court. No one appeared to argue the case on either side.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J—The appellant Nizam Sheikh was tried upon the following charge: "That you, on or about the 21st of May 1883, at Azugerah, in thanah Shazedpore, in the course of the enquiry into the cause of death of Abuchi Bewa and Kefat Chokra by the Subordinate Inspector of Shazedpore, stated in evidence, 'I came to the place of occurrence on hearing the screams of Abuchi Bewa. I saw Mora, Dhanoo and Pana carrying the dead body of Abuchi towards her house,' and that you, on the 14th day of August 1883, at Serajgunge, in the course of a judicial enquiry into the cause of death of Abuchi Bewa and Kefat Chokra by the Joint Magistrate, stated in evidence, 'I did not see Mohar, Panulla and Dhanoo dragging Abuchi Bewa on to her *bari* by night. I did not hear that night any one call out 'Help' I am killed' I did not see Mohar and his companions put Abuchi Bewa's body in the *ghar* facing east,' one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code and within the cognizance of the Court of Sessions, etc." The prisoner has been convicted upon this alternative charge and has appealed.

Under the provisions of s. 161 of the Code of Criminal Procedure, a witness examined by a police officer making an investigation is bound to answer

† [Sec. 161 —Any Police-officer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.]

truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture. A witness, therefore, who made a false statement to a police officer in reply to a question which he is bound by that section to answer would be guilty of intentionally giving false evidence, and the law laid down in the Full Bench case of the *Empress v. Kassim Khan* (I L. R. 7 Cal., 121) must be taken to have been altered by the Legislature.

[407] In order to sustain any conviction for giving false evidence upon an alternative charge when no evidence is offered to prove the falsity of either statement in particular, it must be clear that the two statements are contradictory. This is not clear in the present case. The statements before the police were :—

- (1) I came to the place of occurrence.
- (2) I heard the screams of Abuchi Bewa.
- (3) I saw *A, B and C* carrying the *dead body* of Abuchi towards her house.

The statements before the Magistrate were—

- (1) I did not see *A, B and C* dragging Abuchi Bewa on to her *bari* by night (whether she was alive or dead is not stated).
- (2) I did not hear that night any one call out " Help! I am killed "
- (3) I did not see Mohar and his companions put Abuchi Bewa in the *ghar* facing east.

It is obvious that no one of the first three statements is necessarily contradictory of any one of the second three statements

Then there is a further error in the proceedings before the Sessions Judge which would, in all probability, have proved fatal to the conviction. The Sessions Judge says in his judgment. " By request of accused's pleader, the witnesses have been heard only once, but the four cases," that is, the case of Nizam Sheikh and of the three other persons who were charged with similar offences, " have been tried separately." How, if the witnesses were heard once only, the four prisoners could have been tried *separately*, the Sessions Judge does not explain, and it is not easy to understand. If the Sessions Judge means that four separate records were made up, while the examination of the witnesses, which was the substantial portion of the trial, was conducted only once for all four prisoners, this is substantially trying the four prisoners together, and that this is an improper mode of procedure has been pointed out on more than one occasion [see for example *Empress of India v. Anant Ram* (I. L. R., 4 All., 293)] We direct that the prisoner Nizam Sheikh be acquitted and discharged. This judgment will govern the case of Nathu Sheikh, the case of Jatu Sheikh and the case of Chamu Chowkeedar

Appeal allowed.

[408] CRIMINAL REFERENCE.

The 25th February, 1884.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

(In the matter of Gamirullah Sarkar.)

Gamirullah Sarkar

versus

Abdul Sheikh

*Magistrate, Jurisdiction of—Summary trial—Criminal trespass—
Mischief—Penal Code, s. 427—Code of Criminal
Procedure (Act X of 1882), s. 260.*

A person may be tried summarily for criminal trespass and mischief unless there is a *bona fide* claim of right depriving the Magistrate of jurisdiction. *Shakur Mahomed v Chunder Mohun Sha* (21 W. R. Cr., 38) disapproved.

IN this case the accused were sentenced to three months' rigorous imprisonment by a Bench of Magistrates. The Sessions Judge of Rungpore transmitted the record to the High Court under s. 438 of Act X of 1882, with the following report:—

"The complaint was one of criminal trespass and mischief. The accused were charged with destroying some *halai* belonging to complainant partly by turning their cattle into it and partly by ploughing it up. They set up a claim to the land, which they said they held under a third party. The case was tried summarily and the accused sentenced to three months' rigorous imprisonment. The judgment appears to rest principally on two documents referred to in it, which are not evidence against accused at all, the one marked A being a copy and not admissible till the original is accounted for, and the one marked B being a decree between complainant and a third party. The Deputy Magistrate, in his explanation herewith appended, says that there was other evidence besides these documents. In that case the judgment is bad for not recording the valid reasons, if there were any, for the conviction.

"Besides this, the case, it seemed to me, is not one which should have been tried summarily—*Shakur Mahomed v Chunder Mohun Sha* (21 W. R. Cr., 38) and *In the matter of Issur Chunder Mundle* (25 W. R. Cr., 65). I therefore recommend that this conviction be quashed, and that, if the Court think fit, the case be sent back to be re-tried by the ordinary procedure."

The District Judge admitted the accused to bail, stating that more than half the sentence had then expired. The Deputy Magistrate in the explanation forwarded by him to the Sessions Judge said, with regard to (1) the evidence on which the accused were convicted, and (2) the summary procedure adopted in trying the accused.

"With regard to (1) I most humbly beg to submit that the Bench of Magis-[409]trates did not convict the accused solely on the strength of the two documents mentioned in the judgment. Independent witnesses were examined from both sides, and the two documents have been mentioned simply as corroborative evidence for believing one set of witnesses in preference to the other. The Bench did not say that Mahabut Ali or the accused were bound by the decree of the Civil Court, but as the matter was once adjudicated by the Civil Court, no one had a right to disturb the order of the Civil Court. If any party was

* Criminal Reference No. 15 of 1884, and letter No. 77, from the order made by J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 18th February 1884.

aggrieved, his remedy lay in moving the Civil Court and getting its order set aside by the same or any superior authority, and not to try himself to make order of the Civil Court inoperative. A Criminal Court is bound to accept the person put in possession by order of the Civil Court as being really in possession of that property.

"With regard to point (2) I beg to submit that I, have not with me the Weekly Reporter, and cannot therefore say what impediment there is in this case being tried summarily. When a person has been once put in possession of certain landed property by order of the Civil Court, the Bench believed that no private person had any right to dispossess him of it, but any person aggrieved by the order might either prefer a claim or bring a regular suit for getting the order set aside. Every man's property would be at the mercy of his rich opponent if for every act of aggression he is compelled to seek the assistance of the Civil Court, for which reason the Bench believed that the Criminal Court would be justified in interfering in such cases."

The Judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The petitioners have been convicted in a summary trial of mischief and criminal trespass.

The Sessions Judge has submitted the proceedings in order that the conviction and sentence may be quashed. First, because "the judgment appears to rest principally on two documents referred to in it, which are not evidence against the accused at all." This objection, however, is effectually disposed of by the fact that there is ample legal evidence, and therefore, under s. 167 of the Evidence Act, we cannot interfere.

The Sessions Judge next relies on the cases of *Shakur Mahomed v. Chunder Mohun Sha* (21 W. R. Cr., 38) and *Issur Chunder Mundle v. Rohim Sheikh* (25 W. R. Cr., 65). With regard to the first case, we would refer to the case of *Sonar Sardar v. Bukhtar Sardar* (25 W. R., 46) explaining it as no authority for the proposition quoted, and with regard to the other case, we would remark that the present case cannot be regarded as a *bono fide* claim of right depriving the Magistrate of jurisdiction, so that the case quoted is not in point. We therefore see no reason to interfere.

[410] APPELLATE CIVIL.

The 25th January, 1884.

PRESENT :

MR. JUSTICE MACLEAN AND MR. JUSTICE NORRIS.

Ballodeb Lall Bhagat.....Decree-holder

versus

Anadi Mohapattur and others.....Judgment-debtors.*

*Appeal—Order in execution of decree—Fraud—Cancellation of sale
in execution of decree—Civil Procedure Code (Act XIV
of 1882), ss. 2, 244, cl. (c) 311 and 588, cl. 16.*

Where it was shown that a judgment-creditor was himself the purchaser at an execution sale, and the amount for which he so purchased the property of his judgment-debtor was set off against the amount due to him under his decree, and where on the application of the judgment-debtor the Court passed an order setting aside the sale on the ground of fraud practised by the judgment-creditor on the judgment-debtor in connection with the sale in consequence of which fraud the property had been sold at an undervalue, *held*, that inasmuch as the order involved the decision of a question between the parties to the suit relating to the execution, discharge, or satisfaction of the decree (the decree having been satisfied as far as the purchase money bid by the decree-holder went, and the order cancelling that *pro tanto* satisfaction), though not appealable under the provisions of s. 588, cl. 16, was appealable as a decree under the provisions of the Code of Civil Procedure (Act XIV of 1882), s. 2 and s. 244, cl. (c).

THIS was an appeal from an order setting aside a sale on the ground of fraud practised by the judgment-creditor, who was himself the purchaser, in agreeing with the judgment-debtor to give him further time to discharge the debt and then bringing on the sale in violation of that agreement.

The judgment-debtor in his application to the Original Court also applied to have the sale set aside under the provisions of s. 311 of the Civil Procedure Code (Act XIV of 1882), on the ground of material irregularities in publishing and conducting the sale, but that Court decided that no such irregularity was proved to have occurred. The Subordinate Judge, however, held that fraud had been practised by the decree-holder, and relying on the decision in *Subaji Rau v. Srinivassa Rau* (I. L. R., 2 Mad., 264) set aside the sale.

The decree-holder accordingly appealed to the High Court.

[411] Mr. Pugh, Baboo Hem Chunder Banerji and Baboo Nilmadhub Sen appeared on behalf of the appellant.

Baboo Chunder Madhub Ghose, Baboo Ambica Churn Ghose and Baboo Koruna Sunkar Mookerjee for the respondents.

* Appeal from Original Order No. 271 of 1883, against the order of F. W. Wright, Esq., Subordinate Judge of Cuttack, dated the 16th May 1883.

The **Judgment** of the Court (MACLEAN and NORRIS, JJ.), which sufficiently states the facts for the purpose of this report, was delivered by

Maclean, J.—This appeal has been made under the following circumstances :—

The appellant is the judgment-creditor and purchaser at an execution sale which was concluded on 31st January 1882. He purchased the property for Rs. 2,700, and the amount was set off against the amount due under the decree.

The judgment-debtor (respondent) applied to the Court to set aside the sale under s. 311 of the Civil Procedure Code on the ground of material irregularities in publishing or conducting it. He alleged that the requisite notices had not been published, and also that the decree-holder, appellant, had agreed to give him further time to discharge the debt, and had brought on the sale in violation of that agreement.

The Subordinate Judge decided that no irregularity was proved to have occurred, but considering that the decree-holder was proved to have practised a fraud upon the debtor in bringing on the sale after agreeing to give further time he set aside the sale. He quoted *Subaji Rau v. Srinivassa Rau* (I. L. R., 2 Mad., 264) in support of this course.

This case shows that there is no specific provision in the Code, and that none is required authorizing the Court to set aside a sale under the circumstances stated above. It is, however, authority for another proposition, and that is for holding that there is no appeal against such an order.

It cannot be said that the order setting aside a sale, not made under the second paragraph of s. 312, but under the general power of the Court to check fraud, is appealable under the provisions of s. 588 (16), but it has been argued that the case is well within the terms of s. 244 (c), viz., that there was a question (1) between the parties to the suit, (2) relating to the execution, discharge or satisfaction of the decree. If this contention is correct the order setting aside the sale is undoubtedly appealable as being a decree. (See s. 2, Civil Procedure Code.)

On the other hand, it was urged that the question did not relate to the execution, discharge, or satisfaction of the decree. Even if it should be held that the execution proceedings were closed by the sale, and that the confirmation or setting aside of the sale did not relate to the execution of the decree, a proposition against which *Viraraghava Ayyangar v. Venkatacharyan* (I. L. R., 5 Mad., 217), is authority, it seems to be difficult to arrive at the conclusion that the partial discharge or satisfaction of the decree was not effected by the order setting aside the sale. The decree was *pro tanto* satisfied by the amount of the appellant's bid having been set off against the amount due from the respondent. The order now appealed against cancelled that *pro tanto* satisfaction, and it, therefore, appears to us that this order related both to the execution as held in *Viraraghava Ayyangar v. Venkatacharyan* (I. L. R., 5 Mad., 217) and to the satisfaction of the decree. In this view of the case the appeal has been properly preferred to this Court. We do not find that the effect of s. 244 on the right of appeal was discussed in the case of *Subaji Rau v. Srinivassa Rau* (I. L. R., 2 Mad., 264) already referred to. We think, however, that the case of *Luchmeeput Singh v. Sita Nath Dass* (I. L. R., 8 Cal., 477) quoted by the appellant's counsel supports this view.

Upon the merits of the case we are unable to agree with the Court below. Apart from the question whether an agreement between the parties not brought to the notice of the Court can be recognized in the face of the provi-

sions of s. 257 (a)* of the Code, we are obliged to hold that the evidence does not establish any agreement at all. At most it gives rise to a suspicion that there were a sort of promise on the part of the appellant that if he paid a certain sum of money which was not paid to him he would not press on the sale. On the other hand, there is no evidence as to when this promise was made, and as we find that the sale commenced on the 21st January 1882, and was continued [413] almost daily till its conclusion on the 31st idem, there would seem to have been no curtailment of the four days said to have been the period for which appellant agreed to wait for the promised payment.

We must, therefore, reluctantly say that no irregularity having been found to have taken place, a finding not impugned in appeal, the lower Court's order setting aside the sale is not justified by the evidence. We accordingly decree this appeal with costs. The sale must be confirmed

Appeal allowed.

[10 Cal. 413]

APPELLATE CIVIL

The 8th February, 1884

PRESENT

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY

Surbomongala Dassi.... ..Plaintiff

versus

Shashubhooshun Biswas..... ..Defendant.†

*Probate—Application for probate—Caveat—Mortgagee—
Attaching creditor—Fraud.*

A mortgaged certain property to B, who obtained a decree on his mortgage on the 20th of August 1881. In execution of this decree B, on the 5th of September 1881, attached the mortgaged property and obtained an order for sale. On the 14th of September 1881, the wife of the mortgagor applied for probate of the will of one Thakomoni Dassi, the mother of

*[Sec. 257A.—Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Agreement to give time to judgment-debtor.

Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

Agreement for satisfaction of judgment-debt.

Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus, if any, shall be recoverable by the judgment-debtor.]

† Appeal from Original Decree No 59 of 1882, against the decree of W. Macpherson, Esq, Judge of 24-Pergunnahs, dated the 31st December 1881.

the mortgagor, who had died on the 16th of May 1881. The testatrix, by her will, left all her property to the mortgagor's wife. The mortgaged property was included in the property dealt with by the will. *B*, the mortgagee, entered a *caveat* against the grant of probate, alleging that the will was a forgery, got up by the mortgagor for the purpose of saving the mortgaged property from being sold in execution of a decree against himself.

Held, that *B* was entitled to enter a *caveat*.

THIS was an application for probate which was made in the Court of the Judge of the District of the 24-Pergunnahs on the 14th of September 1881 by Surbomongala Dassi. The applicant stated that she was the wife of one Bhagabati Churn Nag, who was the son of Thakomoni Dassi, that Thakomoni Dassi died on the 16th of May 1881, having previously, on the 12th of May 1881, made and published her last will and testament, whereof she appointed the applicant sole legatee and executrix. It was of this will that Surbomongala Dassi applied for probate. A general [414] citation was issued on this application, and on the 2nd of November 1881 a *caveat* was put in by Shashibhooshun Biswas of Kidderpore. The case was then set down as a contentious cause, and Shashibhooshun Biswas filed a written statement.

In that written statement he alleged that the property purported to be disposed of by the alleged will of Thakomoni Dassi had been the property of her husband Tariny Churn Nag, who died on the 6th of July 1871 intestate, leaving him surviving his widow, the said Thakomoni Dassi, and an only son named Bhagabati Churn Nag, that in 1873, 1874 and 1876, Bhagabati Churn Nag had mortgaged portions of the property to different persons, by registered mortgage deeds, in which he (Bhagabati Churn Nag) had declared that the property was his, and that he had inherited it from his father, the said Tariny Churn Nag, that on the 24th of January 1877, he mortgaged the whole property to one Mirtunjoy Mookerjee, who on the 16th of July 1880 assigned his mortgage to the *caveator* Shashibhooshun Biswas for valuable consideration, that on the 4th of January 1881, the *caveator* instituted a suit on his mortgage, and obtained a decree on the 20th of August 1881, that in execution of this decree the mortgaged property was attached on the 5th of September 1881, and a notice of sale was served on Bhagabati Churn Nag on the 16th of September 1881. The written statement went on to submit that the property purported to be dealt with by the alleged will of Thakomoni Dassi was in reality the property of Bhagabati Churn Nag, that the alleged will of Thakomoni Dassi was a forgery set up by Bhagabati for the purpose of preventing the mortgaged property from being sold in execution of a decree against himself, and that the *caveator* was entitled to oppose the grant of probate applied for.

The Judge found on the evidence that the will was not proved, and he dismissed the application for probate with costs. The applicant appealed to the High Court on the facts, and also on the ground that "the Court below has erred in law in allowing the attaching creditor of Bhagabati to enter a *caveat* and oppose the granting of probate."

Mr. Evans and Baboo Biprodoss Mookerjee for the Appellant.

Baboo Sreenath Doss for the Respondent.

[415] The Judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—In this case Surbomongala Dassi, wife of Bhagabati Churn Nag, applied for probate of the will of one Thakomoni Dassi, dated the 12th of May 1881. A *caveat* was entered by Shashibhooshun Biswas, who objected that the property included in the will really belonged to Bhagabati Churn Nag, his judgment-debtor, and that the will was set up by his judgment-debtor,

through his wife Surbomongala Dassi, in order to save the mortgaged property which had been attached, from being sold in execution of the decree. In other words, Shashibhooshun Biswas declared that Bhagabati Churn Nag, in order to defraud him, one of his creditors, had set up a false will and had drafted it in such a manner as to pass the property to his wife. The question that we have to decide is, whether under these circumstances Shashibhooshun Biswas can be allowed to object to probate being granted or not. In the case of *Nobeen Chunder Sıl v Bhobo Soondery Dabee* (I. L. R., 6 Cal., 460), which is the last decided case in this Court touching upon the point now before us, a Division Bench, following the case of *Umanath Mookhopadhyaya v. Nalmoney Sing* (I. L. R., 6 Cal., 429) decided that an attaching creditor was entitled to oppose the grant of probate of a will, which had the effect of passing a property which should otherwise come to the heir. The case of *Umanath Mookhopadhyaya v. Nalmoney Sing* (I. L. R., 6 Cal., 429) was taken up to the Privy Council (L. R. 10 I. A., 80· I. L. R., 10 Cal., 19), and although their Lordships refrained from coming to any final decision as to the right of an attaching creditor to apply for the revocation of a probate, they expressed themselves thus: "Assuming that a purchaser (from an heir) can oppose the grant of a probate, or apply to have it revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. But as, after hearing the appellant's counsel upon the question of the execution of the will, their Lordships did not consider it necessary to hear the [416] counsel for the respondents, the question whether the Raja could apply for the revocation of the probate has not been argued before them, and therefore they give no final opinion upon it."

It therefore appears from the opinion expressed by their Lordships in the Privy Council that no attaching creditor can seek to revoke the probate of a will, or oppose the grant of probate unless he puts his case upon the ground that the will set up was in fraud of creditors. We think that the ground set forth in the application made by the objector in this case amounts to a statement that the will set up by the wife of the judgment-debtor is a forgery and a fraud upon the mortgagee. Under such circumstances, we are of opinion that the attaching creditor is entitled to oppose the grant of probate. Were we to come to any other decision the result would be that, although the attaching creditor would be in a position to contest the demand of any other person claiming the attached property, he would not be able to dispute any title derived under a will.

In regard to the merits of the case, we concur in the opinion expressed by the lower Court that the will is not proved to have been executed by the alleged testator, and we therefore dismiss the appeal with costs.

Appeal dismissed.

NOTES

[See Notes to 10 Cal., 19.]

[10 Cal. 416]

APPELLATE CIVIL.

The 14th February, 1884.

PRESENT

MR JUSTICE McDONELL AND MR. JUSTICE FIELD.

Biswa Sonan Chunder Gossyamy Judgment-debtor

versus

Binanda Chunder Dibingar Adhikar Gossyamy. * Decree-holder.*

Limitation—Civil Procedure Code, ss. 108, 230 and 647—Application for execution of decree—Practice of striking off execution proceedings—Procedure.

A decree was obtained on the 10th July 1858 and applications to execute it were made in June 1862 and January 1866. The last application prior to the coming into operation of the Civil Procedure Code of 1877 was on the 10th January 1876. This proceeding was struck off. The decree-holder on the 13th June 1879 again applied for execution, the decree was transferred [417] to S for execution, where on objection that it was more than twelve years old and therefore barred by s. 230 of Act X of 1877, the execution proceedings were again struck off on the 17th January 1880. This order was appealed against, and eventually on the 25th April 1881 the application was re-admitted. In June 1881 an application was made to the S Court for transfer of the case for execution to D, which was granted and the case transferred, but no steps having been taken by the decree-holder in the D Court, it was struck off by that Court on the 19th August 1881. On the 4th March 1882 (the judgment-debtor having died meanwhile) an application was made to the D Court to restore the proceedings for execution against his representative. Notices were issued, and the 2nd June was eventually fixed for the hearing. On that day no one was present on behalf of the decree-holder (whose pleader had died in the meantime). And the case was again struck off. On the 11th July 1882 application was made to restore the proceedings, notices were issued, and a day fixed for hearing, and after numerous adjournments the objections of the judgment-debtor were overruled on the 5th March 1883 and execution of the decree granted. On appeal the Judge found that the execution proceedings had been continuous throughout, and that there had been no unreasonable delay in the prosecution of the execution proceedings. *Held* that execution of the decree was not barred by s. 230 of the Code of Civil Procedure.

The rights of the parties to execution proceedings are not affected in any way by the case being "struck off" by the Court, there being no provision in the Civil Procedure Code for such a course. *Baroda Soondari Debra v. Fergusson* (11 C L R, 17) followed. The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, when the parties do not appear, is to dismiss it. A case so dismissed can be restored on application under s. 108, which is by s. 647 applicable as well to execution proceedings as to suits and appeals.

THE facts of this case are stated as follows in the judgment appealed from:—

"The date of the decree is the 10th July 1858: it has several times been executed, but never fully.

"The last occasion on which the execution was taken out, prior to the coming into force of Act X of 1877, was in 1876.

* Appeal from Appellate Order No. 340 of 1883, against the order of C. J. Lyall, Esq., Offg. Judge of Assam Valley Districts, dated the 27th July 1883, affirming the order of H. C. Williams, Esq., the Subordinate Judge of Durrung, dated the 5th March 1883.

"On the 13th June 1879 the decree-holder filed an application before the Subordinate Judge of Tezpur in which he stated that the judgment-debtor having concealed his property, the application for execution made in 1876 had been struck off; that the decree-holder had now discovered that the judgment-debtor had taken some property to his house, and that execution against this property was desired. Notice was accordingly issued to the judgment-debtor. The execution proceedings were then transferred to the Court of the Subordinate Judge of Sibsagar. An objection was there taken [418] by the judgment-debtor that the decree was barred as more than twelve years old by the provisions of s. 230 of Act X of 1877. This objection was allowed by the Subordinate Judge and the execution case struck off on the 17th January 1880.

"This order was appealed against, and eventually on the 25th April 1881 the District Judge re-admitted the application under the last clause of s. 230 of the Code.

"In pursuance of the Judge's decision a petition was in June 1881 (date in month not stated) presented to the Subordinate Judge of Sibsagar, asking that the case might be re-admitted and the decree transferred for execution to the Subordinate Judge of Durrung. On the 13th July 1881 the Sibsagar Court wrote a proceeding transmitting the decree for execution to Durrung. On the 29th July 1881 the Subordinate Judge of Durrung recorded the following order on the proceeding received from Sibsagar: 'Register and give 7 days' grace to decree-holder to take the necessary steps.' On the 19th August the case was struck off the decree-holder having failed to take the necessary steps.

"On the 4th March 1882 (the judgment-debtor having meanwhile died) the decree-holder filed an application before the Durrung Subordinate Judge, asking that the case which had been struck off and sent to the record-room might be brought again on the file, that notice might be sent to the judgment-debtor's son who was his heir; and that the property specified in the application might be attached and sold. On the 1st April 1882, it was ordered that notice should issue to the judgment-debtor under s. 248, Civil Procedure Code, to show cause why the decree should not be executed against him. The judgment-debtor having filed objections, it was ordered on the 1st May that the 18th May should be fixed for hearing the suit. On the 18th May the Deputy Commissioner being absent, the case was postponed till the 2nd June. On the 2nd June 1882, the following order was passed: 'No one is present on behalf of the decree-holder whose pleader has died. The case will be struck off.'

"A petition dated 16th June (but apparently not presented till 11th July) was then filed by the decree-holder before the Subordinate Judge, asking that the decree might be re-admitted.

"On the 11th July 1882 it was ordered that this should be brought up with the previous papers.

"On the 22nd July it was ordered that notice should be issued on the heirs of the judgment-debtor under s. 248 to show cause, the 22nd August being fixed for hearing.

"On the 22nd August the 'pleader for the opposite party being sick, case adjourned till to-morrow'

'On 23rd August the case was again adjourned till 28th August.

"On 28th August, at the request of the decree-holder's pleaders, the case [419] was adjourned till 6th September 1882, to see what execution of decree cases took place previous to 1879.

"On 6th September, 'no time, case postponed to 8th.'

"On 8th September three witnesses examined on behalf of decree-holder, and summons ordered to issue to objectors (that is, judgment-debtor's) witnesses to appear on 4th October next.

"4th October, 'case postponed to first open day after Doorga Pooja holidays.'

"Nothing seems to have taken place on the day fixed

"3rd February, 1883, 'at request of judgment-debtor, case adjourned till pleader returns'

"5th March 1883, objection raised dismissed, decree-holder to furnish list of property he desired to be attached by 14th."

From this order an appeal was preferred to the Judge on the following grounds.—(1) that the decree is barred from execution under s. 230 of Act XIV of 1882, (2) no steps having been taken to execute the decree between the 30th June 1862 and 10th January 1866 and between the 10th January 1876 and the 11th July 1879, the decree cannot be executed, (3) the appellant having received no assets from the judgment-debtor the decree cannot be executed against him, (4) the decree-holder has been satisfied already and what is claimed as due is interest upon interest.

In his judgment the Judge stated as to these grounds.—

"As regards the first ground it is urged that s. 230 of the Civil Procedure Code gives, in the case of decrees more than twelve years old, only the right to *one* application for execution to be made 'within three years after the passing of the Code, the Code received the Governor-General's assent on the 30th of March 1877 and came into force on the 1st October 1877, taking the latter (as has been held to be the proper interpretation) as the date of passing, it is said that after the 1st October 1880 it was no longer possible to take proceedings for execution of the decree granting that the proceedings instituted on the 13th June 1879 were within time, these proceedings terminated with the order striking off the case on the 19th August 1881, the renewed application for execution presented on the 4th March 1882 was inadmissible, and it, too, was brought to an end by the order striking off the case on the 2nd June 1882, the present is the third application since the passing of the Act X of 1877 and is barred by limitation.

"In support of this contention I am referred to the rulings of the High Court in *Afrannussa Chowdhuran v. Sherafutolla Chowdhry* (9 C. L. R., 321) and *Sreenath Goochoo v. Yusuf Khan* (9 C. L. R., 335). In the former of these cases an application was made for execution within the three years, and granted, but erroneously [420] (as the High Court held) struck off on an untenable ground by the Judge. A second application was made and rejected under s. 230. The Court held that the decree-holder could not obtain relief on appeal against the second order, because his proper course was to have appealed against the first order. In the second of these cases an application to execute was made within time, and subsequently a second application was put in, asking that the properties specified in the first application might be released from attachment and certain other properties specified in the form attached in their stead. It was held that the latter was a second application and barred by the section referred to.

"On the other hand it is argued for the respondent that the orders of the 19th August 1881 and 2nd June 1882, striking the execution proceedings off the file, do not operate to terminate those proceedings, and that the

proceedings consequent on the application of the 13th June 1879 must be regarded as continuous down to the present date. In support of this contention the following cases are quoted.—

“*Pudo Monee Dassee v. Roy Mothooranath Chowdhry* (12 B. L. R., 411 ; 20 W. R., 133), *Soonder Singh v. Bubooria Alum Boshu Koer* (24 W. R., 36) ; *Panaul Hug v. Kishen Mun Dabee* (9 C. L. R., 297), *Barada Sundari Dabee v. Fergusson* (11 C. L. R., 17). The first two of these rulings (the first of which is of the Privy Council) clearly lay down that no inflexible rule can be asserted regarding the effect of an order striking off an execution case, ‘but that the question must be determined by the facts and circumstances of each case.’ In the fourth and most recent of the cases the Court expressed itself as follows—

“‘We wish to observe that it cannot be too widely known that when execution proceedings are struck off on the mere motion of the presiding judicial officer, the rights of the parties to those proceedings are not in any way affected. The striking off is not in accordance with any provision in the Code of Civil Procedure. It is done merely for the convenience of the Court, and with a view to diminish the number of cases which might otherwise appear to have been pending in their Court for a long time. When the striking off-takes place upon the application of the parties, or after their failure to appear when they have received due notice to appear, their rights may be affected by the striking off, but whether they are so or not would depend upon the circumstances of each case.’

“Applying the principles just stated to the present case, I find that the striking off the execution proceedings on the 19th August 1881 was not a termination of them. It is to be borne in mind that the case had been transferred from one district to another, and that a reasonable time ought to have been given to the decree-holder to prosecute them in the new Court. It appears, however, that the proceedings only reached the Durrung Court on the 29th July, and that they were struck off for default of [421] prosecution twenty-one days later, without, as appears from the record, any notice having been given to the decree-holder.

“The next question that arises is, whether, granting that the order of the 19th August 1881 did not of itself operate to bring the proceedings to an end, the failure of the decree-holder to take any further steps for six months afterwards (until the 4th March 1882) implied abandonment of the proceedings. Here the point is more doubtful, and the facts are not very fully disclosed on the record or by the pleaders. But it is admitted that in this interval the original judgment-debtor died, and that of itself is reasonable ground for admitting a certain amount of delay in further prosecuting the case. I think on the whole that the interval does not of itself prejudice the right of the decree-holder to continue the proceedings.

“The next question is, whether the order of the 2nd June 1882 was a termination of the proceedings. I am clearly of opinion that it was not. The Deputy Commissioner had been absent on the 18th May, the date fixed for hearing, and the 2nd June was fixed only in the usual manner by notice in Court for the information of the pleaders engaged. The decree-holder’s pleader had died between the two dates, only a fortnight apart, and on the 2nd June no one appeared. Granting that the case was not extinct as a result of the previous proceedings, I think that it was decidedly not brought to an end by the order of the 2nd June. Subsequent to this order no unreasonable delay occurred in prosecuting it, the next petition having been verified on the 16th June, and (apparently) prosecuted on the 11th July. Subsequent to that date nothing occurred to impose any check on the progress of the case. On the first ground of appeal, therefore, I find for the respondents.

"As regards the second ground, I have already said that the matter was not fully argued, but it appears to me that it is now too late to urge the Limitation Act in respect of periods prior to the admission of the application for execution of the 13th June 1879. I may refer to the decision of the Privy Council in *Mangul Pershad Dicht v Grija Kant Lahiri* (I L. R., 8 Cal., 51, L. R., 8 I. A., 123) as apparently conclusive on the matter.

"The third and fourth grounds of appeal were not placed before the Court, and in the absence of any argument in support of them, the respondent is entitled to a decision in his favour in regard to them.

"The appeal is dismissed and the order of the lower Court confirmed."

Baboo *Bhoobun Doss* for the Appellant

Baboo *Jusodanundun Poramanick* for the Respondent.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—The facts of this case are fully set out in the judg-[422]ment of the learned Judge in the Court below, and it is not necessary for us to recapitulate them. The Judge refers to the following passage in the judgment of WHITE, J., in *Barada Sundari Dubea v Fergusson* (11 C.L.R., 17) "We wish to observe that it cannot be too widely known that when execution proceedings are struck off on the mere motion of the presiding judicial officer, the rights of the parties to those proceedings are not in any way affected. The striking off is not in accordance with any provision in the Code of Civil Procedure. It is done merely for the convenience of the Court, and with a view to diminish the number of cases which might otherwise appear to have been pending in their Court for a long time. When the striking off takes place upon the application of the parties or, after their failure to appear, when they have received due notice to appear, their rights may be affected by the striking off, but whether they are so or not would depend upon the circumstances of each case." It has been pressed upon us that the result of the application of this principle will be that decree-holders will manage to avoid altogether the provisions of the Limitation Act as to the execution of decrees. We are wholly unable to accede to this argument, and we desire to say that we concur in the view expressed in the passage which I have just quoted. If Mofussal Courts would follow the provisions of the Circular Orders laid down for their guidance, and post in their Court-houses a list of cases ready for hearing, specifying the date on which those cases are to be heard, parties would have no just ground of complaint if their cases, being taken up on the dates so specified, were dismissed in default of their appearance. It would be very desirable that Courts in the Mofussal should abandon the practice of "striking cases off." There is no provision in the Code of Civil Procedure for striking off a case. The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, when the parties do not appear, is to dismiss it. When a case is dismissed in consequence of the parties not appearing, an application may be made to the Court under the provisions of s. 108. This section applies to regular suits, but under the provisions of s. 647 it is equally applicable to all proceedings other than suits and appeals. It is [423] therefore applicable to execution proceedings. When an execution proceeding therefore is dismissed in default of appearance of the decree-holder, he can within the time allowed by the law of limitation present an application under s. 108 asking that the order of dismissal be set aside, and that a day be appointed to proceed with the case. This application must of course set forth such matter as is specified in the section, and the grounds upon which it is made. If the Court of First Instance, having improperly set aside its order

dismissing a suit or other proceeding, appoints a day for taking further steps in the matter of such suit or proceeding, there may be an appeal. The parties have thus full opportunity of litigating the question, whether an execution proceeding has been properly dismissed in consequence of the decree-holder not appearing at any stage at which such appearance may be necessary.

Now, let us apply these principles to the present case. The Judge has found that the execution was one continuous execution, and that the orders made upon the applications of the 4th March 1882 and 11th July 1882 merely restored the original execution proceedings to the file, and that, therefore, the original execution proceedings were being continued. If after the execution proceedings were struck off on the 19th August 1881, or on the 2nd June 1882, a proper application under the provisions of s 108 of the Code had not been made, the judgment-debtor might have objected in the first Court, and might have followed out his objection by preferring an appeal.

No such course was taken, and neither in the lower Appellate Court nor on the grounds of appeal now before us has it been urged that the Court of First Instance did not properly exercise its jurisdiction under s. 108 of the Code in restoring the execution proceedings to the file by its order in the petition of 4th March 1882, or by its subsequent order in the petition of the 11th July 1882. This being so, the only question which we have to consider is, whether the Judge in the Court below, having found that there has been one continuous execution proceeding throughout, we can say that the application of the 11th July 1882 is barred by s 230 of the Code of Civil Procedure. We think we cannot say that it was so barred. Then the Judge having [424] found that there has been one continuous execution, no ground has been shown to us upon which we can question his finding upon this matter, which is a matter of fact. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES

[WHETHER SECTION 108 (Or. 9, RULE 13 OF THE C P C OF 1908) IS MADE APPLICABLE BY SECTION 647 (S 141 OF THE CODE OF 1908) TO EXECUTION PROCEEDINGS :—

Under the Code of 1882 it was held by the High Courts of Allahabad (7 All., 359 10 All., 71. 12 All., 179; 12 All., 392) and Bombay (6 Bom., 681) that the section applied to application to execute decrees but on the other hand, the High Court of Calcutta held that it did not apply (18 Cal., 635 but see 10 Cal., 416). So an explanation was added to the section by Act 6 of 1892 upholding the Calcutta view and superseding those of Bombay and Allahabad. Meanwhile, the Privy Council in 12 All., 179 adopted the Calcutta view. So in the Code of 1908 the explanation was omitted, the Privy Council judgment being enough to serve the purpose. Thus under the C P C 1908, Order 9, Rule 13 is not applicable to execution applications, See. 18 Bom. 429. But such dismissal is no bar to a fresh application, 18 Mad. 131.

Striking off execution Proceedings : its effect.—The rights of the parties to execution proceedings are not affected in any way by the case being struck off, there being no provision in the Civil Procedure Code for such a course, 10 Cal. 416; See also 16 Bom. 294; 3 M. L. J. 298 and 21 Mad. 261 where their Lordships held that the striking off the Munsiff's file meant no more than he (the Munsiff) ceased to show it as pending in his statistical returns, but the petition not having been dismissed or otherwise legally disposed of must be regarded as still pending (following the reasoning of MUTTUSAMI AYYAR J. in Appeal against Appellate Order No. 34 of 1892 unreported).

If under the Code of 1908, sec. 141 does not include execution proceedings, it is doubtful whether an execution application can be dismissed under O 9, rule 8, on the ground of absence of parties though it may do so under its inherent power, 15 All. 84. Compare 10 Cal. 416.]

[10 Cal. 424]
APPELLATE CIVIL.

The 19th February, 1884

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Bamasundari Dassi..... ..Plaintiff

versus

Krishna Chandra Dhur and others. . . . Defendants

*Registration Act, 1877, s. 50—Registered and Unregistered documents—
Priority—Notice of prior sale.*

Quere.—Whether the case of a second registered purchaser with notice of a prior sale is an exception to the rule laid down in the Full Bench case of *Narain Chunder Chuckerbutty v Dataram Roy* (I L R., 8. Cal., 597) The Court held that it was not necessary to decide the question in the present case inasmuch as the facts of the case did not justify them in finding that the purchaser had such notice.

THE plaintiff purchased from Ram Coomar *alias* Shih Nath Sen, the fourth defendant, a 5-gunda share of taluk Mohun by a registered *kobala*, dated the 22nd Bhadro 1285 (6th September 1868), for a consideration of Rs 100. The plaintiff thereafter applied under Bengal Act VII of 1876 for registration of his name in respect of the above share, but was opposed by the first, second and third defendants, who alleged that they had purchased the same property (among others) from the fourth defendant by an unregistered *kobala*, dated 4th Srabun 1276 (16th July 1869), and claimed to have their names registered in respect of the 5-gunda share. The Collector accordingly rejected the plaintiff's application for registration of her name, and registered the share in the names of the first, second and third defendants, who, as the plaintiff alleged, had, in collusion with the fourth defendant, opposed her in entering in possession of the disputed share.

[423] The plaintiff therefore brought this suit to set aside the defendants' *kobala*, for possession, and for registration of her name after reversal of the Collector's order registering the names of the defendants. The plaintiff alleged that the fourth defendant was a minor at the time of the alleged sale to the other defendants, and that the sale was therefore invalid, and that this *kobala* being unregistered could not have any effect as against hers which was registered.

The defendants alleged that the price of the land covered by their deed was less than Rs 100, and therefore there was no necessity for registering it, that the fourth defendant was not a minor at the time of sale, but that he and his mother had sold the property to pay the debts of the fourth defendant's father, one Sumbhoo Nath Sircar.

The Munsiff found that the fourth defendant was a minor at the date of the sale to the defendants; but that the sale was valid, having been made by his mother as guardian of the fourth defendant, in order to pay his father's debts. He also came to the conclusion that the plaintiff had purchased with notice of the defendants' purchase and possession, and that the defendants

* Appeal from Appellate Decree No. 1208 of 1882, against the decree of T M Kirkwood, Esq., Judge of Mymensingh, dated the 24th of April 1882, affirming the decree of Baboo Bepin Chandra Roy, Additional Munsiff of Netrokona, dated the 4th of April 1881.

having been in possession under their purchase, and ever since the date of it, the plaintiff's deed of sale, though registered, could not prevail against the defendants' unregistered deed.

The Judge on appeal held that the sale by the fourth defendant to the other defendants was valid, although he was a minor at the time, inasmuch as it was not void because so made, but only voidable, and his subsequent conduct on obtaining majority had ratified it, and that from the possession by the defendants it was to be presumed that the plaintiff had notice of their purchase.

He therefore dismissed the appeal. The plaintiff appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the Appellant.

Baboo *Harī Mohun Chakravati* for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case the plaintiff is purchaser under a [426] registered conveyance from defendant No. 4. Defendants 1, 2 and 3 are purchasers under an unregistered conveyance from the same person. The Judge in the Court below has decided that the title of defendants 1, 2 and 3 ought to prevail against that of the plaintiff. The Judge says in his judgment. "The Munsiff is wrong in finding, that now since the Act of 1877, registered documents of which the registration is compulsory, have no priority over unregistered documents executed before 1877, of which the registration was optional. Under the present Act no document executed after the passing of the Registration Act of 1864, if unregistered, and the registration was optional, can take effect against a later registered document. But the purchase under the later registered document cannot prevail against the former unregistered purchaser, if it is shown (1st) that the earlier bill of sale was a legal conveyance, and (2nd) that it was accompanied by delivery of possession. Such delivery of possession divests the vendor of all title and retention of possession by a prior purchaser over a long period, and makes it proper to presume that the second purchaser had notice." This must be taken to be an incorrect statement of the law since the decision of the Full Bench in the case of *Narain Chunder Chuckerbutty v. Dataram Roy* (I. L. R., 8 Cal., 597). The Judge then proceeds: "In this case undoubtedly possession was in 1276 (1869) transferred to the first purchasers, defendants Nos. 1, 2, 3, who continued in peaceable and evident possession for nine years prior to the second sale, and for eleven years prior to the bringing of this suit. The plaintiff is a relative of defendant No. 4, and lives in a *bari* adjoining his, she is a woman, but a married woman, and her husband is a clerk in this office, and a man of some degree of education and intelligence; clearly then it must be presumed that plaintiff had notice of the former sale." The Judge accordingly bases his judgment on the ground that the registered purchaser had notice. This raises the question whether the case of a second registered purchaser having notice of a prior unregistered sale is an exception to the rule laid down in the Full Bench case—*Narain Chunder Chuckerbutty v. Dataram Roy* (I. L. R., 8 Cal., 597). This is [427] a point which can scarcely be said to have been settled by the decisions of this Court. In the case of *Fuzluddin Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., 336) the Chief Justice says (p. 342): "If, indeed, it could be shown that the subsequent purchaser under the registered instrument had notice of the conveyance by the prior unregistered deed, then the equitable doctrine which obtains in like cases in England; and which is explained in the case of *Le Neve v. Le Neve* (3 Atk., 646; 2 Wh. & Tudor L. C., 34) might prevent the registered purchaser from asserting his rights against the unregistered under s. 50." Clearly in this passage the learned Chief Justice does not

* See in Original.

decide the point. In the judgment of Mr. Justice PONTIFEX, at page 350, the question whether the plaintiff had sufficient notice was considered and decided in the negative. It may then be said that the question of notice was considered by one learned Judge to have arisen in that case. In the case of *Dino Nath Ghose v. Aluck Moni Dabee* (I. L. R., 7 Cal., 753) Mr. Justice PRINSEP bases his decision upon the fact that the second and registered purchaser presumably had notice of the title of the first purchaser. My judgment in that case proceeded upon other grounds. In the Full Bench decision in *Narain Chunder Chuckerbutty v. Dataram Roy* (1 L. R., 8 Cal., 597), Mr. Justice PONTIFEX adverts to the question of notice, but inasmuch as the question of notice or no notice did not directly arise in that case, any observation made upon this point must be regarded as an "*obiter dictum*." We observe that the Madras High Court in two cases—*Nallappa Goundan v. Ibrahim Sahib* (I. L. R., 5 Mad., 73) and *Kondayya v. Guruvappa* (I. L. R. 5 Mad., 139)—have decided that the question of notice is immaterial, regard being had to the express provisions of the Registration Act. Now, if we had to decide the question whether the case of a second registered purchaser having notice is an exception to the law laid down in the Full Bench case, we might, perhaps, think it right under the circumstances to refer this question to a Full Bench, but we think that in the present case the question does not really arise. The Judge says in his judgment, "The plaintiff is a relative [428] of defendant No. 4, and lives in a *bari* adjoining his, she is a woman, but a married woman, and her husband is a clerk in this office, and a man of some degree of education and intelligence. Clearly then it must be presumed that plaintiff had notice of the former sale." We think that no such presumption arises upon the facts stated. There is some evidence that the plaintiff is related to defendant No. 4, although what degree of relationship does not appear, but admittedly there is no evidence on the record that the plaintiff lives in a *bari* adjoining that of defendant No. 4. In the case of *Fuzluddin Khan v. Faku Mahomed Khan*, already referred to, PONTIFEX, J., says, "According to the English decisions, the notice of fraud must be very clearly proved," and then he refers to the case of *Wyatt v. Barwell* (19 Ves., 435) the judgment in which contains the following passage. "We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected." Applying this principle to the present case, we think that the decision of the Judge, in the Court below, is erroneous—first, because there is no clear proof of notice, and second, because, he has raised a presumption upon facts which do not support the presumption raised. This being so, the question whether the case of a second registered purchaser having notice is an exception to the general rule laid down by the Full Bench case, does not arise, and it is unnecessary to decide it on the present occasion. We must set aside the decree of the lower Appellate Court and decree this appeal with costs of all Courts."

Appeal allowed.

NOTES.

[Where in a conflict between a prior optionally registrable and unregistered deed and a subsequent registered deed, the person claiming under the latter deed has notice of the former deed, he will not be entitled to priority over the former, 16 Mad. 148 F. B., 25 Mad. 1 (BENSON and BHASHYAM IYANGAR), 6 Bom. 515, 9 Bom. 427, 10 Bom. 105, 27 Bom. 408, 27 Bom. 452, 8 All. 540; 19 All. 145, 20 All. 252, 25 All. 366, (1908) A. W. N. 99 5 A. L. J. 607; 5 Cal. 336, 8 Cal. 597 (F. B.); 10 Cal. 1073, 11 Cal. 667; 13 Cal. 70, 16 Cal. 411, 22 Cal. 179, 56 P. R. 1900 F. B.]

[429] APPELLATE CIVIL.

The 7th January, 1884.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

In the matter of the Petition of Noorjehan Begum

Sakhawat Ally and others

versus

Noorjehan Begum.

Act XL of 1858, ss 10, 12 and 21—Bengal Act IX of 1879, s. 10—

Cancellation of certificate

Where an application is made under the provisions of s. 21 of Act XL of 1858 to have a certificate granted under that Act recalled and a fresh certificate granted to another, the applicant should set forth in his petition a sufficient cause for such course being taken, and the Court should thereupon proceed to enquire *judicially* whether such sufficient cause is established.

When the estate of a minor consists in whole or in part of land or any interest in land and when such application is made, the Court can only proceed to act in accordance with the provisions of s. 12 of Act XL of 1858, and has no jurisdiction to grant another certificate to any fit person, such a course being confined to cases in which the property is of the description indicated by s. 10.

COLONEL HEDAYUT ALI, Khan Bahadur, died some time in the year 1881, leaving two widows, Noorjehan Begum and Goordustan Begum, a daughter Mussamut Amirunissa, an infant son and three daughters, also infants under the age of eighteen years. Noorjehan Begum, on the 4th October 1882, applied to the Court under the provisions of Act XL of 1858 and obtained a certificate appointing her guardian of the persons of the minor children and the administrator of the property of her deceased husband. On the 5th May 1883 Amirunissa applied under the provisions of s. 21 of Act XL of 1858 to have the certificate, which had been granted to Noorjehan, cancelled, and to have a fresh certificate granted to her appointing her the guardian of the persons and the manager of the estate of the minors in the place of Noorjehan. On the same day Noorjehan presented a petition to the Court praying that the estate of the minors might be placed under the management of the Court of Wards.

The District Judge thereupon, after making what he termed "a somewhat prolonged enquiry, local and otherwise, himself," held that Amirunissa was not a fit and proper person to take charge of [430] the persons of the minors, nor to manage their property, and rejected her petition, and he directed the Court of Wards, under the provisions of s. 10, Beng. Act IX of 1879, to have the estate of the late Colonel Hedayut Ali taken under its management together with the persons of the minors.

Against that order Mussamut Amirunissa now appealed to the High Court, and while the appeal was pending in the High Court, the Court of Wards

* Appeals from Original Order Nos. 227 and 228 of 1883, against the order of J. Pasford Esq., Officiating Judge of Patna, dated the 22nd and 23rd June 1883.

refused to take charge of the minors or undertake the management of the estate.

Mr. *Abul Hossem*, Munshi *Mohamed Yusoof* and Baboo *Saligram Singh* for the Appellant.

Moulvie *Serajul Islam* for the Respondent Noorjehan who did not prefer any appeal against the order.

The Judgment of the High Court (MITTER and FIELD, JJ.) was as follows.—

Field, J.—In this case Noorjehan Begum, the widow of Lieutenant-Colonel Hedayut Ali, deceased, obtained a certificate on the 4th of October 1882, granted under the provisions of the Minors' Act XL of 1858. On the 26th of May 1883, a petition was presented by Amrunissa Begum under the provisions of s. 21 of the Act. This section provides that the Civil Court for any sufficient cause may recall any certificate granted under the Act, and may also for any sufficient cause remove any guardian appointed by the Court. It is clear that any person applying under this section ought to set forth in his or her petition a sufficient cause for recalling the certificate, and that the Court to which such petition may be presented ought to proceed to enquire judicially whether such sufficient cause is established. In the case before us the District Judge, after stating that he had ascertained by prolonged personal enquiry that there were dissensions amongst the members of the family of the late Colonel Hedayut Ali, which rendered it undesirable for his widow Noorjehan Begum to continue as manager of the property, and that none of the other members of the family were competent to manage, proceeded to apply, under s 10, Beng. Act IX of 1879, to the Court of Wards to have the estate of Colonel Hedayut Ali taken under the management of such Court of [431] Wards. Although the Judge does not in so many words say that he *recalls* the certificate previously granted on 4th October 1882, it is clear that he must have intended to do so, as otherwise he could not have applied to the Court of Wards, regard being had to the express language of s 21, Beng. Act XL of 1858, and s 10, Beng. Act IX of 1879. It is objected in appeal before us that the Judge had no power to recall the certificate without holding a proper judicial enquiry, and that he was not justified in acting upon the personal enquiry which he states in his judgment that he had made.

The difficulty which we experience in dealing with this objection is caused by the fact that Noorjehan Begum, to whom the certificate had been granted, has not appealed against the order of the Judge. She is however represented before us, and her vakeel has stated that the reason of her not appealing was that she was satisfied that the management of the estate should be taken over by the Court of Wards. A copy of the order of the Court of Wards has been placed before us, from which it appears that the Court have declined to assume charge of the estate, and it is represented to us on behalf of Noorjehan Begum that in consequence of the Court of Wards having so declined the charge she is now anxious that the certificate granted to her should not be recalled. It was pressed upon us that we should leave the District Judge to exercise his discretion in granting a certificate to some other suitable person, but unfortunately the state of the law appears to preclude the District Judge from the exercise of any such discretion. Section 10, Act XL of 1858, provides that "if the estate of the minor consist of moveable property or of houses, gardens or the like, the Court may grant a certificate to the public curator, appointed under s 19, Act XIX of 1841, or, if there be no public curator, to *any fit person* whom the Court may appoint for the purpose." No public curator has been appointed in these provinces under this section and in a case to which it applies the Judge may appoint *any fit person*, a case, that is, where the estate of the minor

consists of moveable property, or of houses, gardens or the like. But this section can have no application to the present case. Section 12 clearly applies, which provides that—"If the estate of the minor consist, [432] in whole or in part, of land or any interest in land, the Court may direct the Collector to take charge of the estate, and thereupon the Collector shall appoint a manager of the property." In the present case a part of the estate consists of land, and the District Judge could only proceed under s. 12. As the law stood before the passing of Beng. Act IX of 1879, the Collector had no option but to obey the mandate of the Civil Court. Section 10 of the Court of Ward's Act IX (B. C.) of 1879 however expressly provided that it should be at the discretion of the Court of Wards to take charge of the person or property of a minor or refuse to do so. Unfortunately this Act, in allowing the Court of Wards this discretion, did not provide what course was to be pursued, if the Court of Wards refused to take charge of the person or property of the minor. This case, inasmuch as it was not contemplated by Act XL of 1858, was not provided for by that Act. Let us now turn to s. 21 of Act XL of 1858, which is as follows—"The Civil Court for any sufficient cause may recall any certificate granted under this Act, and may direct the Collector to take charge of the estate, or may grant a certificate to the public curator or *any other person as the case may be*" It is clear that these last words have reference to the previous provisions of the Act to which reference has already been made, and that a Civil Court when it recalls a certificate has no jurisdiction to grant another certificate to *any fit person* in cases in which s. 12 applies, that is, in cases in which a minor's estate consists, in whole or in part, of land. No doubt the Court would have jurisdiction to deal with any application made under the earlier section of the Act, but the Court has not itself the power of selecting a fit person. If therefore the order of the District Judge, which virtually recalls the certificate granted to Noorjehan Begum, be allowed to stand, the property will be without a manager, and the District Judge will have no jurisdiction to select a proper person to manage the property, unless some one comes forward and makes an application under s. 3. We think it is not desirable that the estate of the late Lieutenant-Colonel Hedavut Ali should be left in this condition. We think, therefore, that the proper order to make in this case is to set aside the order of the District Judge of the 23rd June, and to direct [433] him to proceed to make upon the proper materials a judicial enquiry upon the petition filed under s. 21 of the Act, and before proceeding to such enquiry he should call upon the petitioner to amend her petition by stating distinctly the sufficient cause alleged for the recall of the certificate.

Mitter, J.—The petition of appeal in this case, which is alleged to be on appeal against the District Judge's order of the 22nd of June 1883, mixes up with the matter of that order a further matter concerned with the order of the 23rd June with which we have just dealt. It appears to us that as so much of the certificate as appointed Noorjehan Begum guardian of the children was never set aside, and as she therefore continues to be the guardian and entitled to the custody of the minors, the Judge was correct in directing the minors to return to her custody. We, therefore, decline to interfere with this portion of the Judge's order.

Appeal allowed in part and order varied.

NOTES.

[Under s. 21 of Act XL of 1858 there must be a judicial inquiry before the certificate is cancelled, 10 Cal. , 429; (1881) A. W. N. 4, (1883) A. W. N. 206; (1888), A. W. N. 279; . As to what are sufficient grounds for removal see Marsh. 244, 7 W. R. 522 B. L. R. Sup. Vol. 720; 2 Ind. Jur. N. S. 200.]

[10 Cal. 433]
APPELLATE CIVIL.

The 24th January, 1884.

PRESENT.

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Boido Nath Mashanta and others.....Defendants

versus

J. W. Laidlay and others.... Plaintiffs.*

*Enhancement of rent, Suit for—Service of notice of enhancement—
Bengal Act VIII of 1869, s. 14.*

Service of notice of enhancement under s. 14 of Bengal Act VIII of 1869 must be made strictly in the manner, provided by that section (*Chunder Monee Dossee v. Dhuroneedhur Lahory* (7 W. R., 2) followed.

When a tenure was held by a Hindu and three Santhals, and it was shown that service of the notice of enhancement had been personal on the latter, but only on the son of the former, who was an adult and living with his father as a member of a joint Hindu family, *Held*, that this was not sufficient service on the Hindu tenant

Quere—Whether, if it had been shown that the notice though served on the son had come into the hands of the father, that would not amount to a sufficient service of the notice.

THIS was a suit for arrears of rent at an enhanced rate after an alleged service of notice of enhancement. The only material [434] point in the case was as to the sufficiency of the service of such notice. For this point the facts are sufficiently stated in the judgment of the High Court.

Baboo Prannath Pundit for the Appellants.

Baboo Bhowani Churn Dutt for the Respondents.

The **Judgment** of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

Tottenham, J.—In this case we feel constrained, though reluctantly, to hold that the lower Courts were wrong in deciding that there has been service of notice of enhancement upon the defendant No 1

The tenants are four in number, one being a Hindu and the other three Santhals. The Courts found that the notice of enhancement had been personally served upon the three Santhals. There was no personal service upon the Hindu tenant, but it was found that his son, who is an adult, had received the notice. The Courts below have held that this was sufficient service within the meaning of the law.

Section 14 of the Rent Law provides that the notice shall, if practicable, be served personally upon the ryot. If for any reason the notice cannot be served personally, it shall be affixed at his usual place of residence. The law does not provide that service on any member of his family or any other person shall suffice.

Our attention has been called by the respondents' pleader to the case of *Nobodeep Chunder Shaha v. Sonaram Dass* (L. R., 4 Cal., 592), in which it

* Appeal from Appellate Decree No. 288 of 1883, against the decree of W. F. Meros, Esq., Officiating Judge of Midnapore, dated the 31st August 1882, affirming the decree of Baboo Sham Chand Roy, Munsif of Gurbetta, dated the 20th September 1881.

was held that where the tenure was owned by a joint Hindu family, it is sufficient service of notice of enhancement under s. 14 of the Rent Act, if any one of the co-sharers is served with the notice. That case does not apply to the present one, for the tenants are not members of a joint Hindu family. If they were, the service on defendants 2, 3 and 4 would, no doubt, have been sufficient. On the other hand, for the appellant the case of *Chunder Monnee Dossee v. Dhuronedhur Lahory* (7 W. R., 2), has been cited, in which Sir BARNES PEACOCK held that service of notice must be strictly in the manner provided [435] by the Act, and that if the notice was served upon the agent of a defendant who was a *pardahnusheen* lady, even if the agency were established, that would not suffice.

It seems to us that we are bound to follow this authority which is literally in accordance with the words of the Act.

We have been asked to take it that the lower Courts found that the notice, though served upon the son of the defendant, reached his, the defendant's, hand, and if we could be satisfied that such was the finding of the lower Courts, we should be disposed to think it sufficient, but we do not find this to be so. The first Court thought that most probably the notice was communicated to the defendant No. 1 by his son. The lower Appellate Court thought that the service effected on the adult son of defendant No. 1, who was living as a joint member of a Hindu family with his father, was a good service.

We think we are bound to insist upon the terms of the law being literally carried out. We must, therefore, set aside the decrees of the lower Courts and direct that the suit be dismissed.

Under the circumstances we make no order as to costs.

Appeal allowed.

NOTES.

[It was held in 3 C. L. R., 432 that a notice though served on the son would be valid if it actually reached the father.]

[10 Cal. 435]

APPELLATE CIVIL

The 18th January, 1884

PRESENT

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

The Secretary of State for India in Council . . . Defendant

versus

Nundun Lall . . . Plaintiff.

Partition—Bulwara—Revenue-paying estate—Benj. Act VIII of 1876, Part II and s. 4, cls (8) and (9)—Civil Procedure Code (Act XIV of 1882), s. 265.

In 1851 an estate was brought under *butwara* under the provisions of Regulation XIX of 1814. At such *butwara* a portion of the estate being land covered with water and unfit

* Appeal from Appellate Decree No. 2370 of 1882, against the decree of A. W. Cochrane, Esq., Officiating Judge of Tirhoot, dated the 21st August 1882, affirming the decree of Baboo Mohendro Nath Bose, Subordinate Judge of that District, dated the 14th September 1881.

for cultivation was not divided, but left joint amongst all the co-sharers, the land-revenue payable on account of the whole estate being apportioned amongst the several estates into which the portion divided was split up. Subsequently, on the portion remaining joint becoming dry and fit for cultivation, an application was made by one of the co-sharers to the Collector to partition the same under the provisions of Beng [436] Act VIII of 1876, but that officer refused to do so, on the ground that the land "did not bear an assessed revenue and was not shown in the *towji*."

In a suit brought under the above circumstances to compel the Collector to make the partition and in the alternative to have it made by the Civil Court, *Held*, that, though the reason given by the Collector for refusing was an erroneous one, he was not bound to make the partition under the provisions of Beng Act VIII of 1876, as the land in suit was not liable for the payment of one and same demand of land-revenue, and was therefore not a joint undivided estate within the terms of s. 4, cl (9) of that Act.

Held, also, that the word "estate," as used in s. 265 of the Civil Procedure Code, must not be construed in the same limited and defective sense in which it is used in Act VIII of 1876, but must be taken to be there used in its ordinary signification, and that consequently the plaintiff was entitled to a decree for partition under the provisions of that section. *Chundernath Nundy v. Hur Narain Deb* (I L R, 7 Cal, 153) approved.

THIS was a suit brought to obtain a partition of certain defined lands within the limits of mouzah Hosainpur-Jamayad. The plaintiff alleged—and there was no dispute as to the facts—that in the *butwara* of that mouzah, which took place in 1851, the portion now sought to be partitioned was left *ymali* for all the co-sharers of the village, as it was then land covered with water and unfit for cultivation. In 1876, however, the land dried up, and the plaintiff applied in 1878 to the Collector to partition it. An Amin was thereupon deputed by the Collector to measure the land and ascertain the rates for the purpose of allotting the several shares, but ultimately, on the 9th January 1880, the Collector refused to make the *butwara*, on the ground that the land did not bear an assessed revenue and a number in the *towji* as a part and parcel of Hosainpur-Jamayad, and it was left as the *ymali* land of the several co-sharers at the *butwara* of 1851.

At that *butwara* the revenue was apportioned between the co-sharers, and the plaintiff contended that it not only represented the land of the mouzah which was brought under the division, but also the land which was then left *ymali* and which was now sought to be partitioned.

The plaintiff accordingly made the Secretary of State for India a party-defendant, and prayed that the order of the Collector might be set aside and that he be directed to partition the land in suit, and [437] in the alternative he asked that the land might be partitioned by the Civil Court and his share allotted to him.

In the Original Court the main contention was that between the plaintiff and the Secretary of State. A third party intervened and claimed to be entitled to julkur rights over the land in suit, but that portion of the case formed no portion of the subject-matter of the appeal, either in the lower Appellate Court or in the High Court.

The Original Court held on the issue between the plaintiff and the Secretary of State that to say that the land in suit did not bear an assessed revenue and a *towji* number was absurd, for the burden of the revenue was not taken off it at the *butwara* in 1851, but the land was merely left *ymali* and the revenue apportioned on the remaining lands of the village. In the Court's opinion this did not convert it into *lakheraj*, but it remained the *mal* land of the village. It held, therefore, that the Collector was wrong in refusing to

make the partition asked for, and accordingly gave the plaintiff a decree, directing the Collector to make the partition and gave certain of the costs against the Secretary of State.

In the lower Appellate Court it was urged that the Civil Court could not interfere, and that the Collector had rightly interpreted the *butwara* law; that there was no provision of law by which the Collector could have made a *butwara* of the land, and that no costs should have been given against the Secretary of State, because he acted as a judicial officer in passing the order he did.

The lower Appellate Court, however, dismissed the appeal with costs, holding that the Collector had acted in his executive capacity, and that the decision of the Original Court, in holding that the land in suit must be taken to be land assessed with the (*sic*) revenue, and that it was an error if it did not appear in the *towji* roll.

Against the latter decision the Secretary of State now preferred a special appeal to the High Court.

The Senior Government Pleader, Baboo *Annoda Persad Bonnerjee* for the Appellant.

Baboo *Abinash Chunder Banerjee* for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

[438] Mitter, J.—This suit was brought for obtaining an order for partition of certain defined lands measuring 191 bighas 18 cottahs 10 dhurs and 7 chattaacks under the following circumstances.

The lands in suit originally appertained to an estate No. 1212 on the rent-roll of the Collector of Tirhoot. The plaintiff's predecessor in title held a share amounting to 5 gunda 9 annas in the said estate.

In 1851 this estate was brought under *butwara* under the then *butwara* law, Regulation XIX of 1814, and the share belonging to the plaintiff's predecessor in title having been separated was recorded as No. 4080 of the *towji*. The lands in dispute, however, being not then fit for cultivation but covered with water were not divided but left joint amongst all the co-sharers of the present estate, whose shares were recorded in separate numbers. In apportioning the entire revenue payable on account of the parent estate, calculation was made excluding the assets of the disputed lands.

Recently these lands having become dry have become fit for cultivation. The plaintiff (respondent) made an application to the Collector for the partition thereof, by allotting to him a defined portion in proportion to his share of 9 annas 5 gundas. The revenue authorities at first entertained this application and commenced the initial proceeding in the shape of measurement of the lands in suit for the purpose of making the allotment asked for, but subsequently they refused to proceed with the proceeding and rejected the application for *butwara*, "on the ground that the land did not bear an assessed revenue and was not shown in the *towji*." Thereupon the plaintiff commenced the present suit, making the Secretary of State for India in Council and his co-sharers defendants.

He made the Secretary of State for India in Council defendant because he contends that the revenue authorities under the *butwara* law were bound to effect the partition prayed for on his application. The suit was answered by the Secretary of State for India in Council by the plea that the revenue authorities

far from being bound were not even competent to entertain the application for *butwara*, the co-sharers who were made defendants not having [439] contested the suit. The question discussed mainly in the lower Courts was the one thus raised between the plaintiff and the Secretary of State for India in Council. The decision of the lower Courts being against the latter, this appeal has been preferred to this Court.

It seems to us that the contention raised before us by the appellant is valid. There is no provision in the present *butwara* law, Beng. Act VIII of 1876, which applies to the facts of this case. Part II of the Act deals with the subject of the right to claim partition. This right is given to a recorded proprietor of a joint undivided estate only. By s. 4 a joint undivided estate is defined to be "all lands which are borne on the revenue roll of a Collector as liable for the payment of one and the same demand of land-revenue, etc., etc." Now the land in suit is *not liable* for the payment of one and the same demand of land revenue; because by the *butwara* of 1851 the land revenue which was demandable in respect of the parent estate was apportioned amongst the several estates into which it was divided, so that in respect of them it cannot now be said that the demand is "one and the same." The revenue authorities were, therefore, right in refusing the application for partition, although the reason upon which the refusal was made was erroneous. The said reason was, as already stated in the language used in the judgment of the Subordinate Judge, "that the land did not bear an assessed revenue and was not shown in the *towji*." This is not correct, because what was done in the *butwara* of 1857 had not the effect of making these lands revenue-free, or excluding them from the revenue *towji*. A certain interest in the land in suit after the partition of 1851 continued to appertain to the new estates which came into existence after the *butwara* was effected. For instance, after this partition the estate allotted to the (plaintiff) respondent comprised the defined lands assigned to it and an undivided fractional share (represented by 9 annas 5 gundas) of the land in suit.

Although the contention made in this appeal is valid, yet we are not called upon to interfere with the decree for partition made in the lower Courts. That decree is quite in accordance with s. 265 of the Code of Civil Procedure. But it was contended before us that the word "estate," which occurs in this section [440] is used in the same sense in which it is used in the *butwara* law, Beng. Act VIII of 1876. But this contention does not seem to us to be correct. The definition of "estate" as given in the *butwara* law, seems to be defective, for instance, it excludes definite lands held jointly by owners of estates recorded in the Collector's *towji* in separate numbers. There is no reason suggested why this restricted meaning of the word should be adopted in construing this word used in s. 265 of the Code of Civil Procedure. On the other hand, it will facilitate the ends of justice in many cases if we construe the word "estate" here in its ordinary signification. In *Chundernath Nundi v. Hur Narain Deb* (I. L. R., 7 Cal., 153) this Court adopted this construction of s. 265 of the Code of Civil Procedure.

The result is that, although the appellant was unnecessarily made a defendant, yet the decree that has been awarded is correct, except as to costs payable by him. But, under the circumstances, he is not entitled to recover costs against the (plaintiff) respondent, because the revenue authorities, by entertaining the application for *butwara*, put the latter to unnecessary costs.

We accordingly modify the decrees of the lower Courts by reversing those portions of them which award costs against the appellant who will be entitled to recover costs of this appeal from the respondent.

Appeal allowed and decree modified.

NOTES

[MEANING OF ESTATE—

What is an 'estate' within the meaning of section 54 of the Civil Procedure Code of 1908 (265 of the Code of 1882)? The word 'estate' is used in its ordinary meaning and should not be construed in a limited and restricted sense, 10 Cal., 435 *Sheri* lands, that is, lands held under a lease from government for a fixed period come within the terms of the section, 16 Bom., 528; but not isolated plots of land which fall short of being the share of a co-sharer of a Mahal, 6 All., 452, A ryotwari holding, has been held not to be an 'estate' within the meaning of the section, 6 Mad., 97, 7 Mad., 382.

As regards the applicability of the section to suits for partition of estates when no separate allotment of revenue is prayed for, see 24 Cal., 725 (745) F B The limitation applicable to the execution of the decree in this case was dealt with in (1899) 16 Cal., 598 (600).]

[10 Cal. 440]

APPELLATE CIVIL.

The 7th February, 1884

PRESENT.

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Harrington. (Defendant) Appellant

versus

Gonesh Roy.... . (Plaintiff) Respondent.*

Limitation—Absence of defendant from British India—Act XV of 1877, s. 13.

Section 13 of the Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, does not apply to a case when, to the knowledge of the plaintiff, the defendant, though not residing in British India, is represented by a duly constituted agent and mookhtar.

[441] THIS was a suit to recover possession of 91 bighas 8 cottahs 18 dhurs of land, being a portion of some 190 bighas which the plaintiff held in the defendant's zamindari as *mowasi kadimjote*. The allegation in the plaint was that in the cultivation season the defendant demanded a termier *kabuhat* with an enhanced rate of rent, and as the plaintiff would not agree, the defendant on the 17th Jait 1287 F., corresponding with the 10th June 1880, dispossessed him.

The suit was instituted on the 25th May 1881 against a Mr Crowdy, who was the manager and mookhtar of the defendant and in charge of the Bhugwanpur Concern, and a summons was issued to him, and the 14th June fixed for hearing the case. On that date Mr. Crowdy presented a petition stating that Mr. E. T. Harrington was the proprietor of the Bhugwanpur Concern, and that the land claimed by the plaintiff was situate in that concern, that as the proprietor was in England, and he was simply the manager, he could not personally be made a defendant; and that the suit should have been brought against Mr. Harrington. The plaintiff was thereupon asked to state whether he meant to sue Mr. Crowdy as manager and mookhtar or as proprietor, and whether he alleged that Mr. Crowdy dispossessed him in his private capacity or as manager of the factory. In reply, on the 16th June, the plaintiff filed a petition stating that he did not know Mr. Harrington, but only knew

* Appeal from Appellate Decree No 223 of 1883, against the order of W. Verner, Esq., Judge of Bhagulpore, dated the 7th May 1883, reversing the order of Hafez, Abdul Kurim, Khan Bahadoor, Second Subordinate Judge of that district, dated the 17th March 1882

Mr. Crowdy, and that he meant to make the factory defendant, and he prayed that the plaint might be amended by putting down in the place of the defendant—"E. T. Harrington, proprietor, by W. S. Crowdy."

Mr. Harrington was accordingly made defendant on the 16th June 1881.

In his written statement, amongst other pleas raised, he contended that the suit being one governed by s. 27, Bengal Act VIII of 1869, it was barred by limitation as the year allowed since the date of dispossession had expired before he was sued.

In answer to that plea the plaintiff contended that as Mr. Harrington was in England, under s. 13 of the Limitation Act no limitation could run.

The Original Court, without going into the other issues raised, dismissed the suit, holding that it was barred

[442] On appeal the lower Appellate Court, while agreeing with the Court below that the period of limitation which governed the case was one year, and that it must be taken that the suit was instituted against Mr. Harrington on the 16th June 1881, said however that s. 13 of the Limitation Act applied, and reversing the decree of the lower Court remanded the case for trial on its merits.

Against this order of remand the defendant now specially appealed to the High Court.

Mr. *R. E. Twidale* appeared on behalf of the Appellant.

No one appeared on behalf of the Respondent

The **Judgment** of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

Tottenham, J.—It is unfortunate that in this appeal nobody has appeared for the respondent, and therefore no arguments have been put before us in favour of the District Judge's order

It appears to us that the reason given by the District Judge for holding that the suit was not barred by limitation cannot be supported in law. The Judge relies on s. 13 of the Limitation Act, which provides that "in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded." He goes on to say "admittedly Mr. Harrington," the defendant in this case, "has been so absent from the date of dispossession till now" It seems, however, that Mr. Harrington is represented in this country by Mr. Crowdy, who, in the first instance, was made a defendant in the case as manager and mookhtar of the Bhugwanpur Factory.

If the Judge's interpretation of s. 13 were correct, there would be no limitation at all as against a proprietor residing in England although suits might be conducted for and against him through his agent in this country. It is impossible to believe that this was the intention of the law. Mr. Harrington, the proprietor, was not made a defendant until the 16th June 1881, and by s. 22 of the Limitation Act a suit as against him is to be taken to be instituted on that date. That was more than one year after the alleged dispossession. It seems a hard case that the plaintiff should be shut out from relief by his ignorance that Mr. Harrington was the real proprietor, but, as observed by the [443] Subordinate Judge, he was clearly aware that Mr. Crowdy was not the proprietor in that he sued him merely as "manager and mookhtar" It was, therefore, within his power to ascertain against whom the suit ought to have been brought.

Upon a strict interpretation of the law we think that the Subordinate Judge was right in holding that the suit was barred.

We must, therefore, set aside the order of the lower Appellate Court, and restore that of the first Court with costs, one gold mohur.

Appeal allowed.

NOTES.

[OVERRULED—

In this case it was held that s. 18 of the Limitation Act 1877 did not apply when to the knowledge of the plaintiffs, the defendants, partners in a firm, are during their absence, carrying on business in British India through an authorised agent. This was dissented from in 14 Cal , 457 , 9 C. P. L. R. 72 (74), and finally *overruled* in (1898) **25 Cal., 496** 2 C. W. N. 269 **F.B.]**

[10 Cal. 443]

SMALL CAUSE COURT REFERENCE

The 6th March, 1884.

PRESENT ·

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR JUSTICE CUNNINGHAM.

Kannye Loll Sett and another.....Plaintiffs

versus

Nistoriny Dossee and another.Defendants.*

*Mortgage of leasehold property—Mortgagee in possession—Liability for rent—
Transfer of Property Act—Act IV of 1882, ss. 65, 76.*

Where the subject of a mortgage is leasehold property, and the mortgagee is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagor becomes liable, as a rule, to pay the rent, but where the mortgagee is in possession and his name is registered in the landlord's books as the tenant, there can be no doubt as to his being liable for the rent

THE plaintiffs in this case were the owners of certain land, No. 8, Juggo Mohon Mullick's Place, and some time back let out to the defendant Toolamoney three plots out of the land above-mentioned, on which the latter built some tiled huts which she let out to tenants. Subsequently on the 10th Assar 1282 (June 1875), Toolamoney mortgaged the tiled huts on this land to one Nistoriny Dossee. Nistoriny then entered into possession and repaired and built other huts thereon.

This mortgage and the fact of Nistoriny being in possession coming to the knowledge of the plaintiff, his agent induced Nistoriny to have her name entered in the landlord's books as the tenant of the property, and received rent from her at the rate of Rs 59 a month and also a *salam* of Rs. 150.

In 1879, Toolamoney brought a suit against Nistoriny to redeem the property mortgaged and for an account, and obtained a **[444]** decree against her. Subsequently to this decree Toolamoney paid rent up to Aghran 1288.

* Small Cause Court Reference under s. 69 of Act XV of 1882 and s 617 of the Civil Procedure Code, *cf.* Baboo Koonjo Lall Banerjee, Second Judge of the Calcutta Court of Small Causes.

Rent of the premises having since then fallen in arrear the plaintiffs brought this suit in the Court of Small Causes against Toolamoney and Nistoriny for Rs. 1,062, being the rent due from Pous 1288 to Joisto 1290.

The Second Judge of the Small Cause Court found that Toolamoney was the real tenant and that Nistoriny was merely the mortgagee in possession, and gave the plaintiffs a decree against Toolamoney, dismissing the suit as against Nistoriny, stating that his judgment was, however, contingent on the opinion of the High Court, whether on the facts stated and the law applied, the decree should be against Toolamoney alone or against both Toolamoney and Nistoriny.

On the reference Mr. *Bonnerjee* appeared for the Plaintiffs and Mr. *Trevelyan* appeared for Nistoriny.

No one appeared for Toolamoney.

The Judgment of the High Court was delivered by

Garth, C.J.—The Judge of the Small Cause Court has made a mistake in this case.

Whenever the subject of a mortgage is leasehold property, and the mortgagee is put in possession of it, under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent. But in this case there is no doubt about the matter, because the mortgagee has not only obtained possession, but has had her name entered in the landlord's books as the tenant of the property in the place of Toolamoney. Nistoriny is, therefore, liable for the rent, and the suit must be dismissed altogether as against Toolamoney.

The Small Cause Court Judge appears to have been misled by the language of s. 76 of the Transfer of Property Act, but it will be found that neither that section, which relates to mortgagees in possession, nor s. 65, which relates to the duties of mortgagors, contain any rules applicable to cases like the present. Those cases are, therefore, governed by the general law.

The plaintiff will be entitled to the costs of this reference from the defendant Nistoriny.

Attorneys for Plaintiffs : *Mitter and Bungo*.

Attorney for Nistoriny : *Dwarkanath Dutt*.

NOTES.

[MORTGAGE OF LEASEHOLDS—

A mortgage with possession of leasehold property may be made either by assignment or sub-lease of the tenure.

Where there is an assignment, the mortgagee will be liable to the lessor not as mortgagee of the lessee's interest but on the ground of the privity of estate arising from the vesting of the assignor's interest in the assignee, 10 Cal., 443, 12 Cal., 185 at 189; 17 Mad., 296, 1 Bom., 70 (73); 29 Bom., 391; 7 Bom., L. R., 313 (318)

It is not necessary that there should be an express assignment, it is enough if he is put in possession under circumstances that amount to an assignment or has his name entered in the landlords' books (10 Cal., 443) or has collected rents from the subordinate holders, 2 C. L. R., 323, but compare 25 Cal., 338 (347, 348) or done some act evidencing entry into possession, 29 Bom., 391. 7 Bom., L. R. 313.]

[445] APPEAL FROM ORIGINAL CIVIL.

The 6th March, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
CUNNINGHAM.

The Corporation of the Town of Calcutta. Defendant
versus
Anderson..... Plaintiff.

Liability of Commissioners of Corporation of Calcutta for breach of statutory duty—Calcutta Municipality Act (Bengal Act IV of 1876), ss. 189, 191, 213, 219, 220, 252—Obstruction in Public way—Suit for damages—Limitation Act (XV of 1877), s. 5.

Under s. 189 of Bengal Act IV of 1876 the roads and streets in Calcutta are vested in the Commissioners of the Corporation of the Town of Calcutta, and s. 191 provides that "the Commissioners shall, so far as the Municipal funds permit, from time to time, cause the public streets to be maintained and repaired, and for such purpose may do all things necessary for the public safety and convenience."

Sections 252 and 213, respectively direct the Commissioners on opening the roads, and persons to whom they have given permission so to do, to fence and light any excavations so made.

In March 1882 the Commissioners, at the request of the Executive Engineer of the Public Works Department of the Government of Bengal, permitted the latter to open up one of the roads in Calcutta for the purpose of carrying off surplus water from a tank which was under the charge and control of such Executive Engineer aforesaid, and for the purpose of connecting the tank with the public sewer

Permission was granted on the usual condition that a contractor licensed to do such works by the Municipality (but who was not in their employ further than the Commissioners had power to cancel his license, nor was he in the employ of the Secretary of State for India) should be employed in the work. Such a contractor was employed by the Secretary of State and obtained a license from the Commissioners empowering him to break open the road.

The road was opened, but was left unfenced and insufficiently lighted at night.

The plaintiff in driving along this road after dusk, drove into the hole and was badly injured, and sued the Corporation, the contractor and the Secretary of State for damages.

Held by the Court of First Instance (1) that the Secretary of State was not liable, because he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way, (2) that the Corporation who had a statutory obligation imposed upon them to repair and maintain the roads, were liable to the plaintiff for a breach of their statutory duty that where there is a [446] dangerous obstruction *à fortiori* where such dangerous obstruction results from a permission accorded by the Commissioners, they are to be held liable for damage caused by it; (3) that the contractor also was liable.

Held on appeal that the fact that the Commissioners gave permission to another person to open up the road, although for a perfectly proper purpose, would not relieve them from their statutory duty under s. 191 of Bengal Act IV of 1876

The fact that the plaintiff's attorney on being served with notice of appeal failed to notice that a party who had been a defendant in the Court below had not been made a respondent in the appeal, coupled with the fact that the application made by the plaintiff to make such

defendant a party respondent after the period of limitation had expired, was not made at the earliest opportunity possible, is not a sufficient ground under s. 5 of the Limitation Act for non-prosecution of the appeal within the period allowed

APPEAL from a judgment of PIGOT, J., dated the 27th June 1883.

In the month of March 1883 the Executive Engineer of the First Calcutta Division of the Public Works Department, under whose charge were the Calcutta maidan and the tanks thereon, finding that a certain tank, called Monohar Dass' tank, overflowed its banks, applied for leave from the defendant Corporation to connect the said tank with the public sewer in Chowringhee Road, which permission the defendant Corporation gave under s. 213 of Beng. Act IV of 1876 on the usual condition that one of the contractors, licensed by the defendant Corporation to carry out such works, should be employed to do the work by the Government. In pursuance of this condition, one Nolit Mohun Chatterjee (one of the defendants) was employed, and he sent in an application to the defendant Corporation asking for permission to open up the road. Permission was granted, and on the morning of the 23rd March the road was opened up from the east side to the centre of the road, and the earth thrown up to a height of three or four feet alongside the excavation on its south side. It appeared from the evidence that there was no fencing placed round the excavation, and that until after such time as the accident, hereafter to be mentioned, took place the excavation was insufficiently lighted by one street lamp, such as is ordinarily used for road repairs, placed on the ground at the west end of the excavation on the north side of the mound of earth, and in such a position that the light from it was not visible [447] to persons going along the road either from the north or from the south. It also appeared that a public street lamp, which stood on the footway in a line with the excavation, was alight at the time of the accident. A little after seven o'clock on the evening of the 23rd, the plaintiff, who was being driven by a friend, one McDonell, was coming down Chowringhee Road from the north, in a gig, and owing to the insufficient light and want of fencing the horse fell over the mound, and the plaintiff and McDonell were thrown out of the gig, the plaintiff falling into the excavation and receiving considerable injuries, which kept him in hospital for five weeks and obliged him on leaving hospital to take a sea voyage, to recruit his health, which lasted another five weeks. Previously to the accident the horse had been driven for some miles, and it did not appear either that he was a restive horse, or that the pace at which he was being driven was excessive.

The plaintiff at first brought his action for damages against the Corporation and Nolit Mohun Chatterjee the contractor, but the Corporation in their written statement denied their liability, stating that the excavation was made under the orders of the Executive Engineer of Government, and not under their superintendence, and that if any one was liable it was the Secretary of State for India. The plaintiff then amended his plaint, making the Secretary of State a party defendant.

Mr. Pugh and Mr. Hill for the Plaintiff.

Mr. Branson, Mr. T. A. Apcar, and Mr. Trevelyan for the Corporation

Mr. Bonnerjee and Mr. Gasper for Nolit Mohun Chatterjee

The following is the judgment appealed from.—

PIGOT, J.—The plaintiff in this case sues the Corporation of the Town of Calcutta, the Secretary of State for India in Council and Nolit Mohun Chatterjee; and he states his cause of action thus—

"The defendant Corporation is a body corporate, in whom all public streets in the town of Calcutta (not being the property and kept under the

control of the Government) and also all sewers, drains, tunnels and culverts in, alongside or under the [448] public streets, whether made at the cost of the defendant Corporation or otherwise, and all works, materials and things appertaining thereto are, and since the first day of July 1876 have been vested ; and since the date aforesaid the defendant Corporation has had the sole management and control of the said public streets, and it is, and since the date aforesaid, has been the duty of the defendant Corporation to maintain and repair the said public streets and for such purpose to do all things necessary for the public safety.

Chowringhee Road is one of the public streets in the town of Calcutta vested in the defendant Corporation as aforesaid

On or shortly before the 23rd day of March 1882, the defendant Corporation caused or authorized and permitted a deep hole or excavation to be made in and across a considerable portion of Chowringhee Road aforesaid, and opposite a certain tank called Monohur Dass' tank, and on the said 23rd March 1882 the defendant Corporation wrongfully and negligently permitted the said excavation to be and remain unfenced and unguarded and insufficiently lighted, so as to be dangerous to persons lawfully passing along the said road.

On the evening of the 23rd March 1882, between the hours of seven and eight o'clock P M , when it was already dark, the plaintiff was lawfully passing along the said road in a carriage which was being driven with ordinary caution, when, in consequence of the said excavation having been left in such unfenced, unguarded and insufficiently lighted condition, the horse attached to the said carriage fell into the said excavation, and the plaintiff was violently thrown out of the said carriage and into the said excavation.

The effect of the said fall upon the plaintiff was the plaintiff's forehead and scalp were severely lacerated, bruised and wounded, and his frontal bone was injured, and the plaintiff suffered great pain, and became and was for some time dangerously ill, and was compelled to remain in hospital under medical and surgical treatment from the said 23rd of March last until the 1st of May last, and was then discharged from hospital only in order that he might and upon the understanding or condition that he should take a sea trip, and by reason of his said injuries and the shock [449] to his nervous system the plaintiff's constitution and bodily health and strength have been injured, and the plaintiff has been and is permanently disfigured, and the plaintiff was thereby put to an expense of Rs. 117 for medical and surgical attendance and nursing.

The defendant Nolit Mohun Chatterjee was, as the plaintiff is informed and believes, employed as a contractor to make the said excavation, and the same was, as the plaintiff is informed and believes, in fact, made by or under the immediate directions* of the said defendant Nolit Mohun Chatterjee, and the plaintiff submits that it thereupon became and was the duty of the said defendant as well as of the defendant Corporation to cause the said excavation to be fenced, guarded and sufficiently lighted, and that the said defendant Nolit Mohun Chatterjee, as well as the defendant Corporation, is liable to the plaintiff for the damages sustained by the plaintiff from his said fall."

The Corporation of the Town of Calcutta put in a written statement and said :—

"The powers and duties vested in and imposed on the defendant Corporation are those prescribed and defined by Act IV of 1876 of the Bengal Council.

"By s. 213 of the said Act it is provided, *inter alia*, that no person shall make a hole in any public street without the permission of the defendant Corporation in writing, and when such permission is granted to any person, he shall, at his own expense, cause such hole to be sufficiently fenced and enclosed until the hole is filled up and otherwise made secure, and shall cause the same to be sufficiently lighted up at night

"In the month of March last the Executive Engineer of the First Calcutta Division of the Public Works Department under the Government of Bengal, in whose charge the maidan of Calcutta and the tanks therein are, being desirous, for the purpose of better draining the said maidan, to connect the tank known as Monohur, Dass' tank with the public sewer in the Chowringhee Road, applied to the said Corporation for leave to connect such tank with such sewer, which permission the defendant Corporation gave, and they authorised the said Executive Engineer under the said s. 213 to open the said Chowringhee Road for the purpose of connecting the said tank with the said sewer.

[450] "The said Executive Engineer, as the defendant Corporation is informed, entrusted the work of making the necessary excavation and laying the pipes for the purpose of making the desired connection between the said tank and sewer to the defendant Nolit Mohun Chatterjee, who was at that time one of the persons licensed by the Corporation to do such work, and who was bound to act in the performance of any such work in accordance with rules framed by the Engineer to the Corporation in that behalf, but the said last mentioned defendant was not in any way employed by, or acting as the agent or contractor of, the Corporation in respect of the said work, nor was the said last mentioned defendant under or subject to the defendant Corporation in any way further or otherwise than he was liable to have his license forfeited on the breach by him of any of the rules framed by the defendant Corporation for the guidance of such licensed drainage contractors "

They then plead that the excavation was made under the orders of the Executive Engineer, and deny it was made by them or under their superintendence, or that any duty was cast on them in respect thereof, and in para 6 put the plaintiff to proof and then say —

"The Chairman of the defendant Corporation was at first led to believe that the said excavation made by the said defendant Nolit Mohun Chatterjee was left entirely unlighted, but he has since been informed that it was lighted by two lamps and was situate immediately opposite to two bright gas lamps which are at the door of Mr. Gubbey's houses Nos 9 to 21, Chowringhee, and the defendant Corporation believes that if the conveyance in which the plaintiff was driving had been driven with due and proper caution the horse attached thereto would not have fallen into the said excavation.

"The defendant Corporation deny that they wrongfully and negligently permitted the said excavation to remain unfenced and unguarded and insufficiently lighted, and they submit that, under the circumstances hereinbefore stated, no duty devolved on them to fence, guard or light the same. .

"The defendant Corporation submit that if any one is liable to the plaintiff in this suit it is the Secretary of State for India in Council and the said Nolit Mohun Chatterjee "

[451] The plaintiff then amended the plaint, including the Secretary of State for India in Council as defendant, and setting out that the defendant Nolit Mohun Chatterjee made the excavation not as agent of the Corporation,

but under the orders of the Executive Engineer of the First Calcutta Division of the Public Works Department under the Government of Bengal, the said Executive Engineer having, as the defendant Corporation further allege, applied to and obtained authority from the defendant Corporation to open the said Chowringhee Road for the purpose of connecting the said tank known as Monohur Dass' tank with the public sewer under the said Chowringhee Road, with a view to the better drainage of the maidan of Calcutta and of the tanks therein, including the said Monohur Dass' tank, such maidan and tanks then being in and under the sole charge and control of the said Government of Bengal.

The first question is, whether or not there was negligence, whether the excavation in the plaint mentioned was in such a condition and so kept at the time of the accident as to entitle the defendant [plaintiff?] to maintain a suit against any one, and on that a mass of evidence was gone into, the defendant Corporation putting the plaintiff to strict proof, and the Secretary of State setting up a defence to which I shall advert, it became necessary to prove the plaintiff's fall was caused by negligence.

The Secretary of State sets up that he has no knowledge of the matters of fact alleged in para 5 of the plaint filed in this suit, and puts the plaintiff to strict proof thereof. He pleads substantially that the work was undertaken with the permission of the defendant Corporation, and at the instance of the Public Works Department, and was made by the contractor, and goes on to say "This defendant believes that on the evening of the 23rd day of the said month of March, the said excavation was lighted by two lamps placed on each side of it by the defendant Nolit Mohun Chatterjee, and also by certain gas lamps on the opposite side of the said road, and that the same was then protected as aforesaid."

The defendant Nolit Mohun Chatterjee has filed no written statement, nor entered appearance until the case came on, and I had better deal with the point raised by his counsel, that the [432] evidence of Mr. Brame was not admissible because he was not represented at it.

I am of opinion that the contention cannot be sustained. The circumstances were such as to constitute that means of cross-examining within the rule under which a party to a case is not held bound by evidence given under such circumstances that he had no opportunity of cross-examination. Mr. Brame, an important witness, was leaving Calcutta, the case was in the day's list. an application was made to have him examined before he should leave, and the case being in the day's list and the parties bound to be present, I ordered that Mr. Brame's evidence should be taken by me in accordance with my practice of having a witness whose evidence is taken under such circumstances examined before me, in place of having his evidence taken at a *de bene esse* examination.

On the day on which I made that order, the defendant entered appearance. In any case, he had been duly summoned, if he was not at pains to appear, it was his fault. In every sense of the rule the defendant had an opportunity of cross-examining within the meaning of that rule. The evidence of Brame is therefore binding on that defendant.

Now, upon the question whether or not at the time of the accident the excavation, which is described in the pleadings, was properly lighted.

The chief witnesses were Brame, Anderson, McDonell, Warwick, Rustomjee and a syce.

The evidence on the other side consists of certain persons, one of them a bearer of the contractor Nolit Mohun, and six other persons, Sumshee, Pertab,

Sudir. &c., servants of Mr. Gubboy, whose house is close to the excavation, and who were called to depose chiefly on this, that shortly after the accident the plaintiff's syce made certain statements, or that there were lights on the spot that are alleged by plaintiff's witnesses not to have been there.

I have no doubt the preponderance of testimony is quite on the side of the plaintiff, both in respect of position and intelligence of witnesses examined, the manner in which they gave their [453] evidence, and as to some of them there is an entire absence of bias and every possible guarantee of independence.

The accident took place close upon 7 o'clock, a little after 7, as to this there is no doubt.

Mr. Brame was on the spot three to five minutes to 7, and narrowly escaped from a similar accident. He says: "I remember an opening in the road on the evening and prior to that, I know Monohur Dass' tank opposite to Gubboy's house and Lindsay Street. The excavation was on the north-east corner of the tank at right angles with the road, as nearly as possible opposite Gubboy's house, it extended from nearly to quite half of the carriage way from the tank side. I saw it in the evening, I nearly tumbled into it, that's how I saw it, I saw it driving home in a brougham, while driving along my coachman suddenly pulled up, nearly threw the horse on his haunches, and threw me forward in the carriage, I found that my horse had his forefeet on the top of the mound of earth excavated from this opening, I got out of the carriage, it was dark, it was about five to three minutes to 7 I should say, I got out because I was afraid of the horse being restive, and getting down the excavation; I am certain there were no lights. I looked particularly to that point, because I thought it was a great shame the opening should be left open, and I looked to see if there were lights. There were no bamboos or any fencing that I could see. I saw no one by to warn people when I was there. At the time I lived at No. 3, Humayoon Place, just beyond Lindsay Street, between 17 and 18 Chowringhee, I did not see the accident, the subject of this suit; I had no sooner got to my house about 200 or 300 yards off, when I heard shouts and saw people running about three minutes after I had left the spot.

"To Court—There was no fog that evening.

"My animal is very steady and does not go fast, we were driving rather slowly, the brougham was a heavy one, and to that I attribute not getting into the excavation myself. My horse's forelegs were on the mound, which was immediately on either side of the excavation.

"The mound was about four feet high."

His evidence was not shaken, and in cross-examination, as [454] is generally the case with a straightforward witness who generally strengthens the case, he shows in most natural and proper way the fact of the evidence which he gave coming to the ear of the plaintiff; upon that evidence alone I should find it difficult to disbelieve plaintiff's case, unless it were clearly established that after Mr. Brame's accident and before the plaintiff's, lights were put up. There is no such evidence, and the evidence of Messieurs Anderson and McDonell, interested no doubt, and of Messieurs Rustomjee and Warwick places beyond doubt that the place was not lit up.

And when I refer to Mr. Anderson's evidence, I am glad to note there was a common expression amongst all the counsel in the case of consideration and respect for the manner in which he gave it; his evidence given in simply straightforward and modest manner must convince any one who heard it of his good faith.

Mr. Anderson says : " On 23rd March last year, I was driving that evening with Mr. McDonell in a tom-tom or gig ; Mr. McDonell was driving. We were going in the direction of Dhurumtollah along Chowringhee Road between 7 and 8 in the evening. We had driven round the Strand and got on Chowringhee Road, corner of Park Street, and were going in the direction of No. 15, Chowringhee.

" I first became aware of the accident before I fell into the drain , the sudden stoppage of the gig first brought it to my notice. A mound of earth thrown up on the road stopped the gig. Before the gig was stopped by the mound of earth, I have no reason to think anything was wrong. There was no fence round this mound of earth and no lights. I saw no light at all round this mound before I fell into the hole. The nearest light I observed was on the tramway side of the road, on the maidan side. The light was about opposite the entrance of Gubboy's house and a little in on the Tramway. I saw the light just as I was being pitched out , it was not visible before in the direction we were coming. I presume the earth thrown up from the drain obscured it. I fell into this drain , I was rendered unconscious for some time , when I regained consciousness, I saw the horse's feet on top of me, the horse fell across the drain. Mr McDonell and [453] some natives assisted me out , they got me out before they got the horse out ; the horse's feet were not on me, but on top of me, I mean above me, across the drain , he did not fall into the drain at that time. I was pulled out with the assistance of natives and walked home about 100 yards." Then he states the nature of the injuries caused and of the consequence of them. " Dr. Comley first came to see me. He would not undertake my treatment, but advised me to go up to the hospital. I had my wounds bathed and started off to the hospital in about half an hour , my chief injuries were about the head, I suffered very much pain from them. I was in the hospital from 23rd March to 1st May. Dr Birch and the house surgeon attended me, I forgot his name. The house surgeon dressed my wounds the day I arrived. I remained in the hospital until 1st May. Dr Birch took the case up on the following morning, and remained in regular attendance until I was discharged. I was unfit for work when I left the hospital. I went a sea voyage to Singapore. I was away five weeks , sometimes now I feel ill effects from my accident , I feel irritation, nervous irritation and headache. I feel the irritation in the region of the forehead. I sometimes suffer from headache. I have been very nervous since the accident. I feel startled by a sound, my memory is not so good as it was before. Things I have been told I forget soon after. I can't say I was nervous before this accident.

" I was not subject to headache before the accident, I have them now frequently.

To Court—

" I have headaches now frequently. I was daily in the habit of driving about before this accident occurred. I was never nervous in driving before the accident , since the accident I have not driven about so much, I am very much more nervous now."

He was cross-examined as to the horse and the ride and extent of ground traversed, and nothing of any consequence was elicited to shake his evidence. In one portion he says : " At the time of the accident, I can't say at what rate we were going , the horse was regularly used and coming back from a long journey , we had no reason to suspect any restiveness."

[456] Cross-examined, he did say that it was a horse which required a little caution to handle, but there is nothing to raise any reasonable suspicion

that the horse was restive. McDonell who is no doubt interested in establishing the case, as he has also brought a suit, says "that he was first aware of the hole when the horse fell into it, with its head on the other side and its forelegs in the hole. It jumped over a mound, a slight mound, it jumped over this, it was a mound of earth. I can't say how high the mound was, there was no fence round the hole, nor round or on the mound. I saw no light before. I approached, I saw a light after, it was the extreme end of the west end of the hole, on the tramway line at the maidan end of the mound, on the ground. It was obscured by the mound, it was on the north side of the mound. I saw no other light in the neighbourhood of the hole. I could not speak as to any light near Gubboy's house. There was no light on the other side of the tramway on the maidan side, there was another hole on that side. I observed this light after the accident, it was an ordinary street lamp such as the Municipality use for street repairs. I was thrown over the hole when the accident occurred, I could not see down the hole, but I heard plaintiff talk. I did not assist in getting him out, I heard his voice from the hole." Then being cross-examined as to his driving, he says he has been able to drive all his life in Morayshire, and says he has driven this horse and another horse, a country-bred. He is a gentleman, who from his early training, would seem pretty sure to have learned how to drive. He says "I saw no lights round this excavation before the accident. I saw two lights after the accident. I did not examine them thoroughly, but I saw the one next the excavation which was an ordinary lamp. The one I saw was on the maidan side, we were going to the north, it was at the west side at the extreme end, the one near the excavation. I mean it was neither north or south, but at the west end."

This is important as regards the most plausible piece of evidence, that plan put in under the circumstances so surprising by Baboo Prossono Banerjee. That plan represents the mounds as crowded by gigantic lamps and conspicuously placed, so as to attract the attention of the most casual bystander. It will be noticed that [457] both the witnesses I have referred to unquestionably indicate the real place of such lamps as were there. On the ground at each end of the excavation, concealed from persons coming from north and south. I don't think it necessary to deal further with McDonell's first cross-examination.

In cross-examination by the Advocate-General, McDonell says that the accident was just after seven, he had his attention fixed on the horse, he required looking after, was not pulling. The phrase required looking after is ambiguous, but the whole effect of the evidence shows that there is nothing in the spirit or speed of the horse, or in the circumstances, to show anything of exceptional kind. He says our lamps were lit. Then in re-examination he adds a fact, which is not immaterial, not very important, that he first drove this horse in April 1882.

The next witness is of considerable importance, there is no suggestion against him, he lives on the spot, is familiar with that part of the road, which he contemplates from his verandah for an hour after sunset daily. It is Mr. Rustomjee. He says he was sitting in the verandah, when it was light, he could see the excavation, that is material, because he saw what went on and saw it at a distance at which Mr. Warwick is supposed not to have seen it. Mr. Rustomjee was at a height looking down at a scene which he was familiar with, which may account for this difference between the two witnesses as to this. "I was sitting in the verandah and I saw no lights at the place of the excavation; there were two mounds on either side, there were no lighted lamps on those mounds; to the best of my knowledge there was no fence round the excavation or the mounds. The excavation was opposite Mr. Gubboy's house,

one of his lamps was lit, that was the public lamp; there is another lamp put up by Gubboy and connected with his house, that was not lit. I don't remember if there was any moon. Just as the plaintiff's trap fell into the hole my attention was drawn to it (he means the plaintiff's trap) I had not noticed it before."

Part of defendant's case was to suggest the existence of light from the moon, from Gubboy's lamps, and other lights not supplied by them, but suggested as being then alight, either to suggest that such lighting as it was their duty to make was not necessary, or to found a supposition of negligent driving.

[458] The moon and Gubboy's lamp are unworthy of consideration.

When Mr. Rustomjee's attention was attracted to the trap just as it fell down, it was not very dark. He says he was sitting facing south, he was positive that there were no lights at the time of the accident, they were brought immediately after the accident.

I am satisfied this was so, whether the person in charge, if any, neglected his duty is immaterial. I am satisfied that the mound was insufficiently lit, that as Mr. Rustomjee says the coolies brought the lights after the accident and that his account of what he says he saw is correct. No one who heard his evidence can doubt his good faith or good memory. Mr. Warwick gives similar evidence. I refer to the passage where he says he could not see the mounds from Rustomjee's house. There is little doubt from Rustomjee's elevation that he would be more likely to see the mounds than Warwick who was on the road. Mr. Rustomjee had been looking at the place for some time; he was familiar with the scene and would probably be able to distinguish to a later period the familiar outlines of the mounds as they gradually faded into the darkness of the evening.

Having read Warwick's evidence I do not at all think it touches Rustomjee's accuracy.

Mr. Anderson had just been taken up from the hole, some coolies had pulled him out. There was no fence whatever round the hole or mound. There was no light round the hole, but there was one on the other side of the tramway line near another hole. I saw no light by the pit itself. He went away down the hole.

It is to be observed that in the written statement of the defendant Corporation it is stated that at first the Chairman was led to suppose that negligence had been committed, but subsequently came to a different conclusion, and that the mound was lit by two lamps. For the defendant contractor there is the evidence of Saboo, trusted bearer of the contractor (his domestic servant). "I am employed in the office in Ezra street, in the service of Nolit Mohun Chatterjee. I know the tank opposite Gubboy's house. I put up a fence at the excavation and placed and lighted some lamps. I put the fence on the east side of the trench, the east side was opposite Gubboy's gate or the road. I put two drainage pipes at the east end of the trench and placed two small bamboos across, [459] one on the top end of the pipes and one at the middle. I tied the two cross bamboos to the pipes with ropes. There were two other bamboos, one on the north and one on the south side of the trench. They were lying on the mounds and the ends were tied to drainage pipes. I did this about a year ago. I was not present when the accident took place, I heard of it afterwards. I did this work before I heard of the accident in the office. I can't say the time of day I did this; it was sunlight, about noon, when I did this. I heard of the accident the next day, I spoke of lighting the lamps, I lighted lamps."

He says he lighted six lamps at this place and describes in detail making of fence around the mound ; and so the other witnesses are called. Shumsher Syce says he saw a syce holding the horse by the head, and the syce told him the Sahib was coming very fast and could not pull up, and he noticed four lights on top of the mound. If that be true, the lights were brought after the accident. If it be true that the syce said that the Sahib was going fast, it is evidence which creates no impression on my mind in the face of the other evidence in the case. It is denied that the syce did say it, if he did, he said, as I believe, what was not true.

Nukken says the same thing ; these are witnesses of that sort of intelligence with whom the border line of recollection and fancy are very vaguely defined

When placing the evidence of these witnesses side by side with the plaintiff's it really has no weight whatever, I shall not further deal with it, had their intelligence been equal to their efforts they would have presented their story with more definiteness. I must now refer to Prosonno Banerjee's evidence and to the map which he produced, and which, relying on his position, the learned counsel for the plaintiff allowed to be put in without cross-examination.

He said " My name is Prosonno Coomar Banerjee I am an Honorary Assistant Engineer, Public Works Department. I was Sub-Engineer last year. When the accident happened, I was Sub-Engineer I know the scene of the accident. I made a plan this is it I made it myself, an assistant sketched it in my immediate presence I measured the distances, I believe it to be a correct plan. I am skilled in this work. I have been 28 years an Engineer (plan put in, Exhibit 3) I supervised the work on [460] behalf of the Calcutta Division. I supervised it to the eastern limit of the boundary of the maidan. I saw the excavation on the road that was to the east of the eastern boundary of the maidan. I saw it on the 23rd March 1882, shortly before candle light It was say ten minutes to 7 o'clock" (suggesting that a plan tendered under his authority must carry conviction), the plan was not objected to, and I must take care that it shall not mislead. It represents the mounds crowned by lamps not represented by their natural size and in accordance with the proposition that the lamps were placed at the mounds He said he visited the scene of the accident just before and the day after He says, " I took the measurement of the plan, the measurements were drawn by me. the lanterns I purposely made big to show them."

After the plan was so put in on this evidence, it appeared that the mounds were drawn by him long before the accident, and that the plan has no real value whatever. He says, " I made the plan about 14 days or a month ago, I made the plans from memory, the mounds by guess and figurative, the bamboo was from memory " A plan ought not to be produced under such circumstances without suggesting to the Court a word of the character of the preparation with which it is made It is to be regretted that he did not reflect that such a map is likely to be accepted by this Court upon the faith of his positive and presumed scrupulousness, and ought not to have been handed in without a warning that it was made as it was.

I find then that the mounds and the excavation were not protected, and were a dangerous obstruction on the road What are the liabilities of the parties? Nolit is clearly liable. An argument was founded on case in *Atkinson v. Newcastle, &c., Company* (L.R., 2 Ex. D., 441), which deals with the question of liability of one on whom statutory obligation is imposed. I do not think that case applies. Then, from the Act, it was clear that a right of action

was not intended to arise upon the breach of the statutory duty imposed. The duty then was solely the creature of the statute in question. I have no doubt the liability of a person obstructing does not depend on statute, although by s. 214 a liability is created, that [461] is, cumulative, and did not take away the ordinary liability. I need not therefore deal further with it. As to Secretary of State. In my opinion the Secretary of State is not liable, not on the grounds of high prerogative set up by the Advocate-General. If the case had depended on that point alone, I should have followed the case of *The P. & O. Company v. Secretary of State* (Bourke's Rep. A. O. C., 166).

In this case I think the Secretary of State is not liable, because he comes within the established rule that one who employs a contractor to do what is perfectly legal must be presumed to employ the contractor to do this in a legal way.

There is nothing to lead to the supposition that the contractor is a servant of the Secretary of State, and not being so, he comes within that rule.

If a man employs another to do a thing in its nature dangerous, those cases are authoritative for the proposition that he may be liable for damage caused by the doing of that act. It is agreed that the digging of a trench in the public road is so dangerous that the employment of a person to do that in itself renders the employer liable, if harm results.

In this case under s. 213 the opening of the road was perfectly legal. The precise point was dealt with in a case of *Peachy v. Roland* (13 C. B. O. S., 182), to which I shall presently refer. The other cases are *Percival v. Hughes* (9 Q. B. D., 441), *Bower v. Peate* (1 Q. B. D., 321), *Gray v. Pullen* (5 B. & S., 970; 34 L. J. Q. B., 265). *Percival v. Hughes* (9 Q. B. D., 441) in which C.J. HOLKER dissented, was the case of a building owner, the owner of the house. In that case there came in the consideration of the right to support, which is of a nature to create special obligation, so also *Bower v. Peate* (1 Q. B. D., 321) stands on same footing. The act done was in itself of a nature to create damage to the adjoining house, unless something additional was done, which it was held to be the business of the employer to have done. No doubt the cases run [462] rather fine. *Gray v. Pullen* (5 B. & S., 970) was a case of statutory liability, and took the plea of special liability. In this case I think the general rule of law applied in *Peachy v. Roland* (13 C. B. O. S., 182) should be applied, in that case *A* employed *B* to construct a drain in a public highway, *B* employed *C* to fill in the earth over the brick-work and to carry away the surplus. *C*, in performing his work, left the earth raised so much above the level of the road that *D* driving by in the dark was thereby upset, and sustained injury. Held that *A* was not responsible for the negligence of *C*.

I think I ought to follow that case. I do not think there is anything in the nature of the work the contractor was engaged to do, so necessarily dangerous as to bring the case within *Percival v. Hughes* (9 Q. B. D., 441) and the other cases cited. It is not worth while to notice that the marginal note was unfavourably criticized in a later judgment.

Next question is the liability of the Corporation. I am of opinion that the Corporation is liable. The leading case is now, I think, *The Borough of Bathurst v. Macpherson* (4 App. Cas., 256; s.c., 48, L. J., P. C., 61). Much of the argument on behalf of the Corporation was founded on the two classes of English cases which appear also to have been cited in the *Borough of Bathurst case*. Those cases are dealt with by Sir B. PEACOCK, at pp. 268-9.

I think the present case stands, with respect to those authorities, in the same position as the *Bathurst case*. and the observation of their Lordships apply here. The judgment, after dealing with the classes of cases referred to, goes on: "This Municipality has original and not merely transferred powers, and therefore does not fall within the class of cases referred to. It more nearly resembles the public body held liable to an action in *Hartnall v. The Ryde Commissioners* (4 B. & S., 361) a decision which has been recognised as sound law in several later cases. It was there held that the statute creating the Commissioners having expressly imposed upon them the obligation of repairing the roads, they were liable not only to [463] be indicted for a breach of that duty, but to be sued by anybody who could show, that by reason of such breach of duty he had sustained particular and special damage. In their Lordships' opinion no substantial distinction can be taken between that case and the present, in which the duty, for the reason above stated, has been found to exist, though not expressly imposed by statute "

Under the Act, s. 189, the Corporation has vested in it all public streets in the Town, and under the Act they shall, "so far as the Municipal funds permit, cause the public roads to be maintained and repaired, and for such purpose may do all things necessary for the public safety and convenience "

The word "may" in this section has a compulsory force. It is an enabling word where the thing to be done is for the public benefit The principle is referred to in 5 App. Cas., p. 225

Therefore, "the Commissioners shall cause the public streets, etc., and for that purpose shall do all things necessary, etc."

It has been argued that no duty is cast expressly on the Corporation to fence and light an excavation and mound made by third persons by their permission, and the two following sections are relied on. Section 213 is as follows —

"No person shall deposit any building material or make a hole in any public street without the permission of the Commissioners in writing, and when such permission is granted to any person he shall, at his own expense, cause such materials or such hole to be sufficiently fenced and enclosed, until the materials are removed, or the hole is filled up, and otherwise made secure, and shall cause the same to be sufficiently lighted at night " And s. 252 —

"When the pavement or surface of any public street, or when any sewer or drain shall be opened or broken up by the Commissioners, they shall, with all convenient speed, complete the work on account of which the same shall have been broken up, and fill in the ground and make good the pavement and surface and the sewer or drain so opened or broken up, and carry away the rubbish occasioned thereby, and shall in the meantime cause the place where pavement or surface shall be so opened or broken up to be fenced and guarded and sufficiently lighted during the night."

It is argued that as express duty cast on the Commissioners by s. 252, no duty could be held imposed on them other than [464] the duty expressed in s. 252, and that they are only liable in respect of unfenced or unlighted obstructions made by themselves. But I do not think the provisions of s. 252 should be read so as to abrogate by implication the duty cast on them by s. 191 in words much stronger than those contained in the section construed in the *Bathurst case*.

In that case the accident was caused by a drain made by the Commissioners and which was not kept in repair, and became damaged and caused injury. It might be argued that there is a difference between the case of persons who are bound to keep a road in repair and who are negligent in performing that duty

in respect of constructions made by themselves, and the case where the negligence imputed is the not repairing structures or the not removing or guarding obstructions not made by themselves, and the duty charged is that of guarding the public and individuals from danger in respect of structures or obstructions not made by themselves. I am not prepared to hold that the distinction exists when the duty is created by language such as s. 191. The distinction cannot be drawn here so as to absolve the Corporation from liability. I shall deal with their position as owners presently, but being charged with statutory duties, they are, I think, liable for individual damage caused by the neglect to fulfil them and an action will lie.

The Privy Council, in the *Dathin* case, after referring to *White v. The Hindley Local Board of Health* (L. R. 10 Q. B., 219), say at page 266 "In the present case the barrel drain, even if the property of it did not belong to the appellants, was not only made by the appellants, but the sole control and management of it were by the statute vested in them. and in their Lordships' view this circumstance threw upon them a duty of a similar kind to that which was held to exist in the case just cited

"Their Lordships are therefore of opinion that the appellants, by reason of the construction of the drain, and their neglect to repair it whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment.

"This being so, their Lordships are of opinion that the Corporation [465] are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty." It is no doubt the case that in no part of the Act is a liability to indictment expressly imposed on the Commissioners for non-performance of their duty but having noticed that, I now proceed to the next point, namely, that the Commissioners are made by s. 189 owners of the roads in respect of which the duty to maintain and repair is imposed by s. 191.

It was not said in *Russell v. The men of Devon* (2 T. R., 667), that had the men of Devon been a judicial person an action would not lie, the principle was that there was no judicial person who could be sued

Now here, then, is an original duty created. Here then is a property vested in a legal person on whom that duty is cast by the Act. What is the position of the Commissioners who constitute that person, having the entire property, control and management of roads transferred to them, and being required by law to maintain them?

In *Conby v. Will* (4 C. B., 556, 27 L. J., C. P., 318) the position of an owner of a road, not a public road, is dealt with, the action was against a person who had put up a construction upon it, an accident arising to a person lawfully or by invitation or allurement, going along a road rendered dangerous.

At page 563, Chief Justice says "It has been contended by Mr *Huddleston* that the owners of the soil, and consequently also any person having leave and license from them, may, as against any other person using the way by the like leave and license, erect an obstruction thereon without incurring any responsibility for injury resulting therefrom, unless in the case of holding out any allurement or inducement to such other person to make use of the way. It seems to me that the very case from which the learned counsel seeks to distinguish this is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question. they held out this road to all persons having occasion to proceed

to the asylum as the means of access thereto. Could they have justified the placing an obstruction across the way, whereby an [466] injury was occasioned to one using the way by their invitation? Clearly they could not.

BYLES, J., says: "It seems to me that the rule of law is precisely the same in respect of a private way, whether by prescription or by license. If the exercise of that right be obstructed, the party injured thereby has a right of action, just the same as if the way had been a public one."

The position here is this as contrasted with persons in *Corby v. Hill* (4 C. B., 556, 27 L. J. C. P., 318). There the liability of owners of roads is described. Here the persons in question is made owner of roads for the purpose of doing what an owner is bound to do. As such owners, and in virtue of their office under the Act, they do hold out the roads to the individuals of which the public is composed, for the use of such persons, and as fit to be safely used by them, a consideration of the consequence of holding that the liability of the Corporation is limited to the not fencing or not lighting in those cases where the pavement of a public street or sewer has been broken up by them, renders it difficult to suppose that such was the intention of the Legislature. Would it be contended that if a road fell in, they ought not to be liable to repair it. The word "maintain" in the section applies more nearly than "repair" to the obligation in the present case.

I think it was the intention of the Act to require that the Commissioners should not be content with the liability imposed by s. 214 on those who break up the roads. It is intended for protection of the Corporation, but can't be treated as absolving them from the duty of keeping the road in a fit and proper state. The Commissioners are not, I think, entitled, by permitting others to open up the road as they did in this case, to free themselves from the obligation cast on them by the Act. They are not entitled to promote, or to authorize, or to permit, dangerous obstruction to roads entrusted to them. The want of lights is an incident rendering an obstruction in the road a dangerous one, an unlighted mound is in itself a dangerous obstruction, and without going so far as to hold that it is the duty of the Corporation themselves to hang lights, it is sufficient to hold generally that where there is a dangerous obstruction *a fortiori* when such dangerous obstruction [467] results from a permission accorded by them, they are liable for damage caused by it.

I, therefore, hold that the Corporation are liable to the plaintiff in this suit, as to damages, no authority has been cited on this point. The damages alleged are entirely beyond what the plaintiff could claim. Happily his health is, in the opinion of doctors, not permanently or grievously injured, that he has sustained some permanent injury I cannot doubt.

I cannot but consider that he must have suffered permanent injury. He is disfigured. Such an accident can't pass over without leaving a permanent effect on his nerves, it makes the man a different man from what he was before the accident, I treat with utmost respect, of course, the views of medical men, but I must treat the matter as a jurymen, and from my own opinion upon the matter, from the evidence before me, and from matters of knowledge common to all persons. In *Dr. Phillip's case* (4 Q. B. D., 406) COCKBURN, C.J., says. "But we think a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are, the bodily injury sustained; the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expense

incidental to attempts to effect a cure or to lessen ; the amount of injury ; the pecuniary loss sustained through inability to attend to a profession or business, as to which again the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life."

It would be preposterous to take test of how much money a man would take to be operated on as this gentleman was.

Upon the whole, I am anxious not to assess damages to such an amount as would be unreasonable, but I can't help feeling a substantial sum is due.

I assess his damages, having regard to no pecuniary loss suffered, but for the pain suffered and length of time and distress and discomfort at Rs. 6,500.

[468] Next, as to costs. Who shall pay costs of the Secretary of State ? I have had great difficulty in the matter.

The Advocate-General contended that the Municipality had insisted on his being made a defendant and should pay his costs.

There is something in that suggestion, the ground on which I have decided in favour of the Secretary of State is, that he employed the contractor, not high prerogative. If I had decided on the latter ground, I should not have awarded costs. I shan't take that course here. On the whole, taking into consideration the character of the case and the nature of the defence, and that the Secretary of State was made defendant at the suggestion of the Corporation, I shall direct the plaintiff to pay the costs of the Secretary of State in the first place and recover them from the Corporation.

The decree will be against the Corporation and the contractor for Rs 6,500 with costs, plaintiff to pay costs of the Secretary of State and recover them from the Corporation.

The Corporation appealed.

Mr *Evans* and Mr. *Trevelyan* for the Appellants.

Mr. *Evans*.—Before the Corporation can be found liable it must be shown that a duty was imposed upon them, and a breach of that duty must be shown. If the accident happened without any negligence on their part, they would not be liable for it—see *Hammond v. The Vestry of St. Pancras* (L. R., 9 C.P., 316). There, as in this case, was a statutory duty imposed on the vestry—can it be said that we were negligent in giving permission to the Secretary of State to open the road—is it necessary that we should have persons ready to light up the excavation, if the Secretary of State failed to do so. There is no allegation that we had any intimation of the fact that there was insufficient lighting.

[GARTH, C.J.—You gave permission to the Secretary of State and you must show that you took proper precautions.]

I contend that unless we have done something which we ought not to have done, no action will lie against us.

[GARTH, C.J.—The question is whether you are not bound to see that the road is kept in a proper state, and were you doing your best to maintain the road, when the accident happened.]

[469] The breaking up of the road was lawful and the permission to do so was lawful, and the act of opening was lawful ; that being so, am I bound to take care that the lights were lighted.

My contention is (1) that I am not an insurer ; (2) that I am only liable for negligence. (3) that I am only bound, according to *Hammond v. The Vestry*

of *St. Pancras*, to use ordinary care and diligence. This is not a failure to maintain; it was for the benefit of the public that the act should be done, and it is contemplated by Bengal Act IV of 1876.

I am not bound to go so far as to say that under any circumstances I should not be liable; but I rely on the fact that I was not bound to do anything, unless notice of the failure of the Secretary of State to light had been given me by the Police. It is not an indictable act to open a road, or repair a sewer; it is a necessary matter, contemplated by the Legislature and not a breach of a statutory obligation to maintain.

[GARTH, C. J.—If you break up the road you are bound to light. And you say that if you give permission to another to break up the road, you can get rid of your liability.]

Lighting has nothing to do with maintaining. It was the duty of the Commissioners to open the road; they were compelled to do so under the words of the Act. The Court below has overlooked the fact, the Secretary of State was liable under the Act to light the road. *See s* 213.

In *Wilson v. Mayor and Corporation of Halifax* (L. R., 3 Ex., 114), the section is similar to the section under Bengal Act IV of 1876, there it was held that a right of action does not arise in favour of an individual unless there has been culpable negligence, or an omission which amounts to an act of omission.

[GARTH, C. J.—I don't think *Wilson v. The Mayor and Corporation of Halifax* applies, as there are words in the section in this case which were not in the section of the English Act.]

Forbes v. The Lee Conservancy Board (L. R., 4 Ex. D., 116), the importance of the case is not in its being on all fours with our case on the facts, for it is not, but it brings out the general principles used in construing these Acts, *i.e.*, that those charged with discretionary powers are not to be held liable by reason of non-feasance in the exercise of [470] those powers. It is also useful to show the meaning attached to several of the decisions.

In *Geddis v. Proprietors of the Bann Reservoir* (L. R., 3 App. Cases, 430, 455) the principle laid down is, that where a person does any dangerous thing on his own land, which by a statutory provision he is permitted to do, no action will lie against him for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage, but an action does lie for doing that which the Legislature has authorized, if it be done negligently. There is no case which goes the length of holding that where permission is given under statutory powers to do a lawful thing, the party granting the permission is to be held liable for the misfeasance of the other. Lord HATTERLEY in his judgment in the above case, at p. 438, points out what ought to be considered in such cases as the present.

But even presuming there to be a general duty on the Corporation to look after the roads, I submit that the evidence clearly shows there was no negligence on our part, and that we discharged every general duty imposed upon us. There is evidence that the lamps were there between 5-30 and 5-45 that evening, standing on the side of the road ready to be lighted. The contractor was bound down by an agreement with us to keep up proper precautions as to lighting and fencing when the streets were taken up. Is the cutting a breach of the statutory duty to maintain, if not, then we can only be charged with nuisance; the questions resolve themselves into this, does liability attach to us

because I gave permission to another to open the road and he acted negligently, or am I liable on my general duty, and were we guarantors for the lighting.

Mr. Trevelyan on the same side.—The mere fact that a breach of a statutory duty has caused damage is not enough to give a right of action to an individual—*Atkinson v. Newcastle Gateshead Water Works Co.* (L. R., 2 Ex. D., 441); except in one or two cases it is only the creation of the nuisance which gives the right of action *Glossop v. Heston and Isleworth Local Board* (L. R., 12 Ch. D., 102); *Hartnall v. Ryde Commissioner* (4 B. & S., 361) was a peculiar case; the Act provided that the Commis-[471]sioners should be liable for refusing or neglecting to repair *Gibson v. The Mayor Alderman and Burgesses of Preston* (L. R., 5 Q. B., 218). *Young v. Davies* (31 L. J., Ex. 250, 7 H. and N., 760) shows that a surveyor of highways is not liable to action. We should not have been ordered to pay the costs of the Secretary of State.

Mr. Pugh and Mr. Hill for the respondents were not called upon, the Court suggesting to Mr. Pugh (who had previously on the 22nd January 1884 applied for a rule calling upon the Secretary of State to show cause why the plaintiff should not be allowed to appeal against him) that he should take the rule, and that if good cause was not shown against it, an opportunity would be given him to argue on behalf of the respondent, if necessary, on the appeal against the Secretary of State. The rule was granted on the affidavit of the plaintiff's attorney, who stated that he did not notice at the time the notice of appeal was served upon him that the Secretary of State had not been made a respondent. The rule came on for hearing on the 4th February 1884.

The Advocate-General (Mr. Paul) shewed cause. Permission to do the work was given to the contractor by the Corporation at the requisition of the Secretary of State, but the Secretary of State was not allowed to do the work except by a contractor licensed by the Corporation. The rule should not be made absolute, first, because in the appeal against the plaintiff by the Corporation it would be of no use for the Corporation to say "I am not liable but another is," and, next, because the lower Court has ordered the costs of the Secretary of State to be paid through the plaintiff. If the costs had been given directly between the Corporation and the Secretary of State, then there might be a ground of appeal for the Corporation.

The suit was heard on the 12th March 1883 and judgment given on the 27th June 1883, the costs of the Secretary of State have already been paid amounting to Rs. 2,731-8. The decree of the lower Court was, "suit dismissed against Secretary of State with costs. Suit decreed in favour of plaintiff with costs against the Corporation, and liberty to plaintiff to add costs payable to Secretary of State to his costs recoverable from the Corporation." Notice of appeal was given on the 20th July 1883, and the last [472] day of appealing, therefore, was the 20th July, the Corporation appealed as late as they could; the notice was served on the plaintiff's attorney, Mr. Orr. Mr. Orr's affidavit stating that he did not observe that the Secretary of State was not a party respondent, and that he first became aware of the omission on the 8th January 1884 is no sufficient ground to allow him to add us now. It is too late now to appeal against the Secretary of State. Section 5 of the Limitation Act (corresponding with Order 57, Rule 6 of the Judicature Act) is the only section which might admit of the appeal being allowed after time, but the case of the *International Financial Society v. City of Moscow Gas Company* (L. R., 7 Ch. D., 242) shows that the facts of this case are not sufficient to allow permission to appeal to be granted.

Cunningham, J.—The case you cite was a mistake of the party and not of the attorney.]

That makes no difference. See *Highton v. Treherne* (48 L. J. Exch. 167), where the attorney thought he had more time to appeal in, and the suit had suffered from that error.

The Courts have favoured the view I am putting forward—see *Collins v. The Vestry of Paddington* (L. R., 5 Q. B. D., 368), there must be some misconduct on the part of the other side, or death or something of the kind to allow of the order being made, but mere negligence on the part of the appellant's attorney is not sufficient. See page 25 of *Rivaz* on Limitation and the case of *Carter v. Stubbs* (50 L. J. C. L., 4). The case of *Zaibunnissa Bibi v. Kulsum Bibi* (I. L. R., 1 All., 250) is strongly in my favour, an error of calculation of time allowed for appealing is not sufficient cause under s. 5 of the Limitation Act.

Mr. Pugh in support of the rule.—We say that permission to do the work was given to the Secretary of State, and that he employed the contractor, who applied for permission to open the road. With reference to the bearing of the order, as to costs, I say it is an order in effect that the Corporation should pay the costs of the Secretary of State, it is the old form of order that has been made use of—*Rudow v. Great Britain Mutual Life Assurance Company* (L. R., 17 Ch. D., 610).

[473] [GARTH, C.J.—Supposing Mr. Orr did not notice that the Secretary of State had not been made a respondent, he had ample time to make the discovery before the end of the year, it is not in the discretion of the Court to allow you to appeal, we must follow the Limitation Act.]

The case of *Carter v. Stubbs* (50 L. J. C. L., 4) was a question of appealing from an order of the Master, the defendant under the order was to file certain interrogatories, or in default the suit was to be dismissed, the suit was dismissed through the failure of the plaintiff to file his answer in time through some slip. I wish to show that the Court decided that it was not right that a man should be deprived of the limit of his litigation simply from a slip of the solicitor's clerk.

[GARTH, C.J.—Under the Judicature Act the Courts have a discretion, under the Limitation Act we have none, how do you account for the time between the 8th January and the 22nd January? Mr. Orr does not make his application till the 22nd, he ought to have come to the Court at once.]

Time must be given him to consult counsel, as to the case of *Collins v. The Vestry of Paddington* (L. R., 5 Q. B. D., 368) Lord Baggally only makes certain observations on general rules laid down by Lord Justice BRAMWELL, he does not say that the rule laid down was wrong. Looking at the question as to whether sufficient cause has been shown, the Court must consider what will be the effect of refusing me leave to appeal. As to the question of the Court of Appeal making the Secretary of State a party to this appeal under s. 582 of the Code of Civil Procedure, the Court would not be fettered by the Limitation Act in so doing. Then as to the question of the payment of costs as between co-defendants; the old form of order is no longer necessary. *Child v. Stenning* (L. R., 11 Ch. D., 82) and *Rudow v. Great Britain Mutual Life Assurance Company* (L. R., 17 Ch. D., 610).

Judgments were delivered by GARTH, C.J., and CUNNINGHAM, J.

Garth, C.J.—This suit was brought by the plaintiff to recover damages from the defendants for injuries which he sustained in consequence of an excavation having been dug in Chowringhee Road in the execution of certain works, and left after dark in a dangerous condition.

[474] The plaintiff and a friend were driving a horse and gig along the road, and there being no sufficient lights or fences to prevent the accident the plaintiff was thrown from the gig into the excavation and sustained very serious injury.

The suit was originally brought against the Commissioners of the town of Calcutta, and the defendant Nolit Mohun Chatterjee who was the contractor employed to execute the work. But upon the Commissioners' submitting to the Court in their written statement that if any one was liable for the accident it was the Secretary of State for India or the contractor, the plaint was amended, and the Secretary of State was made a defendant.

At the trial, however, the learned Judge dismissed the suit against the Secretary of State, and gave a decree against the other defendants for Rs. 6,500 damages, from which the appellants (the Commissioners) have appealed to this Court.

Their counsel here have confined their argument entirely to the question of legal liability. They contend that under the circumstances the Commissioners had nothing to do with the work that was in progress, and that, whatever negligence might have been committed by others, they were in no way answerable for it.

In order to understand their view of the matter, it is necessary to explain how the works came to be executed, and why the Secretary of State was made a party.

The tanks on the maidan, as well as the maidan itself, on the east of Chowringhee Road, are the property of the Government and in charge of the Public Works Department.

One of these tanks opposite Mr. Gubboy's house, called "Monohur Dass' tank," was frequently overflowed in the rainy season, by which the maidan and footpaths became flooded. An application had therefore been made by the Government to the Commissioners to allow a pipe from the tank to be connected with the main sewer under Chowringhee Road, for the purpose of carrying off the surplus water from the tank.

This application was granted, but upon the usual condition that one of the contractors, who are licensed by the Commissioners to carry out such works, should be employed by the Government, and accordingly the defendant Nolit Mohun, who is one of such contractors, was so employed, and it was upon his [475] application on behalf of the Government that the leave was granted by the Corporation to open up the road.

The work was commenced on the morning of the 23rd of March 1882; a large excavation was made from the east side to the centre of the road during the day, which was left open during the night with a mound of earth three or four feet in height thrown up alongside of the excavation. The accident occurred after dark, a little after 7 P.M. No lights were there at the time to warn passengers of the danger, although two or three lanterns (unlighted) appear to have been placed near the eastern end of the excavation and nothing like a proper fence had been erected to prevent accidents.

The learned counsel for the appellants very prudently abstained from reopening before us the question which was raised in the Court below, as to the sufficiency of the fencing and lighting, but I think it right to say, by way of warning for the future, that, in my opinion, very different precautions ought to be taken on such occasions to secure the safety of the public, from those which were taken in this instance. A rough but strong bamboo fence of five or six feet high could easily be put up on both sides of the excavation at little

or no expense, whenever such works are executed in a public street: and I consider it to be culpable negligence to allow an excavation of this nature to remain open at night in such a street (however useful or laudable its purpose may be) without sufficient protection being provided against accidents.

We have now to decide whether the lower Court was right in holding the appellants liable to the plaintiff.

The Commissioners of the town of Calcutta are incorporated by Beng. Act IV of 1876. By s. 189 of that Act all the public streets in the town (of which Chowringhee Road, the street in question, is one) are vested in them, and s. 191 provides that "the Commissioners shall, so far as the Municipal Fund permits, from time to time, cause the public streets to be maintained and repaired, and for such purpose may do all things necessary for the public safety and convenience."

There is no question here as to sufficiency of funds. The Commissioners have ample funds for maintaining and repairing [476] the streets, and for doing all that is generally necessary to secure the public safety and convenience.

It seems to me, therefore, that they were bound to maintain this street, and for that purpose to do what was necessary for the safety of the public. The last clause of the section only expresses what the law would imply without it, namely, that for the purpose of maintaining the street the Commissioners should have power to do all that was necessary for the public safety, and I think that in allowing an excavation to be made in the street, without taking proper steps, or seeing that proper steps were taken to protect the public from accident, they were guilty of breach of duty, for which they are liable to the plaintiff.

This seems to be entirely in accordance with the law upon this subject, as laid down in *The Borough of Bathurst v. Macpherson* (L. R., 4 App. Cas., 256), *Gibbs v. The Trustees of the Liverpool Docks* (3 H. N., 164) and other cases cited in Addison on Torts, 4th edition, 740.

But the Commissioners contend that this rule does not apply to them, because they were guilty of no negligence. They say that they did not make the excavation, and were not aware that it was insufficiently fenced or lighted; and that although it was made by their permission, it was only right and proper that the permission should have been granted, because the object of it was a reasonable one, and for the public benefit.

They say, moreover, that the negligence complained of did not consist in making the excavation (which was a proper thing to do, and was done in a proper way), but on the omission to light and fence it, which was a duty imposed by the Act upon the Government.

Section 213 of the Act provides that when permission is given by the Commissioners to make a hole in a street, the person to whom such permission is given shall fence and enclose it at his own expense, and s. 522 makes it the duty of the Commissioners to fence and light, whenever they open up the road. They say, therefore, that the Government is answerable for not properly fencing and lighting the excavation in this instance.

[477] This contention directly raises, what appears to me to be the only arguable point in the case, namely, whether the fact of the Commissioners giving permission to other persons to open up the streets, although for a perfectly proper purpose, relieves the Commissioners themselves from their statutory duty under s. 191.

Mr. Evans went so far as to contend that the Commissioners were bound to give permission to the Government as they are bound under s. 220 to give

permission to persons, who wish to connect their drainage system with the common sewer. But this, I think, was not so. It was undoubtedly right and reasonable under the circumstances for the Commissioners to give the permission, but, at the same time, it was optional for them to give it or not.

This, however, does not, in my opinion, affect the question whether the fact of permission being given, coupled with the other provisions of the Act, has the effect of relieving the Commissioners from their obligations under s 191

I think that it does not, and that if it did, the public would often be placed in a position of considerable peril. It constantly happens that the persons to whom permission is thus given are householders and others of very slender means, and the so-called contractors, who are licensed by the Commissioners to do the work, are generally in small way of business; so that if the Commissioners could relieve themselves of liability by thus shifting it upon irresponsible persons, the public, in the event of accidents, would be wholly without redress.

It was argued that it might make a difference in the liability of the Commissioners whether they gave permission to open the roads to *responsible* or to *irresponsible* persons, but I think we have no right to construe the law in that way. It cannot be that the duty of the Commissioners under s. 191 is different in the one class of cases from what it is in the other.

I consider that under that section the Commissioners are bound, so far as the streets are concerned, to protect the rights of the public, and they ought to be especially careful, when those rights are interfered with by their permission, for collateral purposes, to see that what they have allowed to [478] be done does not cause any greater danger or inconvenience than is absolutely necessary.

I, therefore, consider that the Court below was right in holding the Commissioners liable.

I am bound to say that I feel more difficulty with regard to the order which has been made as to the Secretary of State's costs. The learned Judge considered that as the Secretary of State was not a defendant, in the first instance, and as he was made a defendant, only because the Commissioners in their written statement suggested that the Government was liable, these costs ought to be paid by the Commissioners.

He, therefore, ordered that the plaintiff should pay the costs of the Secretary of State in the first instance, and that the Commissioners should repay those costs to the plaintiff.

Mr Pugh has referred us to a case of *Child v. Stenning* (L. R., 11 Ch. D., 82) upon this subject which he contends is an authority in favour of the learned Judge's order.

It seems to me, however, that the circumstances of that are different from those with which we are now dealing, and I feel bound to say that I have great doubt as to the propriety of the order in question, but as my learned brother is prepared to confirm it, and as the order itself, assuming the Secretary of State to have been rightly relieved from liability, is substantially a just one, I shall not express any dissent from the judgment.

This appeal will, therefore, be dismissed with costs on scale 2.

It only remains now that we should decide the rule which has been obtained against the Secretary of State.

Mr. *Pugh*, when this appeal was first called on, applied to us on the part of the plaintiff for a rule, calling upon the Secretary of State to show cause, why, notwithstanding the delay which has occurred, the plaintiff should not be allowed to prefer an appeal against the Government

He explained to us, with good reason, that so long as his client was sure of obtaining his damages and costs from the Commissioners, he was quite content to leave matters as they were, and incur no further expense in appealing against the Secretary of [479] State, but that as an appeal to this Court had been made by the Commissioners, it might be that the Commissioners would be relieved from liability, and that in that case the plaintiff would be without remedy, seeing that the other defendant, Nolit Mohun Chatterjee, was a man of no means.

We thought, however, that the delay, which had occurred, presented a great difficulty in the way of our granting this rule, so we determined to postpone Mr. *Pugh's* application until we had heard the present appeal.

The case having then been argued, we considered that if there were no insuperable objection to Mr. *Pugh's* application, the justice of the case required that the appeal should proceed against the Secretary of State.

I confess I had serious doubt myself, whether, having regard to the provisions of s. 213, the case should have been dismissed against the Secretary of State, and I had also serious doubt, whether under any circumstances the Secretary of State ought to have had his costs

We, therefore, thought it right to grant Mr. *Pugh* a rule, calling upon the Secretary of State to show cause why the plaintiff should not be at liberty to appeal against him.

This rule has now been argued, and we feel bound, though with great regret, to discharge it

If the question had been one for our discretion we certainly should have allowed the appeal.

The appellant had good reason for not appealing in the first instance, and it was only reasonable that he should wish to appeal when there was a chance of the Commissioners being relieved from liability; and the justice of the case, as I said before, was in favour of the whole case against all the defendants being fully discussed.

We consider, however, that, having regard to the language of the Limitation Act, we have no discretion in the matter. The plaintiff was bound to appeal within twenty days from the date of the decree, and before he could relieve himself from this obligation, he was bound to satisfy us (under s. 5) that *he had a sufficient cause for not prosecuting the appeal within that period.*

[480] We cannot say that any sufficient cause in point of law has been shown, and we must consequently discharge the rule

As we ourselves, however, suggested to Mr. *Pugh*, that he should take his rule, in order that, if possible, complete justice might be done between the parties, we think it right to make no order as to costs.

Cunningham, J.—I concur in thinking that the Original Court was right in holding that the Corporation is bound, in virtue of its general powers and duties under the Act, to take the necessary steps for keeping the public roads in a safe condition, and that its duty in this respect is not impliedly abrogated, in cases in which permission to make a hole is given under s. 213 by the provisions in that section, and s. 214 which impose a duty of fencing, enclosing and lighting holes on the person who is permitted to make them; nor by the provision in s. 252 as to the duties of the Corporation when streets are broken up or drains opened by the Commissioners. It was contended in

appeal that as the Act empowers the Corporation to give permission to make holes, and imposes on the person so permitted the duty of fencing and lighting them, all that the Corporation was bound to do was to use a proper discretion in granting permission, and a reasonable care in seeing that the person, permitted to make the hole was complying with the law. In both these respects the Corporation had, it was urged, fulfilled its duty, the Secretary of State was clearly a proper person to have permission, and it was shown that reasonable precautions had been taken for securing the proper lighting of the hole. This argument appears to me to admit of two answers. In the first place the power to give permission to make holes in the road, and the duty imposed on the person making them to fence and light, does not, I think, relieve the Municipality from its general liability under the Act to keep the roads in a safe condition; and in the next place I do not think that reasonable precautions were taken in this case, because, whatever may have been done as to lighting, it is clear, on the evidence, that there was no adequate fencing and enclosing, and this was an omission which might easily have been observed and guarded against by the Municipal authorities.

[481] It was further contended that a mere breach of a statutory duty occasioning injury does not necessarily give rise to an action for damages; but that rule has never been held to apply in cases in which the breach has been one of a specific duty imposed in favour of the plaintiff, such as, in my opinion, there was in the present case. I think, accordingly, that there was here a negligent breach of duty on the part of the Corporation, and that the plaintiff was entitled to sue for damages occasioned by that breach.

I also think that there are no grounds for interfering with the order of the Original Court as to costs. The defendant Corporation in their written statement pleaded that they were in no way liable for the injuries occasioned to the plaintiff, but that, if any one was liable, it was either the Secretary of State or the contractor. Thereupon the plaintiff added the Secretary of State as a party to the suit. The Original Court having found that the Corporation is liable, and that the Secretary of State is not, it seems to me just that the Corporation, who put the Secretary of State forward as the proper defendant, should pay the costs which the improper addition has occasioned. A private person who seeks his remedy in consequence of having been injured by a gross act of neglect in maintaining the roads of the Corporation in a safe condition, may reasonably infer that such a body as the Corporation will not raise an unsustainable defence, or attempt to get rid of its liability by throwing it on a person who is not legally liable, and the plaintiff, having on the strength of the defendant Corporation's plea, added the Secretary of State, may with justice be allowed to recover from the Corporation the costs which that improper joinder occasioned. The powers, as to costs, conferred by Chapter XVIII of the Code are extremely wide, and the observations of the Master of the Rolls in *Child v Stenning* (L. R., 11 Ch. Div., 82) seem to justify the principle on which the present order has been made.

Appeal dismissed.

Attorney for Appellant: Mr. Carruthers.

Attorney for Respondent. Messrs. Barrow and Orr.

Attorney for the Secretary of State: Messrs. Sanderson & Co.

NOTES.

[On the question of the liability of the person under a statutory duty for the default of licensee (or contractor) from him, see (1896) 1 Q. B. 335, *Penny v. Wimbledon Urban*

Council (1899) 2 Q. B. 72; *The Utopia* (1893) A. C. 492; (1888) P. R. 108; 11 Bom., 329.

On the point of limitation, *see* (1880) 11 Cal., 767 (776), (1889) 13 All., 78 (82); (1911) 4 B. L. T., 175; 11 I. C. 812.]

[482] PRIVY COUNCIL.

The 17th November, 1883.

PRESENT.

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER
SIR R. COUCH, AND SIR A. HOBHOUSE.

Adjudhia Baksh and another.....Plaintiffs
versus
Rakhman Kuar and others.....Defendants.

[On Appeal from the Court of the Judicial Commissioner of Oudh]

Legal Construction of Will—Devise of taluq— The Oudh Estates' Act, I of 1869—Requirement of registration— Acceleration of remainder on failure of life estate.

A gift in remainder, expectant on the termination of an estate for life, does not fail, but is accelerated, by reason of the gift of such prior life estate not taking effect.

The principle of the decision in *Lamson v. Lamson* (5 De Gex, M. & G., 754, 18 Beav., 1) held applicable to a will made by a Hindu testator.

A taluqdar, whose taluq was entered in the third of the six lists prepared in conformity with s. 8 of "The Oudh Estates' Act," I of 1869, devised his estate by a will, which was not registered, to one of his wives for life, and after her death to his younger son by her. Held, as a consequence of the above rule, that it was not necessary to decide, upon a claim by the elder son as heir-at-law, whether the widow, as a person "who would have succeeded to an interest" in the taluq, if the taluqdar had died intestate, would have been within the exception, in reference to the effect of non-registration of will contained in s. 13 of the same Act.

APPEAL from a decree (17th August 1880) of the Judicial Commissioner of Oudh, affirming a decree (13th March 1880) of the District Judge of Lucknow.

The question raised on this appeal related to the effect, with reference to the Oudh Estates' Act, I of 1869, to be given to a will made by Raja Thakur Singh, Terbedi, taluqdar of the taluq of Terbediganj, in which the proprietary right had been conferred upon the Raja by *sanad*, dated 29th October 1860. The *sanad* contained the following clause: "It is another condition of this grant that, in the event of the original proprietor or his succeeding heir dying intestate, the entire estate shall descend in due order, according to the Raj or Gaddi, to the nearest male heir, such as sons and brother's sons, etc., and the original proprietor, or his succeeding heir, shall also have full power to transfer,

[483] according to his wish in his lifetime, the estate, either in whole or in part, by sale, mortgage, gift, bequest, or declare as his successor any one whom he may have adopted, and cause him to be made a proprietor of the estate."

The Raja's name was entered in lists 1 and 3, prepared in pursuance of s. 8 of the Oudh Estates' Act, 1869. In list 1 his name was entered with those of the Oudh taluqdars generally. List 3 contained the names of those taluqdars whose estates did not, according to the custom of the family, descend to a single heir, but to whom grants had been made, as in this, declaring that the succession should thereafter be regulated by the rule of primogeniture. The appellant, Adjudhia Baksh, as the eldest son of Raja Thakur Singh, claimed the taluq, both under the law of the Mitakshara, and also according to the provisions of Act I of 1869. Kalicharn, the other appellant, had purchased a share in the property, and his title depended on that of Adjudhia Baksh. The respondent, Rakhman Kuar, the fourth wife of the Raja, and his son by her, the respondent, Gujadar Baksh, a minor represented by his guardian Ramjivan, set up a title under the will. After the Raja's death, which took place on the 30th December 1875, the respondent, Rakhman Kuar, succeeded to the management of the taluq, having been put into possession of it under the order, in the Revenue Department, of the Chief Commissioner of Oudh, dated 26th June 1876. The Raja's will, which was dated 30th April 1875, contained the following :—

"I, Raja Thakur Singh, Terbedi, am taluqdar *sanad*-holder of taluq Terbediganj tahsil Haidarganj, district Bara Banki, in Lucknow Division.

"Whereas I have, up to this day, been loyal to both the Native and British Governments, and preserved a good name under both, have been loyally performing the duties appertaining to me, and have never failed in them, nay, even now I am in receipt of a pension from the Government, and whereas, by favour of both the Governments, I have acquired, by personal exertions, this entire estate of Terbediganj, and other villages, landed property and promissory notes, as detailed below, together with all moveable and immoveable property, and I hold and possess all of these without having any co-sharer or a co-parcener [484] therein, up to the time of this writing, and nothing of the above property is ancestral, it has been acquired with great pains and industry. I, therefore, desire that this, my estate, may continue intact. But I am sorry that I have married four times, my first wife being Rani Hans Kuar, second, Rani Biranj Kuari, deceased, third, Rani Phool Kuar, deceased, and fourth, Rani Rakhman Kuar, still living, each of whom has children, but none of the sons is so able and efficient as to be able to protect the estate and preserve my name after me. On the contrary, when during the mutinies the rebels plundered my property that was within the house at Lucknow, the sons of Rani Hans Kuar, my first wife, took all my property, such as was in the house at Terbediganj, and turned my mortal enemies, but, by the grace of God, and the happy associations of the Government, my life was preserved. I no longer approve of the unregistered will which I formerly executed in favour of Raja Dabi Baksh, son of Rani Phool Kuar, during the Summary Settlement, in accordance with a call from Government to make a will: I, therefore, actuated by the desire of insuring the protection of my estate, and the preservation of my name, do, whilst in full possession of my senses and mental faculties, of my own free will, and without coercion, hereby giving away and granting all my ilaka estate, all notes, goods, cash, jewellery, all documentary papers, the *sanad* granted by the Government, all property, small and large, moveable and immoveable, acquired and possessed by me, to Rani Rakhman Kuar, my fourth wife, make her owner and proprietress of all: provided that after my death,

Rani Rakhman Kuar, having held and possessed all my property, her descendants shall, generation after generation, carry out the provisions of this will, and after paying up the expenses mentioned herein, apply the remainder of the profits to their own use. They have no authority to do otherwise. And Raja Gujadhhar Baksh, son of Rani Rakhman Kuar, being of under age, shall, when he attains the age of majority, carry on the work of management, with the advice of the aforesaid Rani; and after the said Rani, he shall be the heir to and representative of the estate, etc., each and everything. No one else can put forward any claims. Should any person do so, his claim will be declared null and void. [485] But none of my representatives and heirs shall have power to do anything against the provisions of this document."

This will was not registered according to the provisions of the Oudh Estates' Act, I of 1869.

The suit was tried on the issue whether the will was invalid under s 13 of the Oudh Estates' Act, I of 1869 1st, with regard to the widow 2ndly, with regard to Gujadhhar Baksh, her son. The District Judge of Lucknow on this gave judgment as follows —

"As regards s. 13 of the Oudh Estates' Act, it is clear that if the will convey a bequest in favour of this younger son, it would not be invalid through want of registration. If, by the terms of the will, themselves the subject of dispute, Gujadhhar Baksh is a legatee, he is a legatee within the terms of the Act, and, by [486] cl 2 of s 13, registration, in his case, was by its express terms unnecessary.

"As regards the widow, it is a very nice question whether, in the presence of male issue, she can be held to come within the meaning of the term, 'a person who, under the provisions of this Act, or under the ordinary law† to which persons of the testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such taluqdar had died intestate.' It goes without saying that by ordinary Mitakshara law she would not have succeeded to either the whole estate or to any share therein. All she would have had would, if the Raja had died intestate, have been a right to maintenance, and there may be room for doubt whether, by strict Hindu law, this right to maintenance could literally be held to be an interest in the estate to which she would have succeeded. I cannot, however, think that the

Cl. 1, s 13

* The Oudh Estates' Act, I of 1869, in s 13, provides as follows —

"No taluqdar or grantee, and no heir or legatee of a taluqdar, or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to any person not being either—

"(1) A person who under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe or religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such taluqdar or grantee, heir, or legatee had died intestate; or

"(2) A younger son of the taluqdar or grantee, heir, or legatee, in case the name of such taluqdar or grantee appears in the third or fifth of the list mentioned in s 8

"Except by an instrument of gift, or a will executed and attested not less than three months before the death of the donor or testator in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution

"By s. 22 the widow only succeeds to a widow's estate on failure of the eldest son and his male lineal descendants, the second and other sons and their male lineal descendants, each in succession, the son of a daughter, who has been treated by the taluqdar in all respects as his son, and the male lineal descendants of such son, an adopted son, the eldest and every other brother successively, then the first married widow, and then other widows.

"And s. 24 provides that the person for the time being in possession shall be liable to pay the maintenance allotted by that section to each widow, the junior widow being entitled to half of what the senior widow is entitled to."

† In this case the Mitakshara.

framers of the law intended to limit the meaning of the term 'would have succeeded to an interest in the estate' so strictly as to exclude a widow, even in the presence of male issue, and thereby to render a will executed in her favour inoperative, simply because it was not registered within three months of its execution, and although not without hesitation, I lean to the opinion that registration of a will in favour of a widow, even although there be male heirs, is not imperative under cl. 1 of s. 13 of the Oudh Estates' Act. It is also urged that even, if under ordinary Mitakshara law, the widow could not be held to have been a person who would have succeeded to an interest in the estate, she was as a person to whom the estate might, under the provisions, 22, have ultimately descended— a person who would, under the provisions of the Act, have succeeded to the estate, or to an interest therein. And it is contested, in reply, that if every person covered by the 11 clauses of s. 22 be held to be a person who, under the provisions of the Act, would have succeeded to the estate, the provision as to registration would be subject to such wide relaxations as practically to defeat its own object.

"Read by the light of s. 13, cl. 1, the persons included in s. 22 must, I think, be held to be not persons who might (in the [487] absence of those to whom the estate would descend immediately) be capable of succeeding to it under s. 22, but *bonâ fide*, the persons who would have succeeded to the estate or to a portion thereof, or to an interest therein, had the taluqdar died intestate. But the fact of there being persons to whom the estate might ultimately descend, or rather of there being persons expressly pointed out by the Act as being persons to whom it might descend, is, I think, a fact which must be held to prove that in the event of intestate succession, they were persons who would have succeeded (not to the estate or even to a portion thereof), but to an interest therein. I think, therefore, that the widow must be held to be a person who, both under the ordinary Mitakshara law, and under the provisions of the Oudh Estates' Act, would have succeeded, in the event of the Raja's intestacy, to an interest in his estate in the sense of cl. 2 of s. 13 of the Act. Holding thus, I must hold that registration was not vitally necessary to the validity of the will, and that the will is genuine and valid. I must hold further, that the Raja did not die intestate, and that the plaintiff's claim, based on the clauses of the Act which govern intestate succession, is untenable. Whether the will gave to the widow an absolute estate, or only a life interest therein, vesting the remainder absolutely in the minor, Gujadhur Baksh, are questions which I do not feel called on to decide. They are questions with which, under the above view, the plaintiff has no concern, and with reference to which no contention has been raised between the defendants. The moveables are claimed by plaintiff as the furniture of the estate, and his claim to them falls with his claim to the estate itself."

The Judicial Commissioner on appeal held that the Court of First Instance had correctly decided that a widow entitled to maintenance out of a taluq was to be considered to have an interest in the latter, within the meaning of s. 13 of the "Oudh Estates' Act," I of 1869.

On this appeal—

Mr. T. H. Cowie, Q. C., and Mr. C. W. Arathoon appeared for the Appellant. Mr. Herbert Cowell for the Respondent.

For the appellant it was contended that s. 13 of the "Oudh Estates' Act," I of 1869, required registration of a will in [488] favour of a widow. She would not, if the testator had died intestate, have succeeded to "such estate, or a portion thereof, or to an interest therein," within the meaning of the

exception declared in s. 13. It followed, therefore, that the devise to her was inoperative, and the whole interest in the taluq immediately vested in the appellant, the heir-at-law.

Mr. H. Cowell for the respondent argued that the construction placed on the words of s. 13 by the Oudh Courts was correct. Those words were sufficient to comprehend the interest for a widow, and the gifts to her was maintainable, although the will was not registered. But even assuming that the gift to the widow failed, on account of the will not having been registered the inheritance would not, for that reason, pass to the heir-at-law. The gift in remainder in favour of Gujadhur Baksh, was unaffected by the non-registration, and this gift would be accelerated if the prior estate failed. To show that it would be so, he cited *Lainson v. Lainson* (5 De Gex, M. & G., 754, and 18 Beav., 1) : *Jull v. Jacobs* (L. R., 3 Ch. D., 703) Jarman on Wills, Chap. XVIII.

Mr. T. H. Cowie, Q. C., replied, arguing that the general intention of the testator was in favour of the widow, and that to confer an estate upon her was his principal object.

At the end of the arguments of Counsel, SIR B. PEACOCK delivered their Lordships' Judgment.

Sir B. Peacock.—Their Lordships are of opinion that, upon the principle laid down by Lord Justice TURNER in the case of *Lainson v. Lainson* (5 De Gex, M. & G., 754, and 18 Beav., 1) to which they have been referred by Mr. Cowell, even if the widow was not a person who would have succeeded to any interest in the estate if the Raja had died intestate, the son's estate was accelerated. That being so, without expressing any dissent, from the opinion expressed by the learned Judges of the Court below, their Lordships are of opinion that, upon the legal construction of the will, the plaintiff has no valid claim to any interest in the estate.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be dismissed, and the decision of the Judges of the lower Court affirmed. The appellant must pay the costs of the appeal.

Solicitor for the Appellants—Mr. T. L. Wilson.

Solicitors for the Respondents—Messrs. Barrow and Rogers.

NOTES.

[See generally, as regards the gift over on failure of previous estates, the *Taqee* case 9 B. L. R. 377 at 409 *et seq.*]

[489] SMALL CAUSE COURT REFERENCE.

The 22nd February, 1884.

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR. JUSTICE
CUNNINGHAM.

Jellicoe and othersPlaintiffs

*
versus

The British India Steam Navigation CoDefendants *

*Bill of Lading—Exemption from damage occasioned by neglect of Company's
servants—Suit to recover goods destroyed.*

The plaintiff shipped two plate glass show cases from Calcutta to Rangoon by a steamer of the defendant Company, and signed a bill of lading which contained the following clause. "Carried and delivered subject to the conditions after mentioned . . . loss or damage for any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, etc., excepted." In landing the two cases, one of them was entirely destroyed owing to the carelessness of the Company's servants. The plaintiff sued the Company, setting out that the damage was occasioned by the negligence of the Company's servants. The defendant Company (who were not subject to the Carriers' Act) relied on the abovementioned clause in their bill of lading. *Held*, that the defendant Company were protected by their bill of lading, the terms of which had been accepted by the plaintiff.

THIS was a reference to the High Court under s 617 of Act XIV of 1882. The facts of the case are fully set out in the following order of reference of the Judge of the Small Cause Court.—

"The plaintiffs' cause of action, as set out in their plaint, is in these terms—

"That they despatched on the 31st March 1883 two plate glass show cases from Calcutta to Rangoon by the S.S. *Chanda* belonging to the defendant Company on payment of freight.

"That the first plaintiff was personally present at Rangoon to receive delivery of the said cases to whom the said cases were consigned.

"That the officers of the said vessel in landing the cases did so in such a careless and negligent manner as to completely smash one of them.

"The value of the case so smashed and damaged is Rs. 500, for which sum with all costs the plaintiffs pray for judgment."

[490] "The defendant Company put in the following defences to the action—

"(1) Deny carelessness and negligence as alleged in the plaint. (2) The cases were landed in the same good order and condition that they were received in, and the Company are not responsible for the contents. (3) Company not responsible for damage or breakage or any other consequence from insufficiency of package. (4) Under the contract of carriage the Company's liability ceased as soon as the packages were free of the ship's tackle, after which they are not responsible for any loss or damage, howsoever

* Reference from the Calcutta Court of Small Causes by R. S. T. MacEwen, Esq., one of the Judges of that Court

caused. (5) Company not responsible for any loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company. (6) Damages, if any, excessive.'

"On this statement of the defence I directed the attention of the plaintiffs' pleader to the third para. of the plaint, which sets out that the damage was caused by the carelessness and negligence of the ship's officers, and to the fifth plea of the defendants, and the exemptions in the bill of lading. The clause, so far as it is necessary to set it out, is in these terms. '*Carried and delivered subject to the conditions after mentioned Accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, etc., excepted.*'

"In reply the plaintiffs' pleader said that his case certainly was that the damage had been caused by the neglect and default of the Steam Company's officers and servants, and that the evidence which he would offer would support and prove the allegation contained in the third para of the plaint, and that that was his case.

"The attorney for the defendant Company thereupon asked me to hold that the clause in the bill of lading above set out was a sufficient answer to the plaintiffs' suit, which ought to be dismissed

"The plaintiffs' pleader applied that the question might be submitted for the opinion of the High Court. As his witnesses would prove what he alleged, it would be a useless proceeding going into evidence if in the end the result would be to prove the defence set up by the defendants.

[491] "In this view I concurred, and eventually it was agreed between the pleader and attorney of the parties with my consent that I should hear them on the question of law, and that the plaintiffs should submit a statement of the facts in writing, which for the purpose of this reference is to be taken as the finding on the facts. It will be noticed that the defendant Company denies the carelessness and negligence alleged, so that their defence amounts practically to a demurrer to the case set up by the plaintiffs

"The plaintiffs' statement of facts is shortly as follows - -

"W. E. Jellicoe, one of the plaintiffs, states that on the arrival of the steamer at Rangoon he went on board and saw the second officer who was in charge of the after hatch in which the cases were stowed, and obtained from him a promise that he would not land the cases until he (Mr Jellicoe) returned to superintend the process, that on returning to the steamer after a short absence he found that the cases had been landed and that one of them had been damaged, that he remonstrated with the second officer about his carelessness and the accident; that the officer expressed regret for not having kept his promise, but excused himself on the plea that he did not recognize them until it was too late, and said they were handled like a baby, that the durwan left on board contradicted the statement and said he had tried to prevent the accident, but the officer replied 'Who is going to delay the work and find special coolies for you, *chalo*', that thereupon the coolies heaved the case over and smashed it, that the two cases were put into one sling and lifted and were lowered on the wharf. on opening the sling the ship's coolies employed to clear it heaved the top case over, which fell upside down upon the wharf, from the height of the lower case, the fall being accompanied by a crash of breaking glass; the lower case was then lifted and carried away properly and was uninjured; that the landing was carried out under the immediate superintendence and direction of the second officer and in his presence. The plaintiffs, therefore, say that the damage was caused by the negligence and default of the ship's officer in landing the cases.'

"It is hardly necessary to say that the defendant Company do not come within the provisions of the Indian Carriers' Act, III of 1865, [492] and that the recent decision of the High Court in *Mothoora Kanto Shaw v. The Indian General Steam Navigation Company, Limited* (I. L. R., 10 Cal., 166) is not an authority in favour of the plaintiffs' contentions in this case. The main argument for the plaintiffs is, that the clause in the bill of lading on which the defendant Company rely should not be upheld by the Courts on the ground that it is contrary to public policy. The policy of the English law, in so far as it applies to common carriers, is very fully set out in the early part of the judgment of the Chief Justice in the case just mentioned, and the effect of the Indian Contract Act, s. 152, is also explained. Upon grounds somewhat similar to those set forth by the Chief Justice in explaining the reasons why common carriers under English law were held, within certain limits, to be insurers of the goods they carried, it was argued that the defendant Company could not get rid of its liability under s. 152 of the Contract Act by a clause in the bill of lading such as that now set up. But this argument overlooks not only a series of decisions bearing upon the point, and to which reference will presently be made, but certain observations of the Chief Justice in the case just mentioned and which touch on this very point. Referring to s. 152 of the Contract Act and the Bombay case, the Chief Justice says "If the Bombay Court is right, any contract or usage of 'trade which is inconsistent with the general law laid down by the Contract Act is invalid'—(and here it is argued that the clause in the bill of lading is inconsistent with the English law relating to common carriers and to the provisions of s. 151 of the Contract Act). 'Now it seems to me impossible to suppose that this was intended. The Act only lays down certain general rules which, *in the absence of any special contract or usage to the contrary*, are binding on contracting parties. But it could never have been intended to restrain free liberty of contract as between man and man. Or to invalidate usages or customs which may prevail in any particular trade or business'. That it seems to me is the whole point, and it is fully answered by the observations of the Chief Justice in this case. Parties are always free to make their own contracts, and if they have made a special contract they are bound by it.

"The only case cited by the plaintiffs' pleader in his argument, [493] was *Phillips v. Clark* (2 C. B. N. S., 156), and it was contended, on the judgment of COCKBURN, C. J., that as in that case, so in this, the contract is susceptible of two constructions, and that the more reasonable one should be placed upon it, viz., that it was not to be supposed that the plaintiffs intended that the defendant Company should be exempted from the duty of taking ordinary care of the goods the care required by s. 151 of the Contract Act, but that it was only meant to exempt them from ordinary common law liability, or from liability when they had exercised the care imposed by s. 151. In other words, that the clause of the bill of lading should be taken only in so far as it was consistent with the section of the Contract Act, and that it could never have been intended to relieve the Company from the responsibility for damage resulting from the direct negligence of their own officers and servants.

"It seems to me the distinction is plain enough. On the bill of lading in *Phillips v. Clark* (2 C. B. N. S., 156), the owner was not to be accountable for 'leakage or breakage,' i.e., leakage or breakage caused in the ordinary course of shipment and landing or from unpreventable causes during the voyage, 'the result of mere accident where no blame was imputable to the master and for which, but for the stipulation in question, he would still have been liable,' in the words of CROWDER, J., but there was nothing in that contract which exempted the owner generally from the negligence of his officers or servants,

and Chief Justice COCKBURN in his judgment admits that 'a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms' *Grill v. The General Iron Screw Collier Company* (37 L.R., 3 C.P., 205) and *The Duero* (L.R., 2 Admr., 393) support this view. In the last case it was said a shipowner was not in the category of a common carrier. Sir R. PHILLIMORE said 'Assuming, for the sake of argument, that the shipowner was in the category of a common carrier, still it would be competent to him, under the authorities, to have protected himself from liability by such a bill of lading as this [494] at all events, if not to have protected himself from the negligence of the servants whom he employed.' It must be observed that it must be presumed that this bill of lading was accepted deliberately by the plaintiffs, though it was, of course, competent to them to have refused so to accept it. The contract does not appear to me in itself to have been unreasonable. There is also a decision of the High Court of Bombay, *Graham v. Hill* (10 Bom. H. C., 60), in which it was held that as no negligence had been proved the master was not protected by the exception 'damage from negligence', the converse of course holding good that if he had proved negligence he would have been protected.

"It was stated in the argument for the defendants that the High Court of Calcutta, in the case of *Nund Coomai Dutt v. The P. and O. Co.* (an unreported case) decided by Mr. Justice PHEAR on 14th January 1876, had also held to the like effect on a similar clause in the bill of lading

"It appears to me to be beyond all doubt settled that a ship-owner may limit his liability in respect to loss of or damage to goods which he contracts to carry, and that the Court will not go into the reasonableness or unreasonableness of the contract

"The plaintiffs have submitted ten questions, but it appears to me that the answer to the second question is practically an answer to the whole of them. The answer to that question, in my opinion, is that the defendants can, by a special contract, such as this bill of lading, get rid of their liability. The other questions only set out the arguments which were advanced for the plaintiffs in support of their contentions

"With regard to the third and fourth questions it may be observed that the practice with regard to the granting of bills of lading was not in dispute, but the mate's receipt states that packages are received 'subject to the conditions in Company's form of bill of lading to be granted for these goods.' This notice is sufficient to put a shipper on enquiry, and the plaintiffs admitted that they took no exception to the terms of the bill of lading when it reached them. It must, therefore, I take it in the words of Sir R. PHILLIMORE, be presumed that 'the bill of lading was accepted deliberately'

[495] "On the facts as set out and relied on by the plaintiffs I was of opinion that the defendant Company was entitled to the judgment of the Court, and that the suit should be dismissed, and I have accordingly dismissed it subject to the opinion of the High Court on the question, whether on the facts as stated by the plaintiffs the defendant Company is not exempted from the damage caused by the neglect and default of the officer of the ship and the other servants of the Company in landing the show case.

"It may be that if the plaintiffs had framed their cause of action differently and had not alleged and undertaken to prove carelessness and negligence on the part of the servants of the defendants but had thrown upon them the

onus and odium of proving negligence of their own officer and servants as an answer to the claim, the result might have been different, or if the officer had been sued instead of the Company. But when the plaintiffs undertake to prove the negligence of the defendant's servants they, in effect, establish the Company's defence. In the *Bombay* case the defendant failed to prove his own negligence, he failed to show that he was a person not to be trusted with the carriage of goods, and as a consequence he had to pay. This may seem an extraordinary and not altogether satisfactory state of things, but it would appear to be the law on the cases cited. Mr. Leggett in his work on Bills of Lading, p 245, points out that there is something to be said for the ship-owners' view and in favour of the decisions which have been quoted. For the ship-owners it was said 'We find sea-worthy vessels with certificated masters, mates and engineers, we do our best to secure immunity from sea-damage, but if our servants act negligently and injure our interest, and at the same time inflict loss upon the goods on board, the fault does not rest with us, and we will not convey merchandise by our ships unless we are exonerated from all liability for the acts of the masters and crew over whom, when they leave port, we have no further control.' And the learned author goes on to point out that 'the question was then narrowed to that of a contract for the carriage of goods under conditional terms. The merchant was not compelled to forward nor the ship-owner to carry the goods, but if the former consented to the terms of [496] the latter, then the agreement rested on the limitation of liability as expressed in the bills of lading. A ship-owner insures his vessel against perils of the sea, but the destruction inflicted by winds and the waves does not include the at times equally disastrous losses brought by the carelessness or ignorance of his servants'

"The costs of the reference have been deposited by the plaintiffs"

'Mr *Barrow* appeared for the Defendant Company.

No one appeared for the Plaintiffs

The **Opinion** of the Court (GARTH, C J. and CUNNINGHAM, J.) was as follows —

The Small Cause Court Judge having found as a fact that the plaintiffs in this case accepted the terms of the bill of lading, we think that we cannot do otherwise than confirm his judgment

The defendants, of course, are not subject to the provisions of the Carriers Act, and they have a right to impose upon shippers any terms, however unreasonable, which the latter think proper to accept. They may thus free themselves from the consequences of their own negligence or default, however gross or willful.

So long as the law allows one class of carriers to insist upon contracts of this kind, and the public submit to have their goods carried upon such terms, Courts of Justice are quite powerless to protect them.

Judgment affirmed.

Attorneys for the Defendants. Messrs. *Barrow & Orr*.

NOTES.

[An exception against negligence is valid, when it is a term of the contract — 10 Cal., 489; 13 Bom., 571. 30 Mad., 79 at 88 (*per MILLER J*) 16 M. L. J., 573; 1 M. L. T., 387; 32 Mad., 95 18 M. L. J., 497; 4 M. L. T. 110 See also 13 Bom., 571; 22 Bom., 184.]

[10 Cal. 496]
APPELLATE CIVIL.

The 12th February, 1884.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Panye Chunder Sircar and others.Plaintiffs

versus

Hurchunder Chowdhry and another . . . Defendants.¹

Right of suit—Sale in execution of decree—Right of purchaser under previous private sale— Notice of transfer -- Landlord and Tenant—Bengal Act VIII of 1869, s 26.

The plaintiff purchased under a private conveyance from the registered tenant of a permanent transferable interest in land such as is described in s 26 of Bengal Act VIII of 1869, but no notice of the transfer was [497] given to the zamindar. The zamindar subsequently brought a suit against the tenant for arrears of rent, and obtained a decree, in execution of which he caused the tenure to be sold, and himself became the purchaser. The plaintiff took proceedings under s 311 of the Civil Procedure Code to set aside the sale, but his application was rejected on the ground, an erroneous one, that he was not a proper party to take such proceedings, and he did no appeal against the order rejecting it. *Heid*, in a suit brought against the zamindar and the tenant to set aside the sale, that in the absence of fraud the suit was not maintainable. The plaintiff might have satisfied the rent decree and so prevented the sale, or he might have appealed against the order rejecting his application to set it aside, but having done neither, and the zamindar having had no notice of the transfer, the plaintiff was not entitled to treat the proceedings in the rent suit as a nullity on the ground that he was not a party to that suit.

THE plaintiffs sued for a declaration of their title as proprietors of a taluq, of which they alleged they became possessed by purchase partly from one Runa Bhina on the 12th Bhadro 1280 (27th August 1873) by private conveyance, and partly by purchase at an auction-sale in execution of a decree against Lala Mahomed Mondul, and the second defendant Sher Mahomed Mondul on the 20th March 1877.

The plaintiffs alleged that the first defendant, who was the proprietor of the zamindari to which the taluq appertained, had on the allegation that it constituted the jama of the second defendant, and acting in collusion with that defendant, who had, the plaintiffs alleged, never been in possession, obtained against the second defendant without the knowledge of the plaintiffs, an *ex parte* decree for arrears of rent of the taluq in execution of which decree he had fraudulently, and in an irregular manner, brought the taluq to sale on the 27th December 1879, and had himself become the purchaser. The irregularity complained of was the omission to issue any *purwana* of attachment, or notification of sale, either when the sale was originally fixed or after a postponement which took place, in consequence of which omission there had been a small attendance of purchasers, and the first defendant had purchased the property much below its value.

The plaintiffs took proceedings under s. 311 of the Civil Procedure Code, to set aside the sale, but their petition was rejected on the 23rd January 1880.

¹ Appeal from Appellate Decree No. 1127 of 1882, against the decree of J. M. Kirkwood, Esq., Judge of Mymensingh, dated the 31st March 1882, affirming the decree of Bahadur Jogendra Nath Mukherji, Munsiff of Ghosegaon, dated the 28th February 1881.

They therefore brought this suit to [498] have the sale declared void on the ground of fraud and irregularity, and for a declaration of the right to possession of the taluq.

The first defendant alone appeared to defend the suit. His allegations were, that the property was not worth so much as stated by the plaintiffs, and the suit had been greatly over-valued, that the order rejecting the plaintiffs' application under s 311 was final, and the plaintiffs themselves were not the judgment-debtors, and the suit therefore not maintainable; that the plaintiffs' vendors had no right to the property, and therefore could convey none to the plaintiffs, whose names, moreover, were not registered in the *serishta* of the zamindari, that the taluq was sold for arrears of rent of the entire mahal due to the first defendant, and therefore the plaintiffs' right was extinguished.

The defendant denied that there had been any irregularity, illegality, or fraud, in the conduct of the sale at which he had purchased the taluq, which he alleged was registered in the *serishta* in the names of the second defendant and his brother Lahu Mahmud, against whom the decree, in execution of which the taluq had been sold had been obtained.

The Munsiff found there had been no fraud by the first defendant in the proceedings against the second defendant, that the first defendant had no notice of the plaintiffs' purchase, and their names were not entered in the *serishta*, that whatever right the plaintiffs might have had was extinguished by the sale in execution for arrears of rent, and that the plaintiffs, having applied to set aside the sale under s 311, and that application having been rejected, could not now sue to set aside the sale on the ground of irregularity. He therefore dismissed the suit, and an appeal by the plaintiffs was dismissed by the Judge.

The plaintiffs appealed to the High Court.

Baboo Umakali Mookerjee for the Appellants

No one appeared for the Respondents

The following **Judgments** were delivered by the Court (McDONNELL and FIELD, JJ) :-

Field, J. - In this case the appellant is the purchaser under a private conveyance of a taluq or tenure such as that defined in [499] s 26 of Bengal Act VIII of 1869, that is, a permanent transferable interest in land intermediate between the zamindar and the cultivator. The zamindar, defendant No. 1, brought a suit for rent against defendant No. 2, who was the tenant of the tenure whose name was registered in the zamindari *serishta*. He obtained a decree, brought the tenure to sale, and himself became the purchaser. The plaintiff in this suit seeks to assert his right to the tenure, setting up a title based upon a private conveyance from defendant No. 2 alleged to have been executed before the proceedings in the rent suit. No intimation of this transfer was formally given to the landlord, and it has not been shown—I may say attempted to be shown—that he was aware of it.

There can be no doubt that the execution sale, under which defendant No. 1 purchased, was not a sale of the tenure itself under the provisions of the rent law, but that it was a sale in execution under the provisions of the Code of Civil Procedure (Act X of 1877), and in this respect the present case differs from the Full Bench case of *Sham Chand Koondo v. Brojo Nath Pal Chowdhry*, (21 W. R. 94). It is contended that all that passed by that sale was the right, title and interest of defendant No. 2, that inasmuch as the defendant No. 2 had, before the rent suit, conveyed away his interest to the plaintiff, there was no right, title or interest in him which could pass by the sale; that the title to the tenure is therefore in the plaintiff, who purchased *bonâ fide* a transferable tenure and that he must succeed in the present suit.

I may first observe that an execution sale under the provisions of Act X of 1877 is something different from an execution sale under the old Code (Act VIII of 1859). What was sold under Act VIII was "the right, title and interest of the judgment-debtor." These words were omitted from the Code of 1877, and what was sold under that Code was the property of the judgment-debtor, that is, the thing itself was sold and not the judgment-debtor's right, title and interest in that thing. The Code of 1877 contains provisions for ascertaining and defining the judgment-debtor's interest in the property about to be sold, and there was one section (313) in that Code which allowed the purchaser to have [500] the sale set aside, if it were shown that the judgment-debtor had no saleable interest in the property. I do not think it necessary on the present occasion to determine what may be the effect of these provisions as compared with the provisions of the Code of 1859 in connection with the question of what passes to a purchaser at an execution sale. I think that the present case must be dealt with upon its own grounds. The plaintiff, notwithstanding his own *laches*, had two courses open to him in order to save the tenure from sale. When the landlord obtained a decree for rent, he could have satisfied that decree and thus prevented the sale. He had a second course under the provisions of the Code of 1877. Section 311 of that Code provides: "The decree-holder or *any person whose immovable property has been sold may apply to the Court,*" &c., and it has been decided [see *Bhagabuti Churn Bhattacharjee Choudry v. Bisheshwar Sen* (I L R., 8 Cal., 367, 10 C L R., 141) and the cases there quoted] that the words "*any person whose immovable property has been sold*" include persons, other than the judgment-debtor. In the present case the plaintiff did make an application under s 311. That application was rejected on the ground that he had no *locus standi*. It was open to him to have appealed against the order rejecting his application. There being thus two courses open to the plaintiff to prevent the sale of the tenure which he is alleged to have purchased, he did not avail himself of one of them, and by a wrong decision of an inferior Court, upon the construction of the Code he was prevented from availing himself of the other. He has now brought a regular suit, and the question is, whether he is entitled to treat the proceedings in the rent suit, and the sale in execution as a nullity so far as he is concerned, on the ground that he was not a party to that suit. It appears to me that he is not so entitled. According to the common law, quite apart from any statutory provisions, when a tenant transfers his interest to a third person, in order to discharge himself from future liability for rent, and in order that the transferee may have the advantages of the tenancy, one or both of them must give notice to the landlord. In this country s 26 of the Rent Law expressly imposes the duty of giving notice upon all transferees of tenures, such as are described in [501] that section, and the tenure in the present case is one of those tenures. The tenant, the transferor, gave no information of the transfer to his landlord, and the plaintiff, the transferee, gave no intimation of his purchase. This being so, the latter has by his own *laches* placed himself in the disadvantageous position which he now occupies. In the course of the argument the case was put to us of a decree-holder who attaches and sells in execution of his decree property which belongs not to his judgment-debtor, but to a third person, and we were asked whether it could be contended that such a sale would convey a good title. I think it could not be so contended, but that is a very different case from the case which we have now before us. When a decree-holder seeks to execute his decree against property, moveable or immovable, it is his duty to make sure that the property which he brings to sale in execution is the property of his judgment-debtor, and, if he makes any mistake, he does so at his own peril. The circumstances of the present case are, I think,

an exception to this general rule. The landlord, the decree-holder, knew that the person whom he sued was his tenant. No doubt that tenant had by law the right to transfer his tenure, but the same law cast upon the transferee the duty of giving the landlord due notice of the transfer, and unless the transferee discharged the duty so cast upon him, the landlord was not, in my opinion bound to look beyond the information contained in his *serishta*, and cannot be affected with knowledge of a fact not communicated to him by the person whose duty it was to communicate it. It will be borne in mind that he had not this knowledge from any other source and no case of fraud has been made out. In this exceptional case, therefore, the duty was, not upon the decree-holder, but upon the person who now comes into Court, and asks for redress. That person has been guilty of neglect in the transaction itself—neglect of a duty expressly imposed on him by the law—whilst the landlord, against whom he seeks redress, has committed no wrongful act, and has been guilty of no omission of duty. It appears to me, therefore, that the plaintiff is estopped by his own omission from saying in this suit as against the landlord that he had acquired a good title to the tenure. Then, there is another consideration. Section 316 of the Code provides that the sale certificate shall, so [502] far as regards the parties to the suit and persons claiming through or under them, vest the title to the property in the purchaser. In the case now before us, the plaintiff claims under one of the parties to the rent suit, that is, the defendant, and I think that the provisions of this section are therefore applicable to him.

I am therefore of opinion that although the tenure in this case was sold under the provisions of the Code of Civil Procedure and not under the special provisions of Bengal Act VIII of 1869, the plaintiff is not entitled to succeed in this suit.

We dismiss this appeal, but without costs, no one appearing for the respondent.

McDonell, J.—In this case it is found by the Court below that the zamindar was entitled to sell the whole tenure, and the sole question we have to decide is, whether he actually sold it. Both the Courts below have found as a fact that the whole tenure was sold, that the tenure was proceeded against and regarded as liable, and that the sale proclamation and sale certificate show that the tenure was sold. Under these circumstances I do not think that we ought to interfere, although there may have been irregularities in the sale proceedings, and I would therefore dismiss this appeal.

Appeal dismissed.

NOTES.

[WHO CAN APPLY UNDER SEC. 311 C. P. C., 1882, (O 21, R 90, C. P. C., 1908)

The words '*any person whose interests are affected by the sale*' have been substituted in the Code of 1908 for the words '*any person whose immoveable property has been sold under this chapter*.'

A person who claims to be the purchaser of a tenure prior to attachment from the judgment-debtor whose interest in the tenure has been sold in execution of a decree for *its own arrears of rent* is entitled to apply under this rule as *his interests are certainly affected by the sale*:—10 Cal., 496; 9 C. W. N. 134 (137), 22 Cal., 802 distinguishing 15 Cal., 488 **F. B.**, where a purchaser of immoveable property from the judgment-debtor prior to attachment was held to be not entitled to apply under this rule. See also 16 Mad., 476. A beneficial owner of property is entitled to apply under this rule where immoveable property has been sold in execution of a decree against the ostensible owner.—20 Cal., 418, 19 Mad., 167.

See also 17 C. W. N. 80, 10 C. W. N. 176 1 C. L. J. 68; (1914) M. W. N. 147, as regards the scope of the rule.]

[10 Cal. 502]

APPELLATE CIVIL.

The 5th March, 1884

PRESENT.

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS

Arut Sahoo and another Defendants

versus

Prandhone Pykura. Plaintiff

Landlord and Tenant—Occupancy of homestead land—Right of landlord to determine tenancy

The mere record of the name of a tenant, who is found in occupation of a particular piece of land, in Settlement proceedings, and of the rent payable by him does not invest him with any permanent title to hold it

Where an estate, at one time the property of the Government, was as a *khas mehal* settled ryotwari for a period of 30 years from 1247, and where in such Settlement *A* was recorded as tenant of the land at a stated rent *Held* that the Court was not bound to presume that the origin of *A*'s title was a grant to continue in permanent possession

[503] *Prosunno Coomaree Debea v. Rutton Bepary* (I. L. R. 3 Cal. 696), *Addanto Charan Dey v. Peter Doss* (13 B. L. R. 117, 17 W. R. 383) followed

THIS was a suit for ejectment, upon a notice to quit, in regard to 4 ghoomts and 13 biswas of homestead land which the defendants and their ancestors had held ever since the Government Settlement at an annual rent of nine annas and seven pies. The defendants in answer denied the receipt of notice, and disputed the plaintiff's right to eject them. The first Court, though found that not only had notice to quit been given, but also that it was sufficient, and held that by virtue of the Settlement made by Government the defendants acquired a title to hold the land at the same rent until a new Settlement should be made, and accordingly dismissed the suit. On appeal the Judge reversed the decision of the Court below, holding that the protection claimed by the defendants could only be claimed by a tenant on the ground that he had acquired a right of occupancy, or that the lease under which he held had not expired, but that neither of their contentions were or could be pleaded in this case. He was further of opinion that, though the defendant had been allowed to hold the land for a lengthened period without a lease at a small rent, that fact was not in itself sufficient to prevent them being ejected by the owner, and that there was nothing in the Settlement proceedings to justify the decision of the Court below. He accordingly reversed that decision and gave the plaintiff a decree with costs. The defendants now specially appealed to the High Court.

Mr. R. E. Twidale for the Appellants.

Baboo Koruna Sindhu Mookerjee for the Respondent.

The nature of the contention raised on the appeal is sufficiently stated in the **Judgment** of the Court (TOTTENHAM and NORRIS, JJ.) which was delivered by

* Appeal from Appellate Decree No. 589 of 1883, against the decree of W. Wright, Esq., Subordinate Judge of Cuttack dated 29th of December 1882, reversing the decree of Baboo Hurrey Kishto Chatterjee, Munsiff of Jajpur, dated the 31st of August 1881

Tottenham, J.—This was a suit to eject the defendant, after notice to quit, from a small piece of homestead land in respect of which it has been found that no right of occupancy could be acquired.

[504] The estate was at one time the property of Government, and as a *khas mehal* it was settled ryotwari for a period of 30 years from 1247 B. S. In that Settlement the defendant was recorded as tenant of the land in suit at a rent of nine annas seven pies per annum. Subsequently the plaintiff became proprietor of the estate. The first Court held that by virtue of the Settlement made by Government the defendant acquired a title to hold the land at the same rent until a new Settlement should be made, and that this action to eject him would not lie.

The lower Appellate Court was of opinion that the fact that defendant had been permitted to hold the land for a lengthened period at a small rent was not *per se* sufficient to protect him from ejectment by the owner; and could see nothing in the Government proceedings at the Settlement to justify the Munsiff's inference in the matter. The Court accordingly made a decree in favour of the plaintiff.

Before us the pleader for the appellant has contended.—

1st.—That the Munsiff's view of the effect of the Settlement was right, and that the plaintiff was bound to respect that Settlement.

2nd.—That the Court below ought to have presumed from the circumstances of the case that the origin of defendant's title was a grant to continue in permanent possession.

We think that neither of these contentions can prevail.

As to the first it seems to us that the mere record of the name of a tenant who is found in occupation of a particular piece of land in Settlement proceedings, and of the rent payable by him, does not invest him with any permanent title to hold it, and admitting that the purchaser from Government was bound to respect the Settlement made with the ryots during its currency, that consideration would not bar the present suit which was brought after the termination of the period of that Settlement. Any further Settlement must be made not with the tenants, but with the proprietor of the estate.

As to the second contention the authority cited is *Govinda Chundra Sikdar v. Ayinuddin Sha Biswas* (11 C. L. R., 281). But that case lays down no more than that the Court is at liberty to presume if it thinks fit from the particular circumstances of a case that the [505] land was granted for building purposes, and that the grant was of a permanent character.

We cannot hold that in the present case the Appellate Court committed an error of law in not making such presumption.

On the other hand, the plaintiff's right seems to be established by the authority of the cases, *Addaito Charan Dey v. Peter Doss* (13 B. L. R., 417; 17 W. R., 383) and *Prosunno Coomar Debca v. Rutton Bepary* (I. L. R., 3 Cal., 696). We must dismiss this appeal with costs.

Appeal dismissed.

[10 Cal. 505]
APPELLATE CIVIL.

The 19th February, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Lalla Dabee Pershad.....Plaintiff

versus

Santo Pershad and others.....Defendants.

Interrogatories—Failure to answer within the time limited—Dismissal of suit—Civil Procedure Code, Act XIV of 1882, Ch. X, ss. 121, 126, and 136.

The question as to whether the Courts below have exercised a proper discretion in dismissing a suit under s. 136 † of the Civil Procedure Code is one into which the High Court will not enter on special appeal

When interrogatories are delivered with the leave of the Court under s. 121 of the Civil Procedure Code, and the Court orders such interrogatories to be answered within ten days under s. 126, there is virtually an order passed under the provision of Chap X of the Code, and consequently upon the party interrogated failing to comply with such order the Court has the power to pass an order under s. 136

In this suit, which was instituted on the 24th April 1880, the plaintiff sought to have his right determined to, and his possession confirmed in 16 cottahs of land with certain trees thereon. He also sought to have certain orders of the revenue authorities in respect of the boundaries of the land cancelled, and to have it declared that the land and trees in suit were situate within his *mulikut* village and not in that of the defendant

The defendant filed his written statement disputing the claim, and on the 11th August 1880 caused interrogatories to be delivered to the plaintiff's pleader, the return to which was ordered to be [506] made within ten days. More than that period having elapsed, and no answer having been filed, the defendant on the 31st August applied under s. 136 of Act X of 1877 to have the suit dismissed. The hearing of that application came on before the Munsiff on the 3rd September, and the plaintiff contended that that section had no application, but the Munsiff held that the section did apply and accordingly dismissed the suit. Before, however, that order was passed the plaintiff applied for further time in which to answer to be granted him, but the Munsiff refused to grant him any further time on the ground that such application was made too late.

* Appeal from Appellate Decree No. 88 of 1883, against the decree of J. Tweedie, Esq., Judge of Shahabad, dated the 27th of September 1882, affirming the decree of Baboo Bhagobuti Churn Mitter, Munsiff of Arrah, dated the 3rd of September 1880.

† [Sec. 136.—If any party fails to comply with any order under this chapter to answer interrogatories or for discovery, production or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered ;

and the party interrogating or seeking discovery, production or inspection may apply to the Court for an order to that effect, and the Court may make such order accordingly

Any party failing to comply with any order under this chapter to answer interrogatories or for discovery, production or inspection which has been served personally upon him, shall also be deemed guilty of an offence under section 188 of the Indian Penal Code]

On appeal the Judge held that the Munsiff was right in refusing to grant further time, and in dismissing the suit. The appeal was therefore dismissed with costs.

Against that order the plaintiff now specially, appealed to the High Court.
Baboo Abinash Chunder Banerjee for the Appellant.

Baboo Kahl Kissen Sen for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—Whether in this case the Courts below have exercised the discretion under s. 136 properly or not is a question which we cannot enter into in second appeal, and we express no opinion upon that point, but as regards the question whether the lower Courts had any power to deal with the case under s. 136, we are of opinion that the objection taken before us is not valid. When interrogatories are delivered with the leave of the Court under s. 121¹, the Court orders these interrogatories to be answered within ten days from the date of service thereof under s. 126. Therefore, there is virtually an order passed under the provisions of Chap. X. That being so, if the party interrogated fails to comply with that order, the Court has the power to pass an order under s. 136.

We are therefore of opinion that the contention of the appellant that s. 136 has no application to this case is not correct.

We therefore dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[In (1891) 18 Cal., 420 F. B. this case was *overruled* as regards interrogatories.

In (1894) 19 Bom., 307 (809) it was held that an appeal lay against an order dismissing a suit under sec. 136 C. P. C., 1882.]

* [Sec. 121.—Any party may at any time by leave of the Court, deliver through the Court interrogatories in writing for the examination of the opposite party, or where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer.]

Power to deliver interrogatories.
 Provided that no party shall deliver more than one set of interrogatories to the same person without the permission of the Court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered a written statement and such statement has been received and placed on the record.]

[507] APPELLATE CIVIL.

The 12th February, 1884.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD

Merjah Janand and another Defendants

*versus*Kristo Chunder *alias* Kinoo Lahary. *... . Plaintiff

Res judicata—Decision of Collector in measurement proceedings—Bengal Act VIII of 1869, s 18—Jurisdiction of Collector.

If a Collector professing to proceed under the provision of s 38, Bengal Act VIII of 1869, does not ascertain the existing rates of rent, but proceeds to assess the rents, in other words to determine what rates are in his opinion fair and equitable, he exceeds his jurisdiction and his proceedings are null and void. But if he has properly exercised the jurisdiction conferred on him by that section, his proceedings are conclusive between the parties in a subsequent suit for rent.

IN this case it was held that it did not plainly appear in the face of the proceedings that the Collector had not properly exercised the jurisdiction conferred upon him. The facts of this case are sufficiently stated in the **Judgment** of the Court (MCDONELL and FIELD, JJ.)

Baboo Nil Madhub Bose for the Appellants

Baboo Griya Sunker Moozumdar for the Respondent

Field, J.—This was a suit for rent. It was brought upon the basis of a *jamabandi* or rent-roll which was drawn up by the Collector in previous proceedings under the provisions of s. 38 of Bengal Act VIII of 1869. The only point which has been pressed upon us is that the proceedings of the Collector and the *jamabandi* drawn up by him were *ultra vires*, and that the defendants in the present case are not bound by them, because the Collector did not ascertain the existing rates of rent [508] (that being what s. 38 empowered him to do), but assessed rates, which were really enhanced rates. Several previous decisions of this Court have been referred to in the course of the argument by the learned vakeel for the appellant. We think there can be no doubt that if a Collector, professing to proceed under the provisions of s. 38 of the Rent Act, does not ascertain the existing rates, but proceeds to assess rates, in other words proceeds to determine what rates are in his opinion fair and equitable, he exceeds his jurisdiction and his proceedings are null and void. On the other hand, if the Collector exercises properly the jurisdiction conferred upon him by the section, then we think that his proceedings are conclusive between the parties in any subsequent suit for rent. There is a distinction between those cases in which the tenants have appealed against the proceedings had under s. 38, and another class of cases in which the proceedings had under s. 38 were sought to be used as evidence in a subsequent suit for rent.

*Appeals from Appellate Decree Nos. 1073 and 1079 of 1882, against the decrees of Baboo Nobin Chunder Ghose, Rai Bahadur, First Subordinate Judge of Zillah Mymensingh, dated the 30th of March 1882, affirming the decree of Baboo Bepin Chunder Rai, Rai Bahadur, Additional Munsiff of Netrona, dated the 25th November 1880.

It is clear that in the first class of cases, questions might be raised which could not properly be raised in the second class of cases. In the second class of cases the proceedings of the Collector are used as a judgment, to show that the question as to the rates of rent is *res judicata* between the parties. It is a rule laid down by the Evidence Act in accordance with principles long established that the judgment of any Court when offered in evidence in a subsequent proceeding may be shown to have been made without jurisdiction, and therefore to be void. In exercising the special powers conferred by s. 38, the Collector is bound to conform strictly to the provisions of the section, and if it plainly appears on the face of his proceedings that he did not so conform, a finite effect cannot be given, to those proceedings and the judgment in which they have been embodied. What we have then to consider in the present case is whether it plainly appears on the face of the proceedings of the Collector that he was not properly exercising the jurisdiction conferred upon him by s. 38. We have read those proceedings, and it appears to us that it does not so appear. There are expressions used in the Collector's decision and in the judgment of the Judge to whom an appeal was preferred against that decision, which may appear equally [309] applicable to *ascertaining* or *assessing* rent, but when these expressions are read with the context, it does not appear to us that the Collector or the Judge did otherwise than *ascertain* the then existing rates of rent. In one passage the District Judge says: "The ryots of the mahal, the Amin said, had not, on account of the enmity which existed, given the exact rates, but he *ascertained* the rates from certain persons who had previously been ryots in the mahal." It also appears that certain previous *butwara* proceedings were used by the Amin, and these *butwara* proceedings would show the then existing rates, not recent or new enhanced rate. It, therefore, appears to us that there is nothing on the face of the proceedings to show that the Collector did otherwise than ascertain the existing rates, and that the Collector's proceedings and the *jamabandi* are binding on the ryots.

Then it is argued that it appears from one passage in the District Judge's judgment in the proceedings under s. 38, that the question of the Collector exceeding his jurisdiction was raised, and that the Judge declined to entertain it. If this were so, if the question was raised and the Judge declined to entertain it, it would be impossible to say that the question so raised, but not heard and determined, was *res judicata*. The passage relied upon is this: "From the Collector's order the present appeal is preferred. The first ground of appeal is to the effect that, inasmuch as the petitioner moved the Civil Court with the intention of illegally enhancing the rent of ryots, his petition was liable to be rejected. The intention, however, of the petitioner cannot now be considered, the present appeal being from the order of the Collector and not from that of the Subordinate Judge, admitting the right of the petitioner to an order under s. 38 of Act VIII of 1869." What the intention of the petitioner under s. 38 may have been is not material. The question which would have been material, and which does not appear to have been raised in the passage, which I have just cited, is whether the landlord was unable to measure the land comprised in his estate, by reason that he could not ascertain who were the persons liable to pay rent to him in respect of such land. There is no allegation that, although he alleged himself to be unable to [310] ascertain the persons liable to pay rent, he might have ascertained who those persons were if he had wished to do so. This being so it appears to us that there is nothing in the passage relied upon by the appellant's vakeel to show that the question of jurisdiction was raised, and that the District Judge in the former

proceedings declined to entertain it. This appeal must therefore be dismissed with costs. This judgment will apply to No. 1079.

Appeal dismissed.

[511] PRIVY COUNCIL.

The 29th and 30th November, 1883.

PRESENT:

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE.

Achal Ram.....Defendant

versus

Udai Partab Addiya Dat Singh.Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh.

*"Oudh Estates Act," I of 1869, s. 8—Talukdar in the second list—
Estate descending to single heir—Primogeniture.*

In the "Oudh Estates Act," I of 1869, rules were laid down as to the title of taluqdars whose estates the Government had created, and as to the mode of succession thereto.

On a question whether or not a taluq, to which the Act was applicable, descended according to the rules of lineal primogeniture, *held*, that where a taluqdar's name was entered in the second, but not in the third, of the lists maintained under the above Act, the estate, although it was to descend to a single heir, was not to be considered as passing according to the rules of lineal primogeniture.

APPEAL from a decree of the Judicial Commissioner of Oudh (25th January 1881), reversing a decree (20th June 1880) of the Officiating District Judge of Faizabad.

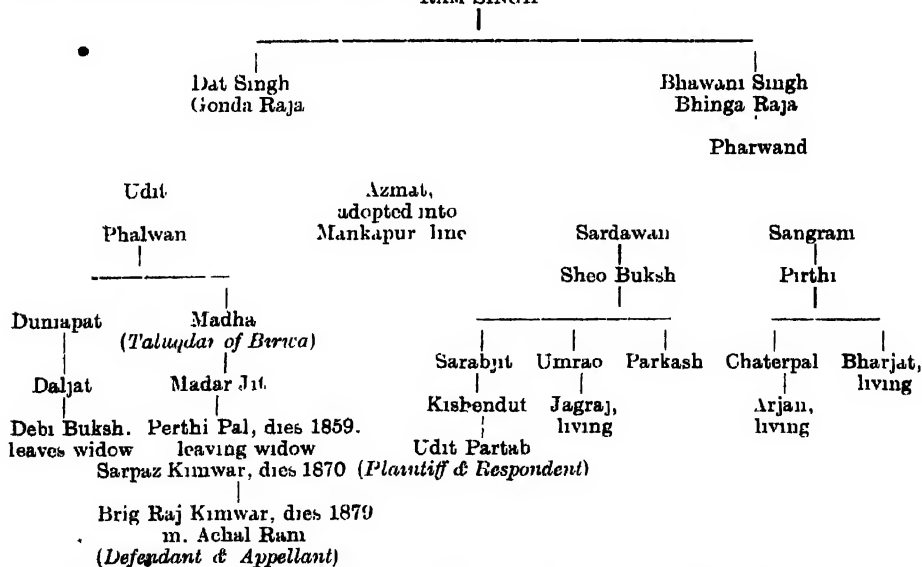
The question raised on this appeal related to the right of succession to the Birwa taluq in the pergunnah, tahsil, and district of Gonda, with the appurtenant estate of Mehnaon

The Birwa taluq was inserted in the first and second of the lists maintained under the Oudh Estates Act, I of 1869, as having belonged to Bhaiya Perthi Pal Singh deceased, as taluqdar, to whom the respondent Udai Partab Addiya Dat Singh claimed to be the nearest male heir, and entitled to succeed.

Raja Ram Singh of Gonda was the common ancestor of Raja Debi Buksh Singh, who, in 1856, at the annexation of Oudh, held the Gonda Raj; also of Bhaiya Perthi Pal Singh, who at the same period held the taluq of Birwa, the subject of the present dispute; and of Bishen Dat Singh, the present respondent's father, who at annexation held the separate taluq of Bhinga, in the neighbouring district of Baraitoh.

The Bhinga taluq was also restored to a descendant of Bhowani Singh, the former Bhinga Raja, and son of the common ancestor Ram Singh. Perthi Pal Singh left a widow and daughter only. With him, and with the ex-Raja of Gonda, the entire male line of descendants from Raja Uddyat Singh, the elder son of the said Ram Singh, and brother of the abovenamed Bhowani Singh, became extinct. Perthi Pal's male collateral relations were to be found among the descendants of Bhowani Singh, unless, as was alleged, the adoption of one of this line into the old Janvar family of Bhinga had separated the branch from the Gonda family. Of these descendants there were four surviving. In the senior male line there was the present respondent, sixth in descent from Bhowani Singh, there was also his cousin, Jagraj Singh, fifth, and Harbhagat Singh, fourth, in descent from the same ancestor, as appears from the following pedigree table —

RAM SINGH



[518] The widow, Thakurain Sarfraz Kunwari, who succeeded her deceased husband, Perthi Pal Singh, as taluqdar, made a will bequeathing all her property to the daughter, Thakurain Brijraj Kunwari, whom she had borne to Perthi Pal Singh. The daughter, on the death of her mother on the 27th of April 1870, succeeded her in possession of the estates which, as she was a minor, came under the superintendence of the Court of Wards. She was afterwards married to the present appellant, and died without issue on the

23rd February 1879. At her death her husband, Achal Ram, claimed the estates as her heir, and obtained possession of them. Whereupon the present respondent brought this suit, alleging that the deceased widow and her daughter had only held Birwa and Mehnaon for successive life-estates which had ended, and that on the death of the daughter, Brijraj Kunwari, the plaintiff, as the collateral heir of Perthi Pal Singh, the last male taluqdar, and last holder of an estate of inheritance, became entitled to succeed him.

The defence was that the plaintiff was not the next heir of Perthi Pal Singh, deceased, the family of the plaintiff having been separated from his family some generations back; that Perthi Pal Singh had made a will in favour of his widow and daughter; that the widow had secured to her a title as taluqdar, in accordance with the "Oudh Estates' Act," I of 1869, and that by a will, authorized by that law, she had bequeathed the estates to her daughter, from whom that daughter's husband, the defendant, derived his title.

The suit was heard by the District Judge of Faizabad. Issues were fixed as to the *factum* and effect of the alleged will of Perthi Pal Singh, and as to effect of the will of Thakurain Sarfraz Kunwari as to whether a legal title had been sufficiently made out by Udai Partab, the plaintiff, and on the question who, by Hindu law, with reference to the provisions of the "Oudh Estates' Act," I of 1869, was heir. The District Judge found that the will of Perthi Pal Singh, dated Kartik-Badi 13, Fasli 1267 (corresponding to the 26th October 1859) was genuine, and that by it the taluq of Birwa, and also Mehnaon, were left to his daughter, with a life-interest bequeathed to her mother, his wife. The District Judge held that the taluq was the special property [514] of Brijraj Kunwari, in the same way that in the case of *Indar Bahadur v. Janki Kunwar* (L. R., 5 I. A., 1) a taluq was held by a daughter.

The husband of Brijraj Kunwari was, in his opinion, entitled to the property as her heir; and against this title that of the plaintiff could not prevail. The plaintiff was representative and head of the Bhinga family, he was "heir by primogeniture to Perthi Pal Singh," and with reference to there being others of the Bhinga line related more nearly in degree to the deceased Perthi Pal Singh, who could come in before the plaintiff, the District Judge found that they had "resigned in the plaintiffs' favour", and that "the estate being one that devolved by the law of primogeniture, the plaintiff, as head and representative of his own line, was the rightful suitor." But he held that the defendant had the better title, concluding as follows:—

"In fine I consider that the judgment above quoted, *Brij Indar Bahadur v. Janki Kunwar* (L. R., 5 I. A., 1) rules this case, and that the property must descend to Brijraj Kunwar's heirs and not her father's. Therefore the defendant, Achal Ram, the deceased's husband, is the heir, and not the plaintiff, a collateral of her father's removed by some 12 generations in an ascending and descending scale."

The suit was, accordingly, dismissed with costs. The plaintiff, now respondent, appealed to the Judicial Commissioner, and the defendant filed a memorandum of objections to the judgment under s. 561 of Act X of 1877.

The Judicial Commissioner reversed the decree of the District Judge, and decreed in favour of the plaintiff. He held that the case of *Brij Indar Bahadur v. Janki Kunwar* (L. R., 5 I. A., 1) did not apply, and that the daughter, Brijraj, took "a mere woman's estate," as heir to her father. On the question whether the alleged will of Perthi Pal Singh was genuine, he was of opinion that it had not been proved, and he added: "I find that the alleged will of Bhaiya Perthi Pal Singh would, if genuine, have no effect on the claim to the taluq, and that if both wills set up be genuine, the heirs to Brijraj

Kunwari's landed estate by Hindu law and Act I of 1869, must be sought among the male reversionary heirs [515] of the first taluqdar, Bhaiya Perthi Pal Singh, and that in no case would the defendant-respondent, Achal Ram succeed as heir to his deceased wife's taluq."

That part of his judgment which related to the question whether or not the plaintiff had shown a sufficient title is set forth by their Lordships.

On this appeal—

Mr. *T. H. Cowie*, Q. C., Mr. *J. T. Woodroffe*, and Mr. *J. E. Howara* appeared for the Appellant.

Mr. *J. F. Leth*, Q. C., and Mr. *J. D. Mayne* for the Respondent.

For the appellant it was argued that even on the assumption that Perthi Pal Singh had died intestate, which was not admitted, the judgment of the Judicial Commissioner was wrong, the plaintiff not having made out his title. Thakurain Sarfraz Kunwar had taken an absolute estate under the law which was contemplated by the 11th clause of s. 22 of the "Oudh Estates' Act," I of 1869. Her daughter had obtained a complete title from the mother, and on the daughter's death her property devolved upon her husband, the appellant. At the same time complete as that title was, there was no necessity for resorting to it, for the plaintiff's title had not been proved. There was no evidence establishing that the Birwa taluq descended according to the rule of lineal primogeniture, and the Commissioner appeared to have been under the misapprehension that there was a primogeniture *sumud*. A nearer heir excluded a more remote one, for, although the taluq descended to a single heir, the rule of lineal primogeniture (which would, if established, have been the only basis on which the plaintiff's claim could rest) had not been shown to govern the descent of the estate. There were other *bundhus*, distant kindred, nearer than the plaintiff, who was thirteenth in degree from Perthi Pal Singh, whose estate was entered in the second and not in the third of the lists maintained under Act I of 1869. This showed that the rule of lineal primogeniture did not apply, and, therefore, the nearer in degree would exclude the more remote. The fact that the taluq was impartible did not affect the Hindu law of inheritance. Reference was made to *Mitakshara*, Chap. 11, s. 5; *Brij* [515] *Indar Bahadur v. Rani Janki Koer* (L. R., 5 I. A., 1); *Tekant Doorga Persad Singh v. Tekaitni Doorga Kunwari* (L. R., 5 I. A., 149); *Periasami v. Periasami* (L. R., 5 I. A., 61), *Mayne Hindu Law and Custom*, para. 461.

For the respondent it was argued that, as this taluq was an impartible estate descending to a single heir, the question was as to the right of succession to an estate in the nature of a Raj, the ordinary law, to which the taluqdar had been subject, being that which was contemplated by Act I of 1869, s. 22, para. 11. Independently of the finding below, that primogeniture prevailed in this family, the estate in question being impartible and descending to one of the issue of the family of the last male proprietor, the "single heir" had to be discovered by the application of the rule of primogeniture. This application of the mode, employed in accordance with Hindu law, in most of the cases of impartible property, to fix "who was the single heir," was appropriate here. Moreover, the evidence showed that in this family there was a presumption in favour of the rule of primogeniture; and although the taluq of Birwa had not been inserted in the third (or primogeniture list) of the lists maintained under Act I of 1869, it was not to be inferred that that mode of descent was excluded in this case. There were both new and old taluqs subjected to the Act, and this was an old one.

Reference was made to *Strange*, Hindu Law, chap. 6; *Periasami v. Periasami* (L. R., 5 I. A., 61). It was submitted that the respondent had made out a title as he had shown that, he being the last of the elder line of the descendants of the Bhinga Raja, was in a position to represent that branch as its head.

Mr. T. H. Cowie, Q. C., in reply, contended that no presumption arose in this case as to the application of the rule of lineal primogeniture; and that, unless the respondent was brought within that rule, the nearer heir excluded the more remote. All that was meant by a "single heir" was a single heir who was also nearest in degree.

At the conclusion of the arguments their Lordships' Judgment was delivered by

[517] Sir B. Peacock.—This was a suit brought by Uday Partab against Achal Ram, who was the husband of Brijraj Kunwari, deceased, and who obtained possession of the estate in question upon the death of his wife. The plaintiff alleged himself to be the heir of Perthi Pal Singh, and in the action of ejectment it was necessary for him, before he could turn out the defendant, to prove that he had a better title. He attempted, in support of his title, to show that the estate was to descend according to the rules of lineal primogeniture. If that rule prevailed he appears to have been the heir of Perthi Pal Singh. A question was raised in the suit whether Perthi Pal Singh had made a will; but it is unnecessary to decide that question, because whether he made a will or not, or whether his daughter, Brijraj Kunwari, the wife of the defendant, took an absolute estate or not, is immaterial, if the plaintiff fails to prove that he has a better title than the defendant. It is necessary, therefore, for the plaintiff to make out that the estate descended according to the rules of lineal primogeniture as distinguished from descent to a single heir amongst several in equal degree.

The estate in question was a taluq created by the Government of India after the confiscation of Oudh. Perthi Pal Singh, upon whom it was conferred, died before Act I of 1869 was passed, but the taluq was one in respect of which the Government of India laid down certain rules as to the title of the taluqdars whom they had created and as to the mode of succession. The preamble of Act I of 1869, intitled "The Oudh Estates' Act," is in these words. "Whereas after the re-occupation of Oudh by the British Government in the year 1858, the proprietary right in divers estates in that province was under certain conditions conferred by the British Government upon certain taluqdars and others: And whereas doubts may arise as to the nature of the rights of the said taluqdars and others in such estates and as to the course of succession thereto: And whereas it is expedient to prevent such doubts and to regulate such course and to provide for such other matters connected therewith as are hereinafter mentioned, it is hereby enacted as follows." Among other enactments is s. 8, which provides that, "within six months after the passing of this Act the Chief Commissioner of Oudh subject to such instructions as he may receive from the [518] Governor-General of India in Council, shall cause to be prepared six lists; namely, first, a list of all persons who are to be considered taluqdars within the meaning of this Act." Perthi Pal Singh, who had been allowed to contract for the revenue, and with whom a summary settlement had been made, was entered in the first of the lists as a taluqdar; and he must therefore be deemed a taluqdar within the meaning of the Act. He was also entered in the second of the lists, which is a list of the taluqdars whose estates, according to the custom of the family on and before the 13th day of February 1856, ordinarily devolved upon a single heir. Therefore the

taluk must be considered as a taluk which ordinarily descended upon a single heir : but it omits altogether to state that that heir is to be ascertained by the rules of lineal primogeniture. The third list is "a list of the taluqdars not included in the second of such lists to whom *sunnuds* or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *sunnuds* or grants shall thereafter be regulated by the rules of primogeniture." Perthi Pal Singh was not entered in that list, and it is contended that because he was in the list of estates which ordinarily devolved upon a single heir, it is to be presumed that the heir was to be ascertained according to the rules of lineal primogeniture. Their Lordships cannot concur in that contention. They are of opinion that when a taluqdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture.

Now the plaintiff having to make out his title, the District Judge in the first Court found that the estate was to descend according to the rules of primogeniture, not saying lineal primogeniture. There was no evidence to show that the estate had descended according to the rules of lineal primogeniture, even if such evidence could have got rid of the provisions of the Act. The Judicial Commissioner also found that the estate descended according to the rules of primogeniture, and it is said that there were two concurrent findings upon a question of fact; but when their Lordships come to examine the [519] reasons and the grounds of the Judicial Commissioner, they find that he was in error. He says that there was a *sunnud* granted to Perthi Pal Singh, according to which the estate was to pass according to the rules of primogeniture. He says "In the present case the confiscation was admitted in favour of Bhaiya Perthi Pal Singh, and the grant as by *sunnud* is to him and his heirs male according to the law of primogeniture, so that unless his daughter from some cause takes a full proprietary heritable estate, those entitled to succeed after her must be sought for amongst the heirs of Bhaiya Perthi Pal Singh." Then he enters into the question whether the plaintiff is the nearest heir according to the rules of lineal primogeniture. Both Courts appear to have failed to consider this case with reference to the principle that a plaintiff seeking to recover possession of an estate against a person who is in possession must recover upon the strength of his own title, and not upon the weakness of his adversary's title. That is a principle of law, and a very essential principle to be acted upon. The Judicial Commissioner, after deciding that the male reversionary heirs of Perthi Pal Singh were to come in, says : "There remains the question as to whether the plaintiff-appellant, Bhaiya Udai Partab Singh, is such male reversionary heir, considering that, as stated in an early part of this judgment, according to ordinary Hindu law, Harbhagat Singh was the nearest collateral heir male to Bhaiya Perthi Pal Singh at his death, and failing him Jabraj Singh, Arjan Singh, and the sons of Harbhagat Singh would have precedence as collateral male heirs. Those named above are not parties to this litigation, and no right that they might have as against Udai Partab Singh would be prejudiced by a decree in his favour against Achal Ram, who is found to have no right or title at all in the taluqa. And in one sense there is a community of interest in all the males of the Bhinga branch, that the Birwa-Mehnaon estate should not pass to a stranger, to the prejudice of their reversionary rights to succeed the last male proprietor. In both these estates the succession is to be regulated by the rule of primogeniture; and plaintiff-appellant, as senior heir male of the Bhinga Bissin family, has succeeded to, and is in full proprietary possession of, that taluq. He may,

therefore, well be held to [320] be representative of the reversioners in his branch, and anyhow it does not lie in the mouth of defendant-respondent, who is found to have no legal warrant for his possession of the Birwa estate, to deny that the plaintiff has a *locus standi*, on the ground that it may be that he may not afterwards be found to be the man among the reversioners whom he represents, who should succeed." In short, the Judicial Commissioner comes to the conclusion that, inasmuch as the defendant is shown to have no title according to his ruling, therefore he has no right to say that the plaintiff is not entitled to succeed. He entirely reverses the rule on which actions to recover possession are founded, namely, that he who seeks to turn another out of possession must first prove that he has a better title. His judgment is consequently erroneous, and ought to be reversed.

It has been stated that the judgment obtained by the plaintiff has been executed, and that the defendant has been turned out of possession. There is no evidence to that effect; but if it is the case the defendant ought to be restored to possession, and ought not by reason of his having been turned out under an erroneous judgment to be placed in the position of having to seek to recover possession himself and to prove his title.

Their Lordships will humbly advise Her Majesty that the decree of the Judicial Commissioner be reversed, and the decree of the Officiating District Judge affirmed, that the respondent do pay the costs in the lower Appellate Court; and that, if the appellant has been put out of possession under the decree of the lower Appellate Court, he be restored to possession.

The respondent must pay the costs of this appeal.

Solicitor for the Appellant: Mr. T. L. Wilson.

Solicitors for the Respondent: Messrs. Young, Jackson, and Beard •

NOTES.

[The entries do not have retrospective effect —(1903) 26 All , 119 8 C W N 201 (207 —6 Bom., L. R. 238 7 O C 257. See also (1904) 8 O C 45 (48)]

[321] APPELLATE CIVIL.

The 5th March, 1884.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Salamat Hossein and another.....Defendants

versus

Luckhi Ram.....Plaintiff.

Civil Procedure Code (Act XIV of 1882), s. 266, proviso, cl. 1 - Attachment of monthly allowance.

A heritable right to receive a certain monthly allowance originally assigned in lieu of a share of landed property is not a mere right to maintenance or anything else exempted by the proviso to s. 266 of the Civil Procedure Code, and is saleable in execution of a decree.

THIS was a suit upon a bond for the sum of Rs. 3,000 with interest. One of the conditions of the bond was as follows :—

"I, Salamat Hossein, mortgaged and hypothecated the allowance of Rs. 100, which, on account of the inheritance of Bibi Fasihunnissa Begum, the late wife of mine, is paid to me, Salamat Hossein, in lieu of my right to the estate, month by month from the *deorhi* of Khugra. I again pledge the same," etc., etc. The plaintiff sought to enforce a lien on the monthly allowance secured to him by the bond. The Subordinate Judge gave him a decree for the realization of the amount by the sale of the mortgaged property.

The defendant appealed to the High Court.

Mr. R. E. Twisdale (with him Munshi Mohamed Yusuf) for the Appellants, contended, as it had been in the Court below, that the right to receive the allowance was not property which could be seized in execution under s. 266 of the Code of Civil Procedure.

Mr. C. Gregory and Baboo Nilmadhub Bose for the Respondent.

The Judgment of the High Court was delivered by

Tottenham, J.—The only question laid before us in this appeal is whether or not the right to receive a certain monthly allowance is seizable and saleable in execution of a decree. The appellant, Salamat Hossein, who is the party entitled to the allowance, mortgaged it under a bond executed by himself and other persons to the plaintiff respondent in consideration of a loan advanced by the latter. The decree provides for the realization of the amount due by the sale in the first place of the mortgaged property.

It is contended that the right to receive the allowance is not property which can be seized in execution under s. 266 of the Code of Civil Procedure. It seems to us that, under the circumstances, it is saleable, for it is shown to be a heritable right derived by the appellant from his deceased wife to whom it was assigned in lieu of her share of landed property. It is thus not a mere right to maintenance, nor anything else exempted by the proviso to s. 266; and as the appellant himself mortgaged it with a stipulation that it should, if necessary, be sold for the liquidation of his debt, it does not lie in his mouth to deny that it can be seized and sold. His pleader has relied upon the case of

* Appeal from Original Decree No. 134 of 1882, against the decree of Baboo Moti Lal Sagar, Subordinate Judge of Purneah, dated March 25th, 1882.

Nilkanto Dey v Hurrosoonderee Dossee (I L R, 3 Cal, 414) in which a question arose as to the attachment of *malikana* payable by the Collector to the judgment-debtor. But in that case it was not ruled that the right to *malikana* could not be sold, but only that the attachment was not sufficiently made by the mere issue of a notice to the Collector under s 237 of Act VIII of 1859. The case does not help the appellants before us. We granted time to enable the parties to come, if possible, to an amicable settlement, but they have found it impossible to do so and we do not see our way to impose terms on the plaintiff or to stay execution. The appeal must be dismissed with costs.

Appeal dismissed

NOTES

[The judgment debtor's life interest in certain funds settled with the Official Trustee was held liable to attachment and sale in 12 Mad. 250 (253).]

[523] APPELLATE CIVIL

The 6th March 1884

PRESENT

MR JUSTICE McDONNELL AND MR JUSTICE FIELD

KIRTE Mohaldar and others

Defendants

versus

Ramjan Mohaldar

Plaintiff

Appeal from order. Suit of the Small Cause Court class. Civil Procedure Code (Act XIV of 1882) ss 562, 586, 589 cl (29) and 589.

A Court in the exercise of appellate jurisdiction passed an order under s 562 of the Civil Procedure Code remanding a case of the Small Cause Court class as described in s 586. *Held* that under the express words of the second portion of s 589 of the Code an appeal does lie to the High Court from such an order.

IN this suit the plaintiff on the allegation that the defendants had prevented him from fishing in a certain *gulku* laid a claim for damages to the amount of Rs 305. The Munsiff dismissed the suit on the sole ground that the plaintiff could not recover damages before he obtained actual possession. On appeal, the District Judge held that a suit for damages would lie and remanded the case for trial on the other issues. On appeal to the High Court from that order, a preliminary objection was taken by the respondents (plaintiffs) pleader, *viz*, that no appeal would lie because the suit was one of the Small Cause Court class, and the amount of the damages not exceeding five hundred rupees.

* Appeal from Appellate Order No 318 of 1883, against the order of R H (reverses Esq) Officiating Judge of Rajshahye dated 13th of August 1883 reversing the decree of Biboo Kuruna Dass Bose, Munsiff of Maldah, dated 25th of November 1882 and remanding the case.

Baboo *Kallikissen Sen* for the Appellants.
 Baboo *Gopeenath Mookerjee* for the Respondents
 The Judgment of the High Court was delivered by

Field, J.—A preliminary objection has been taken in this case, *viz*, that no appeal will lie because the suit is one of the Small Cause Court class being a suit for damages. Section 586 of the Civil Procedure Code provides that “no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, etc. The present appeal is not a *second* appeal. It [524] is an appeal from an order falling under cl 28 of s 588. Section 589 provides as follows. An appeal from any order specified in s 588, cls (15), (16) and (17), shall lie to the High Court. “When an appeal from any other order, that is, any other order than the orders specified in cls (15), (16) and (17), is allowed by this chapter,” (and it is clear that an appeal under cl 28 comes within this description), it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or, when such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.”

Now if the present case had to be governed by the first portion of this sentence, it might be contended that, as no appeal lies from the decree in the suit in relation to which the order was made, therefore no appeal will lie from the order, but this first portion of the sentence does not apply. The portion which applies is the *second* portion, *viz* “When such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.” The order in the case now before us was passed by a Court in the exercise of its appellate jurisdiction, and therefore, under the express words of this section, the appeal lies to the High Court. There may have been an oversight on the part of the Legislature but we think that upon the interpretation of this express language, we must hold that an appeal in a case of the Small Cause Court class lies to the High Court from an order made under s 562 remanding a case.

The question raised upon the appeal itself has, we think, been properly decided by the Judge in the Court below. This appeal will, therefore, be dismissed with costs.

Appeal dismissed

NOTES

[Under the C P C 1908 an appeal lies from an order under sch 1 O 41 r 23 see O 41 r 1 (u) by virtue of sec 105 (2) thereof where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. See (1897) 24 Cal 774 (777) where this case was distinguished.]

[525] APPELLATE CIVIL.

The 4th January, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Luchmon Sahai Chowdhry and another.....Plaintiffs
versus
Kanchun Ojhain and others.....Defendants *

Limitation—Suit for declaration of title—Suit to set aside an order of revenue authorities—Land Registration Act (Act VII of 1876), s. 89—Limitation Act (Act XV of 1877), sch. II, art. 14.

The Civil Court has no power to set aside an order passed under the Land Registration Act, and when a prayer for such relief is contained in a plaint which also asks for a declaration of right and title to, and confirmation of possession in property, such prayer may be treated as mere surplusage

When, therefore, a plaint was filed containing separate prayers for the above relief, and when the original Court held that the main object of the suit was to have certain orders made by the revenue authorities set aside, and that the suit was accordingly governed by art. 14 † sch. II of the Limitation Act, and passed a decree dismissing the suit as having been brought more than a year after the date of such orders,

Held, that such a decree was wrong; that the suit being one simply for the declaration of the plaintiffs' title in respect of the property in dispute, art. 14 had no application to the case.

IN this case the plaintiffs sought to be confirmed in the possession of, and to have an adjudication of, their right and title to a share in certain mouzahs in the district of Durbungah. They alleged that they had purchased the share in question, and that upon their submitting a petition for the registration of their names in respects thereof, the defendants filed a petition of objection denying the purchase, and that the plaintiffs were in possession of the disputed share as they alleged.

This petition of the plaintiffs was disallowed on the 21st June 1879, and that order was upheld by the Collector on the 28th August 1879, on an appeal being preferred to him. The plaintiffs then carried their appeal to the Commissioner, but that officer, on the 2nd July 1880, dismissed it on the ground that no appeal lay to him from an order passed by the Collector, merely affirming the order of the Deputy Collector.

* Appeal from Original Decree No 197 of 1882, against the decree of Baboo Koilas Chunder Mukerji, Rai Bahadur, First Subordinate Judge of Mozufferpore, dated 6th March 1882.

† [Art. 14 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year ...	The date of the act or order.]

The plaintiffs accordingly, on the 1st July 1881, filed this suit, praying—
[526] (1). That the Court would be pleased to confirm, by adjudication of their right, title, and possession, their possession in the disputed mouzahs.

(2). That the Court should adjudge that the defendants had no right or title to the possession of the share in the mouzahs in respect of which their names had been registered, and which were claimed by the plaintiffs.

(3). That the Court should set aside the orders made in the Revenue Department, dated the 21st June 1879, the 28th August 1879, and the 2nd July 1880, and grant the plaintiffs a decree for the registration of their names in the Collectorate in respect of the shares claimed.

In the lower Court the only issue determined was that of limitation. That Court held that, as the main object of the suit was to set aside the Collector's and Revenue Commissioner's orders refusing to register the plaintiffs' names in respect of the disputed share under the Land Registration Act (Bengal Act VII of 1876), and as the prayer for the declaration of right was merely a subsidiary prayer, the suit was governed by art. 14, sch. II of the Limitation Act, which allowed only one year from the date of the order. It further held that the time during which the appeal was pending before the Commissioner could not be deducted, inasmuch as no appeal lay to that officer at all under s. 85 of the Land Registration Act, and that the period should therefore be calculated from the 28th August 1879, and that the suit was therefore barred. The Court also refused to apply art 144 of sch. II of the Limitation Act to the suit on the ground that that Act only applies to cases in which possession is asked for.

The Court accordingly dismissed the suit with costs.

Against that decree the plaintiffs now appealed to the High Court.

Munshi Mahomed Yusuf for the Appellants.

Baboo Unnoda Pershad Banerjee, *Baboo Chunder Madhub Ghose*, and *Baboo Raghunundan Pershad* for the Respondents.

The **Judgment** of the High Court (MITTER and MACLEAN, JJ), was delivered by

Mitter, J.—We are of opinion that the decision of the lower Court dismissing the plaintiffs' suit as barred by limitation under **[527]** art. 14, sch. II of the Limitation Act is erroneous. It is true that the plaintiffs in the plaint prayed for the reversal of the orders passed under the Land Registration Act VII of 1876, but that prayer may be treated as mere surplusage. The Civil Court has no power to set aside an order passed under the Land Registration Act. The second clause (a), section 89, of the Land Registration Act provides that nothing contained in that Act shall be deemed to "preclude any person from bringing a regular suit for possession of, or for a declaration of right to, any immoveable property to which he may deem himself entitled," and that is the clause under which the plaintiffs in this case are entitled to maintain this suit for declaration of their right to the property in dispute, and if they can successfully establish that right in a Civil Court, then under the decree of the Civil Court they would be entitled to have their names registered. On the production of that decree and on a proper application being made by the plaintiffs, the revenue officers will rectify their register in accordance with the declaration made by the Civil Court. Therefore it is quite clear that art. 14 has no application, because it is not a suit to set aside any act or order of an officer of Government in his official capacity. It is simply a suit for declaration of the plaintiffs' title, in respect of the property in dispute. Whether the six years' limitation, or the twelve years' limitation applies, we

need not discuss, because in either case the claim is within time. All that we decide in this appeal is simply this, that the plaintiffs claim on the face of the plaint is not barred under the provisions of art 14 of the second schedule of the Limitation Act

We set aside the judgment of the lower Court and remand this case to that Court for trial on the merits Costs, as usual, will abide the results

Appeal allowed and case remanded

NOTES

[Art 14 of the Limitation Act 1817 would not bar a suit by a person dispossessed under Bengal Act VIII of 1876 sec 116 even though no suit be brought to set aside the Collector's order under sec 150 when the plaintiffs were not parties to the order of the Collector — 24 Cal 149

See also 32 Cal 716 33 Cal 693 (1907) J C 1 J 91]

[328] APPELLATE CIVIL

The 5th March 1884

PRESENT

MR JUSTICE TOLLINHAM AND MR JUSTICE NORRIS

Hanuman Kamat (Plaintiff) Appellant

versus

Dowlut Mundar and others (Defendants) Respondents

*Hindu law Mitthala Sale by one of several co sharers in a joint estate
How far alienation by father of joint family property
is binding on sons Antecedent debts*

Although no member of a joint Hindu family governed by the Mitthala or Mitthala law has authority without the consent of his co sharers to sell or mortgage even his own share in order to raise money on his own account and not for the benefit of the joint family yet if a father does alienate even the whole joint property of himself and his sons in order to pay off antecedent personal debts the sons cannot void such alienation unless they prove that the debts were immoral

But to make the alienation to this extent binding upon the sons who did not consent to it it must be shown that it was made for the payment of antecedent debts and not merely in consideration of a loan or of a payment made to the father on the occasion of his making the alienation In the case of a voluntary sale the purchase money does not constitute an antecedent debt such as to render that sale binding on the sons unless they prove the transaction to have been immoral

In this case the first defendant, Dowlut Mundar was the father of the defendants Nos 2 to 6 defendant No 7, Sarober being the son of Hanuman, defendant No 2 In March 1867 a conveyance of a 1 anna 6 gundas 2 cowries and 2 krants share in a certain mouzah was executed by one Raghunundun Jha in favour of Hanuman Subsequently at an execution sale the rights of Damuda Jha and others in a 6 annas 3 gundas 1 cowrie 1 krant share in the same mouzah was purchased in the name of Sarober, making in all an 8 anna share in the said mouzah In August 1879 Dowlut Mundar executed in favour

* Appeal from Appellate Decree No 219 of 1883 against the decree of W Verner Esq Judge of Bhagulpore dated 18th of December 1882 reversing the decree of Moulvie Hafez Abdul Kurim Second Subordinate Judge of that district dated the 19th of September 1881

of the plaintiff a deed of sale, purporting to convey 2 annas and 10 gundas out of the said 8-anna share standing in the names of Hanuman and Sarober. After obtaining such conveyance the plaintiff applied to the Collector to have his name registered as proprietor of the share [529] so purchased by him, but on an objection to such registration being preferred by Hanuman and Sarober, his application was rejected.

He accordingly brought the present suit to obtain possession of the share so purchased by him, and to have the order of the revenue authorities set aside.

Hanuman and Sarober alone appeared and contested the plaintiff's claim.

The fact of the purchase of the respective shares in the names of those two defendants has not been disputed, but the plaintiff alleged that all the defendants were members of a joint Hindu family governed by the Mithila law, and that the purchases were made in these names out of joint family funds by Dowlut Mundar and on behalf of the joint family, and that Dowlut Mundar had caused those defendants to file the petition of objection before the Collector to prevent him obtaining possession of the share which he had purchased.

Hanuman and Sarober both filed written statements, denying that they were joint either with Dowlut Mundar or with each other, and alleging that the respective shares had been bought by them each out of his own separate funds.

The first Court held that the defendants were members of a joint family, and that the property in suit was the property of the joint family, and in this finding of fact the lower Appellate Court concurred.

Amongst the issues raised in the first Court the only one material for the purposes of this report was whether or not the share in the property claimed by the plaintiff was sold by Dowlut Mundar for the benefit of the joint family, and with the consent of all the defendants. Upon this issue the first Court found that the defendants Hanuman and Sarober were present when the conveyance to the plaintiff was executed, and that it was executed with their consent; that the consideration money was paid to Dowlut Mundar, and that it was not proved by the sons that the share had been sold for immoral purposes, or that the purchase-money had been applied to such purposes. That Court accordingly gave the plaintiff a decree.

Hanuman and Sarober thereupon appealed, and the lower Appellate Court disagreed with the finding of the Court below, that [530] those defendants had been present at the execution of, and consenting parties to, the conveyance, and held that that fact had not been proved, that though there was some evidence that shortly after the sale Rs. 1,100 had been paid by Dowlut Mundar to one Bhukun, being the principal and interest on a loan alleged to have been expended on the marriage of the sons of some of the defendants, there was no sufficient ground for holding that the sale had been effected for the benefit of the members of the joint family. That Court further held that upon the authority of *Sadabar Prasad Sahu v. Foolbash Koer* [3 B. L. R., (F. B.) 31], it was precluded from making a decree as against Dowlut Mundar, and the other defendants, who did not contest the suit, and accordingly reversed the decree of the Court below, and dismissed the plaintiff's suit with costs.

The plaintiff now specially appealed to the High Court against that decision.

Mr. O. C. Mullick, Mr. C. Gregory and Baboo Aubnash Chunder Bannerjee for the Appellant.

Mr. Evans and Baboo Troilockya Nath Mitter for the Respondents.

The following cases were cited and relied on at the hearing of the appeal. On the question as to the son's liability for the debts of the father—*Girdhari Lall v. Kantoo Lall* (14 B. L. R., 187; 22 W. R., 56); *Suraj Bunsí Koer v. Sheo Pershad Sing* (I. L. R., 5 Cal., 148; L. R. 6 I. A., 88); *Luchmun Dass v. Giridhur Chowdry* (I. L. R., 5 Cal., 855; 6 C. L. R., 473); *Rampal Singh v. Degnarain Singh* (10 C. L. R., 489); *Gunga Pershad v. Sheo Dyal Singh* (5 C. L. R., 224).

And upon the contention that the father's share was at least liable, and that the plaintiff had a right to have the father's share ascertained upon partition—*Deendyal Lal v. Jugdeep Narain Sing* (I. L. R., 3 Cal., 198), *Phoolbas Koonwar v. Lalla Jogeshur Sahoy* (I. L. R., 1 Cal., 226), *Mahabees Pershad v. Ramyad Singh* (12 B.L.R., 90, 20 W. R., 192).

[531] The Judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

Tottenham, J.—This suit was brought to obtain possession of a 2½ annas share of a certain mouzah by virtue of a conveyance executed in the plaintiff's favour on the 1st of August 1879 by Dowlut Mundar, defendant No. 1. Plaintiff was unable to get possession by reason of the opposition of defendants 2 and 7, a son and grandson of Dowlut, who set themselves up as the exclusive owners of the property claimed by plaintiff, and denied that Dowlut had any interest in it.

The other five defendants are all sons of Dowlut.

The suit in the Courts below, and the present appeal to this Court, have been defended by only defendants Nos. 2 and 7, and since the appeal was filed, the defendant No. 1, Dowlut Mundar, has died. A moiety of the village in question has been found to be the joint property of the seven defendants, composing a family governed by the Mithila law. And the question before us is, whether the alienation made by the father, Dowlut, is binding upon the son and grandson who contest it.

The plaintiff in his plaint alleged that the sale was made to him under necessity and for the benefit of Dowlut's family. In evidence he attempted further to prove that the sale was made with the direct assent even of the defendants 2 and 7.

The lower Appellate Court has found that this was not so; and has also found that the sale was not shown to have been effected for the benefit of the family. It held that the family were not bound by it, and considered that the ruling in the case of *Sadabart Pershad Sahu v. Foolbash Koer* [3 B. L. R., (F. B.) 31] forbade the passing of a decree for the plaintiff even for so much of the share claimed as belonged to Dowlut himself and to the other non-contending defendants.

The learned counsel for the plaintiff appellant has impugned the lower Appellate Court's decision that the sale by Dowlut is not binding on the respondents on this ground, that they have not proved that the money raised by the sale was obtained for immoral purposes or for the discharge of immoral debts; and he [532] contends that in a suit in which the son contests the validity of an alienation made by the father, it is incumbent upon him to prove that the object was to pay off immoral debts, and not upon the purchaser to prove that there was legal necessity for the sale.

We have considered all the cases cited to us as bearing upon this point, and the outcome of them all appears to be that, although no member of a joint Hindu family governed by Mitakshara or Mithila law has authority, without the consent of his co-sharers, to sell or mortgage even his own share

in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of himself and his sons, in order to pay off antecedent personal debts, the sons cannot avoid such alienation unless they prove that the debts were immoral.

But to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, not only in consideration of a loan, or of a payment made to the father on the occasion of his making the alienation.

It cannot be said that in the case of a sale voluntarily made the purchase money itself constitutes an antecedent debt, such as to render that sale binding on the sons, unless they prove the transaction to have been immoral.

In the present case the facts found by the lower Appellate Court are not sufficient to entitle the plaintiff to a decree; for the Judge does not find that there was any antecedent debt, for the liquidation of which the father sold the property. On the contrary, though one witness deposed that a sum due to him was paid off shortly after the sale, the Judge evidently does not believe that the sale was effected for that purpose.

So far as the contesting defendants, therefore, were concerned, we cannot say that the lower Appellate Court was wrong in deciding in their favour. And as regards the other contention on behalf of the plaintiff appellant that the Court below should have given him a decree so far as concerned the interests of the non-contending defendants, we feel bound to hold that the sale having been found not to have been for the benefit of the family, and not having been shown to be necessary for the payment of antecedent debts [533] the authority of the ruling in *Sadabart Pershad Sahu's* case was binding on the lower Court, and it rightly refused to recognize the alienation.

It would be still more difficult to give effect to it now that the defendant No. 1 who was the vendor is dead, and his interest in the property has thus become extinguished. Even if the lower Court had a discretion in the matter, we cannot say that as a matter of law it was bound to exercise it.

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[As regards antecedent debt, see 15 All. 75, 31 All. 176; 6 A. L. J. 273; 29 Mad. 200; 35 Bom. 169, 34 Cal 735]

[10 Cal. 333]
APPELLATE CIVIL.

The 22nd February, 1884.

PRESENT.

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Jugatmoni Chowdrani.....Plaintiff

versus

Romjani Bibee and others..... Defendants *

Wuqf, Essentials of—Increase in value of wuqf properties how appropriated.

Where by a *sunnu*d a gift was made of the then income of certain villages with a specification that one-third of it was for the defrayal of the expenses of the servants of a mosque and *fursh* and light, etc., one-third for the expenses of a *mudrassa*, and the remaining one-third for the maintenance allowance of the *mutwulli*, *Held*, that the gift complied with the four essential conditions necessary to create a valid *wuqf* according to Mahomedan law. *Held*, also, that in the absence of any express direction as to what was to be done with any surplus profits of the dedicated property, the reasonable presumption is that the improved value of the dedicated property, or any excess of profit over and above the amount stated in the *sunnu*d, was intended by the grantor to be devoted to the same purpose for which the amount, which was the actual value of the property at the time of the gift, was expressly assigned

IN this suit one Jugatmoni Chowdrani sued for possession of certain villages. She based her claim upon a *dur-mokurruri* lease granted by one Azizunnissa Bibi, who, it was alleged, had obtained a *maurusi* lease of the property from one Jaffir Ali. The defendants, among other things, contended that Jaffir Ali held possession only as *mutwulli*, and had no proprietary right to the villages, and that it was not competent to him to grant a permanent lease thereof. They relied upon two old *sunnu*d's which provided that "Mouzah Adoni, etc., [334] bearing a jumma of Rs. 1,080, are fixed and confirmed as *mudud-mash bafurzandan* in favour of the *mutwulli*, and the other servants of the said mosque; that the said mouzah, etc., etc., should be given over to their possession *bafurzandan*, so that they may enjoy the proceeds of the aforesaid mouzahs and defray the expense of *fursh*, lighting, etc., and ever be employed in prayers for eternal and perpetual wealth." There was then a memorandum or endorsement to the effect that mouzah Adoni, appertaining to pergunnah Luskerpore, of which the annual income of Rs. 1,080 should be divided into three portions, one-third or Rs. 360 per annum for the defrayal of the expenses of the servants of the mosque and *fursh* and light, etc., one-third or Rs. 360 per annum for the expenses of a *mudrassa*, and the remaining one-third or Rs. 360 for the maintenance of the *mutwulli*. The Subordinate Judge dismissed the suit, but held, relying on *Futtoo Bibee v. Bhurat Lal Bhukut* (10 W. R., 299) and *Basoo Dhul v. Kishen Chunder Geer Gossain* (13 W. R., 200), that the properties were not *wuqf*, but merely heritable estates burdened with a trust. On appeal to the High Court an objection was taken to the judgment of the Court of First Instance, under s. 561 of the Code of Civil Procedure, and the pleader for the respondents supported the decree upon the question of *wuqf*, which had been decided against them in the lower Court.

Mr. Pugh, Baboo Kishori Mohun Roy, Baboo Sharda Churn Mitter and Baboo Kishori Lal Sircar for the Appellants.

* Appeal from Original Decree No. 225 of 1881, against the decree of Baboo Girish Chunder Chowdhry, Rai Bahadur, Subordinate Judge of Rajshahye, dated 20th of June 1881,

Mr. C. Gregory and Baboo Rajendra Nath Bose for the Respondents.

The **Judgment** of the High Court was delivered by

McDonell, J.—Mr. Gregory, who appears on behalf of the respondents, has contended that under s. 561 of the Code of Civil Procedure, he is to support the decree of the Court below upon the question of *wuqf*, which was decided against him in the lower Court. We think that this contention is sound, and we proceed accordingly to deal with the question of *wuqf*. The first grant is to be found at page 50 and following pages of the paper-book, and it is dated [335] so far back as the year 1756. It recites that a firman is issued to the effect that mouzah Adoni, etc., appertaining to taluk pergunnah Luskerpore, etc., Sirkar Barungabad, in the province of Bengal, which yields a sum of Rs. 1,080, be fixed (granted) *bafurzandan* as detailed in lieu of Rs. 3 per day for the expenses of *fursh*, lighting, and servants of the mosque, and *mudrassa* erected by Dost Mahomed Khan in Lalbagh, pergunnah Asadnugur, Sirkar Oodnir as *mudud-mash* of the *mutwulli* Bedar Ali and other servants of the aforesaid mosque. It then directs that the authorities, *amlas* and others do give over the said mouzah in their appropriation *bafurzandan*, without any change or alteration, and that they should raise no objections as to *malwajhat* and other items of expenditure, and should not demand a fresh *sunnu* every year. There is then a memorandum, or endorsement to the effect that mouzah Adoni, appertaining to pergunnah Luskerpore and so forth, of which the annual income is Rs. 1,080 in lieu of Rs. 3 per day for the defrayal of certain expenses as aforesaid, has been granted; and attached to this document there is a specification of the manner in which the sum of Rs. 3 per day is to be spent. This sum is divided into three portions, one-third or Rs. 360 per annum is for the defrayal of the expenses of the servants of the mosque and *fursh* and light, etc., etc., one-third or Rs. 360 for the expenses of a *mudrassa* at one rupee per day, and the remaining one-third or Rs. 360 for the maintenance allowance of Bedar Ali, son of Dost Mahomed Khan. These three portions make up the total of Rs. 1,080 and the nett jama of the villages granted is shown to amount to the same sum.

The second grant is dated 14 years later, 1770 A. D., and it recites that the first grantee, Bedar Ali, who had been adopted by Dost Mahomed, having been found incompetent to discharge the duties of *mutwulli*, had been turned out of the house, and the said Dost Mahomed Khan has applied for a *sunnu* in his own name. The new grant is then made to Sheik Fukeerulla, nephew of Dost Mahomed Khan, and the document concludes as follows:—

“For this purpose mouzah Adoni, etc., appertaining to the said pergunnah, etc., bearing a jumma of 86,500 *damao* which are equivalent to Rs. 1,080, are fixed and confirmed as *mudud-mash* [536] *bafurzandan* in favour of Sheik Fukeerulla, the *mutwulli*, and other servants of the said mosque. It is that the said mouzah, etc., should be given over to their possession *bafurzandan* without in any way raising objections, so that they may enjoy the proceeds of the aforesaid mouzahs and defray the expenses of *fursh*, lighting, etc., and ever be employed in prayers for eternal and perpetual wealth.” Then follows an account similar to the account of the manner in which the proceeds are to be spent, set out in the first instrument and to which I have already referred.

The first question with which we shall deal is, whether this instrument is one which creates a *wuqf* valid according to Mahomedan law. Let us see what are the essentials of such a grant. In the first place, the appropriator must destine its ultimate application to objects not liable to become extinct; secondly, it is a condition that the appropriation be at once complete; thirdly, that there be no stipulation in the *wuqf* for a sale of the property and expenditure

of the price on the appropriator's necessities ; and fourthly, perpetuity is a necessary condition. We think that this grant fulfils all these four essentials. Then it is provided by the Mahomedan law that if a man appropriate his land for the benefit of a *musjid* and to provide for its repairs and necessities, such as oil, &c., this is valid appropriation. Looking at the instruments of grant in this case, it appears to us that there was a valid appropriation. But then arises the question what was appropriated. It has been contended by the learned counsel for the appellant that all that was the subject of appropriation was the annual sum of Rs. 1,080 ; and that all the surplus profits of the villages over and above this annual sum must be taken to have been given to Fakeerulla and his heirs who are related to Dost Mahomed Khan, who obtained the grant and erected the mosque. We have considered this argument, and it appears to us that what was appropriated was not the annual sum of Rs. 1,080, but the whole of the villages. We think that the specification contained in the two instruments was merely intended to indicate the proportions in which the money was to be expended on the different objects of the appropriation. It is [537] true that the grantor does not seem to have contemplated an increase in the value of the property. Certainly he has made no express provision for any surplus profits that such increase or an improved value of the property might yield over and above the annual sum of Rs. 1,080 : nevertheless, looking at the express terms of the grant, it appears to us, as I have already said, that the whole of the annual profits of the villages was the subject of appropriation. We think that in dealing with the surplus profits we must decide that those profits are to be appropriated in the same proportion to the objects for which the sum of Rs. 1,080, which was at that time the annual profit of the villages, was expressly appropriated. In putting a construction upon this grant of the Mahomedan Government, we may refer, by way of illustration, to the case of *jagirs*, which were grants of land to those retainers of the Mahomedan Government who were still in service. They were assignments, not of the land, but of the revenue, and were made as an appendage to the dignity of *mansub*, a kind of nobility conferred for life. These *jagirs* were of two kinds, conditional and unconditional. Conditional *jagirs* were granted generally to the principal servants of the Emperor, in order to meet the expenses of a particular office, and these were held only so long as the office was retained. Unconditional *jagirs* were independent of any office, and were personal grants for the maintenance of a dignity. These grants were for life only. If the lands produced more than the *mansubdar's* allowance, which was always fixed, he was bound to account for the surplus. Now it is a matter of history that these *jagirs*, which were at the time grants for life only, have become hereditary, and that the *taufir* or excess over and above the allowance fixed in the grant, instead of being accounted for and made over to the Government, has become the property of the *jagirdar*, and his descendants ; in other words, that all surplus, over and above the specific money amount of the grant, has followed the same object and destination as this specific amount.

A *tonkha* or Mahomedan assignment to revenue was in all probability something of the same kind. There is nothing before us to show that there was in this case any express direction as [538] to what was to be done with any surplus profits over and above Rs. 1,080 ; but we think that, looking at the express terms of the second grant, dated 1770, with the light which is to be obtained from similar grants made by the Mahomedan Government, the reasonable presumption is that the improved value or any excess over and above Rs. 1,080 was intended by the grantor to be devoted, or has come to be regarded by the grantee as devoted to the same purpose for which the amount of Rs. 1,080, which was in 1770 the actual value of the property, was expressly

assigned. In this view of the case we come to the conclusion that the whole property is *wuqf*; and, therefore, it was not competent to Jaffir Ali to alienate it. It may be well to say that the *dur-mokurruri* lease granted by defendant No. 4 and the *mokurruri* lease which was obtained from Jaffir Ali, though in the form of leases, are really alienations of the greater portion of the beneficial interest in the property. We are, therefore, of opinion that the decree of the Court below must be upheld, although upon a different ground to that upon which that Court has proceeded. This appeal must in consequence be dismissed with costs.

Appeal dismissed.

NOTES

[See also the following cases —(1889) 13 Mad 66 (68), (1892) 20 Cal 116, 1905 8 O. C. 379 (389).]

[10 Cal. 538]

APPELLATE CIVIL.

The 21st February, 1884.

PRESENT

MR. JUSTICE McDONELL AND MR JUSTICE FIELD.

Fakaruddin Mahomed Ahsan... .Petitioner

versus

The Official Trustee of BengalOpposite party.

Civil Procedure Code (Act XIV of 1882), ss. 244 and 647—Execution proceedings—Review.

Where a judgment-debtor, pending the execution proceedings, was granted permission to examine the state of the accounts, but failed to do so, and then made a fresh application to the Court for the same purpose after the execution proceedings had been struck off, and the decree declared to be satisfied *Held* that the question must be determined with reference to the provisions of s. 647 of the Civil Procedure Code and the only course open to the judgment debtor would have been to apply for a review of the order which declared the decree to be satisfied and struck off the execution proceedings.

Held, also, that the words, "the following questions shall be determined by order of the Court executing the decree," of s. 244 of the Code of Civil [539] Procedure, must be interpreted to mean the Court executing the decree at the time when the application is made, and that they do not include the Court which has executed the decree and has, therefore, become *functus officio*.

THIS was an application made by the petitioner for the refund of Rs. 2,33,183 from the Official Trustee who was late the holder of a decree against the petitioner. On 3rd February 1883 the judgment-debtor (petitioner) applied to the Court for liberty to examine the state of the accounts. The request was granted, but the judgment-debtor neglected to take any further steps.

* Appeal from Original Order No. 377 of 1883 against the order of F. McLaughlin, Esq., Judge of Pabna, dated the 27th of August 1883.

On 7th May the decree was struck off as fully satisfied, the money having been paid out of Court. On 3rd July an application similar in terms to the one of 3rd February was made, but disallowed by the District Judge, and the petitioner thereupon appealed to the High Court.

Baboo *Grya Sunkur Mozoomdar* for the Appellant.

The *Advocate-General* and Mr. *Macnam* for the Respondents.

The **Judgment** of the High Court was as follows :—

In this case the execution proceedings were struck off by an order dated the 7th May 1883, which set forth that the decree was satisfied. The petition which forms the subject of this appeal was filed on the 3rd July following, and in that petition it was sought to re-open the whole of the accounts between the parties.

It has been contended to-day before us that this petition of the 3rd July ought to be read with a previous petition of the 3rd February 1883. As to this petition of the 3rd February, the Judge says : "In February last, the judgment-debtor applied to scrutinize the state of the account, and the request was granted." The original petition has not been produced before us to-day, and we must accept the account given of it by the District Judge. Accepting this account, it appears clear that all that was asked by the petition of the 3rd February was permission to examine the accounts, and that this permission was granted. This being so, it was open to the judgment-debtor, having examined the accounts between the 3rd February and 7th May, to object to the manner in which they were taken, and, if necessary, to the sum total for which execution was issued. Nothing of this sort was done, and we [540] must take it that the effect of the order of the 7th May was to close the execution proceedings.

It is contended that the judgment-debtor had a right to apply on the 3rd July to re-open the accounts, and it is said that, as there is no special provision of the Limitation Act applicable to an application of this kind, the judgment-debtor was at liberty to make this application at any time within three years. *Art 178*.—There is no section of the Code of Civil Procedure which gives the judgment-debtor a right to make an application of this kind,—that is, an application, after the execution has been closed and the decree satisfied, to re-open a matter which might have been discussed or argued in the course of the execution proceedings. We think, having regard to the provisions of s. 647 of the Code of Civil Procedure, that if the judgment-debtor having neglected the opportunity which he had between the 3rd February and the 7th May to examine the accounts, desired to show that more money had been levied from him under the execution than was due from him under the decree, the only course open to him would have been to apply for a review of the order of the 7th May, which declared the decree to be satisfied, and struck off the execution proceedings.

It has been contended that the matter of this petition of the 3rd July 1883 was a matter which the Court was bound to investigate under s. 224 of the Code of Civil Procedure. That section runs as follows :—"The following questions shall be determined by order of the Court executing a decree." As we understand these words, we think they must be interpreted to mean the Court executing the decree at the time when the application is made, and that they do not include the Court which has executed the decree, and has thereby become *functus officio*. We were pressed with the case of *Sheikh Ali Hossein v. Sheikh Muzhur Hossein* (4 C. L. R., 577). That was a case decided under the old Code of Civil Procedure (Act VIII of 1859 read with Act XXIII of

1861). The facts of that case are not clearly stated either in the judgment, or in the statement of facts given by the reporter. Mr. Justice BROUGHTON says: "The payment of Rs. 1,275 by the judgment-debtor in December 1868 was a payment made [541] in consequence of a decree having been passed against him, and an account having been made, showing that a balance of Rs. 732 was still due from him. That account was not a final one, but subject to revision, and appears to have been subsequently revised." We are not in a position, therefore, to say what was the nature of the account in that case, and how far the decision itself is applicable as a precedent. The view which we take of the law is in accordance with the decision of the Madras High Court in the case of *Ramanadan Chetti v. Kunnappu Chetti* (6 Mad. H. C. R., 304). That also was a case under the old law. We think, however, that this question must now be determined with reference to the provisions of the new Code, and as s. 647 has made applicable to all proceedings other than suits or appeals, the provisions of the Code which are applicable to suits or appeals, we think, as already stated, that the only course open to the judgment-debtor was to apply for a review. We are then asked to treat this application of the 3rd July as an application for review, but we are of opinion that this course is not open to us. The appeal is therefore dismissed with costs.

Appeal dismissed.

NOTES.

[A separate suit will lie when the execution proceedings are closed :—(1897) 1 C. W. N., 708; (1889) 15 Cal., 187 (194); (1909) 31 All., 364; (1905). U. B. R., 4th Qr. C. P., 36 (38); (1901) P. R. 63. (1901) P. L. R., 101; (1910) 10 I. C. 991 (1910) I. U. B. R. 66. See also (1901), 5 C. W. N. 627 (629) where this case was distinguished, (1899) 2 O. C. 366 (368); (1904) P. R. 45. (1904) P. L. R. 113.

In (1895) 18 All., 106 (107) it was held that sec 244 C. P. C., 1882 (sec 47 of C. P. C., 1908) was not applicable to suit for contribution by one of two judgment-debtors, who had paid up the decree, against the other]

[10 Cal. 541]

APPELLATE CIVIL.

The 4th and 14th March, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Fuzloor Ruhman(Judgment-debtor) Appellant

versus

Altat Hossen and others.....(Decree-holders) Respondents.*

Decree, Execution of—Step in execution of decree—Informal application for execution—Limitation Act (Act XV of 1877), sch. II, art. 179.

An application for execution of a decree having been made on the 19th January 1882 within time, but not in the form prescribed by the Civil Procedure Code, inasmuch as it did

as from Appellate Orders Nos. 200 and 201 of 1883, against the orders of H. Beveridge, Esq., Judge of Patna, dated 29th of March 1883, affirming the orders of Baboo Porosh Nath Banerjee, Second Subordinate Judge of that district, dated, respectively, the 27th of January 1883 and 30th of December 1882.

not contain the right number of the suit in which the decree was passed, an order was made on the 19th January directing the petitioner to amend the application within four days by giving the correct number. That order was not complied with, and the petition was left on the file of the Court without being [542] disposed of in any way till the 21st September 1882; on which date more than three years having then elapsed since the date of the decree, it was returned to the vakil of the petitioner for amendment within eight days. The required amendment was made, and the application again placed on the file of the Court on the 22nd September.

On an objection being taken that the decree was barred, and that execution could not issue, *Held*, following the principles laid down in the case of *Syud Mahomed v. Syud Abeddollah* (12 C.L.R., 279), viz, that it was the duty of the Court to dismiss the application when it found that it was informal, and thus to give the applicant an opportunity of putting in a proper application, and that the decree-holder should not be made to suffer for such omission on the part of the Court, that the former application could not, though informal, be treated as a nullity; and that the application on the 22nd September must be taken as having been presented with the object of amending the original informal application, and that it was in continuation of the execution proceedings commenced however informally on the 19th January 1882; and that consequently the decree was not barred. *Held*, also, that the fact of the application having been returned to the vakil for amendment instead of being amended while on the file of the Court, made no difference to the application of the above principle.

THE facts of these two appeals, which were analogous ones, are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. C. Gregory for the Appellants.

Moulvie Serajul Islam for the Respondents.

The Judgment of the High Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—In this case an application for execution of the decree of the Appellate Court, which was passed in the month of February 1879, was made on the 19th January 1882. The petition did not contain the right number of the suit in which the decree was passed, and an order was made on the 19th January, directing the petitioner to amend the petition by giving the right number within four days. This order was not complied with, but notwithstanding the petition was left on the record of the Court without being disposed of in any way. It was brought up again on the 21st September 1882, and on that date it was returned to the vakil of the petitioner to amend it by [543] giving the correct number of the suit within eight days from that date. The required amendment, however, was made on the day following, viz., on the 22nd September 1882, and the application was put upon the record again. Thereupon the Court directed it to be registered and ordered notice to issue. It is quite clear that if the application be considered to have been made on the 22nd of September, the decree would be barred by limitation as it was more than three years from the date of the decree. If, on the other hand, the application is to be considered as having been made on the 19th January 1882, it would be within time. The lower Courts have decided in favour of the decree-holder. The objection taken before us in appeal is, that under the circumstances stated above the lower Court should have held that the application was really made only on the 22nd September 1882, and therefore was barred by limitation. Our attention has been called to a decision in the case of *Syud Mahomed v. Syud Abeddollah* (12 C. L. R., 279), and although the facts of that case are not exactly similar to those of the present, yet the principle upon which that decision proceeds seems to us to be applicable here. The only

difference that we can find in the facts is that, in the case under consideration, there was originally an order requiring the appellant to amend the application within four days, whereas in the case cited there was no limit fixed by the Court requiring the petitioner to amend the application. There is also another difference in the facts, viz., that in the case now before us the petition was actually returned to the vakil for amendment, while in the case cited the petition always remained on the file of the Court. But these are differences upon points which are not essential. The principle upon which the decision cited proceeded was that, as it was the duty of the Court to dismiss the application when it found that it was informal, and, as the Court did not so dismiss it, the decree-holder ought not to suffer for the omission on the part of the Court to dismiss the application, and the reason assigned for this is that, if the Court had done its duty and dismissed the application, the decree-holder might have put in a proper application on the [544] next day. Applying the same principle here, if, on the 19th of January, which in that case was within time, or on the expiration of four days from that date the application had been refused, the decree-holder would have been in time to make a fresh application in proper form. Therefore, it seems to us that the Court not having dismissed the application on the expiration of the four days allowed by it, and allowed the petition to remain on the file, the case comes within the purview of the decision cited. As to the other difference it is no difference at all, because, instead of allowing the vakils to amend the petition while it was on the file of the Court, the Court simply allowed the vakil to take it away and to amend it within the time given by the Court. That would not make any difference as to the application of the principle upon which the decision cited was passed. That being so, and it not being shown that the decision cited does not correctly lay down the law, we dismiss these appeals but without costs.

Appeals dismissed

NOTES.

[AMENDMENT OF INFORMAL EXECUTION APPLICATIONS—

Sec 245 of the C P C, 1882 was in the O P C, 1908, sch I, O 21, r. 17, amended in two important particulars viz, in sub clause, the words, 'the defect to be remedied' were substituted for the word 'amended', and a new sub-clause (2) was added providing for the amendment being "deemed to have been an application in accordance with law and presented on the date when it was first presented"

This rule affects the value of 23 Cal 217 but virtually gives effect to decisions like 17 Mad. 76, 2 A.L.J., 367 (869), 20 All 478. See also (1890) 17 Cal 691 (635), 118 P.R., 1912.]

[10 Cal. 344]
APPELLATE CIVIL.

The 31st March, 1884.

PRESENT.

MR. JUSTICE MACLEAN AND MR. JUSTICE FIELD.

Watson & Co. Defendants

versus

Nistarini Gupta..... Plaintiff.

Vis major—Ijara settlement—Land acquired by Government for public purposes—Deduction from rent.

An ijaradar took on lease certain lands, giving a *habuliat*, which contained the following clause —“In regard to the aforesaid rent we take upon ourselves the risk of flood and drought, of death and flight, of alluvion and diluvion, of profit and loss In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion,” &c.

During the lease part of these lands were taken up by Government for the purpose of a railway, and compensation was paid to the lessor therefor The ijaradar claimed to make a deduction from his rent for the land taken away from him Held, that such a claim did not come under the meaning of the word ‘abatement’ as used in the rent law, nor was it intended by the parties to be within the clause of the lease, but the land having been taken from the whole area demised, not by natural causes, but by *vis major*, the ijaradar was entitled to a deduction from the rent on his showing that there were tenants of his on the land who, before the land was taken by Government, paid rent to him which they had now ceased to pay.

[545] IN this case the defendants took from the plaintiff an ijara settlement of certain lands at an yearly rental of Rs 585 for a term of ten years from 1277 to 1286.

During the continuance of this settlement part of the lands included in the ijara were taken up by the Northern Bengal Railway Company, and for these lands so taken up the plaintiff had received compensation from Government. The *habuliat* given by the defendants contained, amongst others, the following clause :—

“In regard to the aforesaid rent fixed at Rs 585, we take upon ourselves the risk of flood and drought, of death and flight, of alluvion and diluvion, of profit and loss. In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion,” &c.

उत्क धार्य 585 टाका जमाय हाजा शुखा फोति फेरारी, सिकप्ति पयप्ति, लाव लोकसान जम्बा आमादिगेर कोन बाबते जमा कमिर अपप्ति करिते पारिबना, अपनाराव नदि पयप्ति इत्यादि कोन बाबते बेशि तलबकरिते पारिबेनना.॥

The defendants paid their rent up to 1285, and for 1286 paid to the plaintiff a sum of Rs. 63 only, stating that they were entitled to obtain a deduction in their rent for the lands taken up by the Government for the railway.

*Appeal from Appellate Decree No. 1529 of 1882, against the decree of Baboo G C Chowdhry, Subordinate Judge of Rajshahye, dated 11th of May 1882, reversing the decree of Baboo Kali Charan Ghosal, Sudder Munsiff of Beauléah, dated 16th of August 1881.

The plaintiff then brought the suit for arrears of rent for the year 1286, contending that the words of the kabuliat prevented the defendants from making any deduction for any purpose. The defendants contended that the deduction should be made.

The Munsiff dismissed the plaintiff's suit, deciding that the defendants were entitled to an abatement of rent.

The plaintiff appealed to the Subordinate Judge, who found that it was clearly the intention of the parties that the lessee should not be able to claim abatement on any account, and that although the ground on which abatement was claimed by the defendants was not specially mentioned in the kabuliat, yet the words "in no case" were wide enough to prevent them claiming any abatement for any purpose whatever, and he therefore held that the defendants were precluded under the terms of the kabuliat from claiming any abatement, and gave the plaintiff a decree.

The defendants appealed to the High Court.

Baboo Bhowani Charan Dutt for the Appellants.

[546] *Baboo Kahi Prosunno Dutt* for the Respondent.

The **Judgment** of the Court was delivered by

Field, J.—We think that the lower Appellate Court has taken a mistaken view of this case. The suit was one for rent against an ijaradar. The ijaradar claimed a deduction in respect of certain land which was taken up for public purposes, that is to say, for a railway. The Munsiff held that the special stipulation in the kabuliat relied upon by the plaintiff did not cover a case of this kind. The Subordinate Judge took a different view and held that the clause in the kabuliat was wide enough to cover the case of land taken for public purposes.

We have heard the clause in the kabuliat, and we think it was intended to meet the ordinary cases in which the area of land demised is diminished by diluvion,* or other similar causes, and that the present case is not within the intention of the parties. Looking at the question from another point of view, it would be inequitable that the zamindar, who has received the whole amount of compensation, should be allowed further to obtain from the ijaradar the former rent undiminished, in other words, after receiving the principal, should be allowed to continue to receive interest on this principal in the shape of rent. We think that this is not properly a case of abatement, as that term is ordinarily used in the rent law. It is a case in which the tenant seeks to have a deduction in respect of land taken away from the whole area demised, not by natural causes, but by *vis major*. In this view we think that the ijaradar is entitled to a deduction. But in order to obtain this deduction, we think he ought to show that in consequence of the land being taken for the railway, his receipts from the tenants of his ijara have been diminished; in other words, that there were tenants on the land who, before it was taken, paid him rent, which they have ceased to pay since it was taken for the railway. The appellants' vakil informs us that there is evidence of this nature on the record, and we must direct, therefore, the lower Appellate Court to consider such evidence and decide the case accordingly. We set aside the decree of the lower Appellate Court, and remand the case for a fresh decision. The costs will abide the result.

Appeal allowed and case remanded.

[547] APPELLATE CIVIL.

The 18th March, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Fakir Chand.....Plaintiff

versus

Fouzdar Misser.....Defendants.*

Landlord and Tenant—Suit for arrears of rent—Ejectment—Transferable tenure—Bengal Act VIII of 1869, ss. 22, 59.

In a suit for arrears of rent and for ejectment by a landlord against a tenant who had a right of occupancy in the holding transferable by sale,

Held (MITTER, J., *doubting*), that the tenant was not liable to ejectment, and that the landlord's only remedy was to sell the holding under the provisions of s. 59, Beng. Act VIII of 1869. *Kristendra Roy v. Aena Bewa* (I.L.R. 8 Cal. 675, 10 C.L.R. 399) followed.

Per MITTER, J.—*Quare*, whether having regard to the provisions of s. 22, Act VIII of 1869, which is not controlled or modified by any subsequent section of the Act, all ryots, whether they have a right of occupancy or not and whether such right of occupancy be saleable by the custom of country or not, are not liable to ejectment if an arrear of rent remains due at the end of the year.

THE plaintiff in this suit sought to recover the sum of Rs. 24-5-9, being principal and interest for arrears of rent in respect of some 32 bighas of land situate in mouza Parasin Pranpore at the annual jama of Rs. 141-1-3 for the year 1288 F. S. He also sought to eject the defendant from the land.

The defendant, while admitting that he held the land, contended that the jama payable by him was only Rs. 138-5-3 per annum, and that out of this amount the plaintiff allowed a remission of Rs. 5-12; that he had already paid Rs. 118, and that only Rs. 14 were due from him. He further contended that he was not liable to be ejected from his holding.

The following issues were framed:—

- (1) What is the annual jama payable by the defendant to the plaintiff?
- (2) What amount of rent is the defendant entitled to by way of remission?
- (3) Is the defendant liable to be ejected?

The first Court found the two first issues in favour of the plaintiff, [548] and on the third issue, upon the evidence, found that the defendant's jote was transferable, and that the plaintiff was not entitled to a decree for ejectment.

The plaintiff then appealed against that portion of the decree which declared that the defendant was not liable to be ejected, but the lower Appellate Court confirmed the decision of the lower Court, holding that an order for ejectment could not be passed in the case of such a tenure, and that it must be brought to sale.

The plaintiff thereupon specially appealed to the High Court on the same grounds as those upon which his original appeal was based.

* Appeal from Appellate Decree No. 2772 of 1882, against the decree of J. Tweedie, Esq., Judge of Shahabad, dated September 12th, 1882, affirming the decree of Baboo Dwarka Nath Bhattacharji, Second Munsif of Arrah, dated January 19th, 1882.

Baboo Aubinash Chunder Bannerjee for the Appellant.

Baboo Rash Behary Ghose and **Baboo Ragnundun Pershad** for the Respondent.

The Judgment of the High Court (MITTER and MACLEAN, JJ.) was as follows :—

Maclean, J.—The lower Appellate Court has found, affirming the finding of the first Court, that the defendant-respondent holds a transferable tenure and therefore cannot be ejected under the provision of s. 52, Beng. Act VIII of 1869.

The question submitted for our decision is whether a landlord is precluded from ejecting such a tenant, viz., a tenant with a right of occupancy, such right being transferable by sale, and is confined to the course laid down in s. 59 of the Act.

In the case of *Turbhobun Sing v. Jhono Lall* (18 W. R., 206) it was explained that sale, and not ejectment, was the landlord's proper remedy. In the latter case of *Krishtendra Roy Chowdhry v. Aena Bewa* (I. L. R., 8 Cal. 675 ; 10 C. L. R., 399) the very question now raised seems to have been discussed, and the decision was against the right of the landlord to eject. The decision under appeal now is in accordance with the cases I have quoted, and should, in my opinion, be confirmed. I would, therefore, dismiss the appeal.

Mitter, J.—If the question for decision in this case were *res integra*, I should hesitate much to adopt the conclusion to which the lower Courts have come. Section 22 of Beng. Act VIII [349] of 1869 says: "When an arrear of rent remains due from any ryot at the end of the Bengalee year or at the end of the month of Jeyt of the Fasli or Wilayutti year, as the case may be, such ryot shall be liable to be ejected from the land in respect of which the arrear is due: provided that no ryot having a right of occupancy or holding under a pottah, the term of which has not expired, shall be ejected otherwise than in execution of a decree, or order under the provisions of this Act."

It is clear, therefore, that all ryots, whether having a right of occupancy or not, and whether such right of occupancy be saleable by the usage of the country or not, are liable to ejectment if an arrear of rent remains due at the end of the year. This provision is not controlled or modified by any subsequent section. Upon the Act itself, therefore, the soundness of the conclusion to which the lower Courts have come is open to doubt. But as there is no conflict of authority on this point, and as it has been understood that the law has been settled in the way in which the lower Court's decision goes, I concur in dismissing the appeal with costs.

Appeal dismissed.

[10 Cal. 549]

APPELLATE CIVIL.

The 20th March, 1884.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN

Fazal Imam and others.....Decree-holders

versus

Metta Singh.....Judgment-debtor.*

Decree—Execution—Step in aid of execution—Limitation—Limitation

Act XV of 1877, sch. II, art. 179, cl. 4.

An application made by a judgment-creditor to take out of Court certain moneys, the sale proceeds realized by the sales of certain properties of his judgment-debtor in a previous execution, cannot be considered to be an application to the Court to take a "step in aid of execution," and is not therefore within the meaning of cl. 4, art. 179, sch. II of Act XV of 1877. *Hem Chunder Chowdhry v. Brojo Soondury Debee* (I.L.R., 8 Cal., 89); *Venkatarayalu v. Narasimha* (I. L. R., 2 Mad., 174) dissented from.

[550] THIS was an appeal from an order holding that the execution of a decree was barred. The application for execution was made on the 1st March 1883, and was within three years of another application, dated the 5th August 1880, made by the judgment-creditors for the purpose of taking out of Court the sale proceeds realized by the sale of certain properties of the judgment-debtors in a previous execution. The judgment-creditor contended that that application constituted the taking of some step in aid of execution; and that consequently they were within time, and that execution of decree was not barred, but the Munsiff rejected this contention, and held that the execution was barred, and this decision was upheld on appeal by the lower Appellate Court.

The judgment-creditor now specially appealed against that order.

Munshi Mahomed Yusoof for the Appellant.

Baboo Saligram Singh for the Respondent.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—The lower Courts in this case have held that the decree-holders right to execute the decree is barred by limitation. It is contended before us that this decision is wrong, because the present application, which is dated 1st March 1883, is within three years from the date of another application, dated 5th August 1880 made by the judgment-creditor in order to draw out the sale proceeds realised by the sale of certain properties of the judgment-debtor in a previous execution. In support of this contention our attention has been called to the decision in *Venkatarayalu v. Narasimha* (I. L. R., 2 Mad., 174). The lower Courts have decided this case on the strength of a ruling of this Court in the case of *Hem Chunder Chowdhry v. Brojo Soondury Debee* (I. L. R., 8 Cal., 89). We have examined both these rulings, and we find that the one of our Court is exactly in point. No doubt in the Madras case it was given as an additional reason over and above the one on which the decision mainly rested, that such an application as this was an application which came within the purview of the words "an application to take some step in aid of

* Appeal from Appellate Order No. 409 of 1883, against the order of C. B. Garret, Esq., Judge of Patna, dated 28th of September 1883, affirming the order of Baboo Sharoda Pershad Ghose, Munsiff of Behar, dated the 17th of July 1883.

[551] execution." We are of opinion that no reason has been placed before us that would warrant us in not following the ruling of our Court.

We therefore dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[STEP IN AID OF EXECUTION—

This case was dissented from in (1893) 17 Mad 165 (166), (1896) 22 Bom 340 (342), (1897) 11 C P L R 161 *See also* (1889) 12 All. 399, (1894) 19 Bom 261 (266) The Calcutta High Court has distinguished this case from those where something more has to be done beyond payment out of money, deposited in court, as for example the ascertainment of the amount payable under rateable distribution, 8 C W N 382 (384), (1900) 27 Cal 709, (1886) 14 Cal, 50, (54) Compare with these, (1905) 10 C W N 28 3 C L J 95 (96), (1905) 10 C W N, 354 (358), (1896) 23 Cal 196 (199)]

[10 Cal. 551]

CRIMINAL REFERENCE.

The 3rd April, 1884

PRESENT

MR JUSTICE MITTER AND MR JUSTICE MACLEAN

Queen-Empress

versus

Nowab Jan

Criminal Procedure Code (Act X of 1882), ss 248, 259, 345, 437—Further enquiry, Power of District Magistrate to direct—"Subordinate Magistrate"—Compoundable offence

A criminal charge under s 448 of the Indian Penal Code having been instituted, the accused was sent up by the Police before a Deputy Magistrate of the first class. Previous to any evidence being taken, the complainant intimated to the Magistrate that the case had been amicably settled, and that he did not wish to proceed further in the matter, upon which the Magistrate recorded an order, "Compromised defendant acquitted." Subsequently the Magistrate of the district, relying upon ss 248 and 259, and professing to act under s 437 of the Criminal Procedure Code, directed the Deputy Magistrate to send up the parties and proceed regularly with the case.

Held, that ss 248 and 259 had no bearing on the case, and that the mere fact of the accused had been sent up by the Police did not prevent the offence, which was legally compoundable, from being compromised, and that consequently the order of the Deputy Magistrate was perfectly correct and legal.

Held, further, that in addition to the Magistrate's order not being warranted by the fact, it was *ultra vires*, inasmuch as the Deputy Magistrate was a Magistrate of the first class and not "inferior" to the District Magistrate and to give the District Magistrate jurisdiction to call for a record under s 435 from another Magistrate and to act under s 437, the latter must be inferior. *Nobin Krishno Mookerjee v Russick Lall Laha* (I L R 10 Cal., 268) followed.

THE facts of this reference were as follows —

On the 2nd December 1883 Pir Bux complained to the Police at thana Mahinapore against Nowab Jan, charging him with house-trespass. The Police sent up the accused to the Deputy Magistrate of Lalbagh for trial, under s. 448 of the Indian Penal [552] Code, on the 6th December. After two

* Criminal Reference No 37 of 1884 and letter No 396 from the order made by T. M. Kirkwood, Esq., Officiating Sessions Judge of Moorshedabad, dated the 17th March 1884.

adjournments, when no evidence had been taken, the case being fixed for the 21st December, an application was made by Pir Bux to the Deputy Magistrate on the 20th December, informing him that the matter had been arranged and that he did not wish to proceed with the prosecution. The case being one under s. 448 of the Indian Penal Code, and being one in respect of a compoundable offence, the Deputy Magistrate on the same day recorded an order, "Compromised, defendant acquitted," and the defendant was accordingly released.

Thereupon the District Magistrate on his own motion, or at the instance of the Police, recorded certain remarks to the effect that when a case had been sent up by the Police no withdrawal by any private person could stop its being proceeded with, and relied upon ss. 248 and 259 of the Criminal Procedure Code in support of that view. He thereupon ordered the Deputy Magistrate, "under the closing portion of s. 437, to send for the parties and to proceed regularly with the case."

This course having been pursued and having resulted in the conviction of the accused and in a sentence of imprisonment being passed, the Sessions Judge, on the proceedings being brought to his notice, submitted the record for the order of the High Court, addressing at the same time a letter to the Registrar of the High Court, of which the following is an extract:—

"The District Magistrate was wrong in thinking he could set aside that order of acquittal. Section 437 of the Criminal Procedure Code dealt with a different condition of things. He was wrong in discussing ss. 248 and 259, which have nothing whatever to do with s. 345 of the Criminal Procedure Code and deal with altogether different contingencies. The offence being under s. 448 of the Indian Penal Code, and the person whose property had been trespassed on having compounded it, the Deputy Magistrate was compelled to acquit. Nowab Jan, having been acquitted, and rightly so, was not liable to be tried again for the same offence, and to be convicted and sentenced."

No one appeared on the hearing of the reference.

The **Judgment** of the Court was delivered by

[553] **Mitter, J.** (MACLEAN, J., *concurring*).—We have no doubt that the District Magistrate has mistaken the law throughout.

It appears that on a charge preferred by Pir Bux, the Police sent up one Nowab Jan for trial, under s. 448 of the Penal Code.

Pir Bux subsequently, on 19th December, petitioned the Magistrate (of the first-class), asking that as the case had been amicably settled, and that as he did not wish to proceed with the case, it might be disposed of.

The Magistrate accordingly endorsed the petition, "Compromised; defendant acquitted."

As it appears that Pir Bux was the person described in the third column of the table attached to s. 345, and that the offence is described in the second column of that table, it is clear that the order of the Magistrate of 20th December is quite correct and legal.

Neither s. 259 nor s. 248 of the Criminal Procedure Code has any bearing on the case; as all that is necessary regarding the compounding of the offence that was under investigation is to be found in s. 345, and we do not understand the law to be that no Magistrate under any circumstances has power to allow a case that is sent up by the Police to be withdrawn.

The District Magistrate's order purporting to be passed under s. 437 was therefore not warranted for the reasons given above; and it was also *ultra vires* from the fact that Mr. Beames is a first-class Magistrate and is not therefore inferior to the District Magistrate. To give the District Magistrate

jurisdiction under s. 435 to call for a case from another Magistrate, the latter must be "inferior." See *Nobin Kristo Mookerjee v. Russick Lall Laha* (I. L. R., 10 Cal., 268).

We set aside all the proceedings subsequently to the 20th December, including the conviction of Nowah Jan, dated 27th February 1884, and the sentence passed upon him.

Conviction set aside.

NOTES.

[The subordination to the District Magistrate of all Magistrates in a district, having been declared in sec 17 (Cr P. C. 1898 ; 1882) the Calcutta High Court in the Full Bench case of **12 Cal., 473** overruled this decision. To a similar effect are the Full Bench rulings in 8 Mad., 18, 7 All., 853 (*contra* 7 All., 194) and the ruling in 9 Bom., 100]

[354] ORIGINAL CIVIL.

The 3rd April, 1884.

PRESENT .

MR. JUSTICE CUNNINGHAM.

In the Goods of Cowar Suttia Krishna Ghosaul, deceased.

Letters of Administration to Hindus—Limited grant—Act V of 1881, s. 4.

Certain joint property in which five brothers were interested being the subject of a suit in which the rights of all parties were fully ascertained and decreed, one of such parties (who died after the decree) was declared entitled to a 5/30th share in the joint estate.

Subsequently to this decree several orders were made in the suit, appointing a Receiver, ordering partition, and excluding certain properties from partition and directing an account.

On partition, a 5/30th share in the properties ordered to be partitioned was allotted and made over to the guardian of the infant children of the sharer who had died, the remainder of the unpartitioned property being in the hands of the Receiver. On the taking of the account, it was ascertained that the deceased sharer had during his lifetime overdrawn from the joint estate, and that the sum so overdrawn by him would have to be made good out of the 5/30th share decreed to him ; it being alleged by the present petition that the sum allotted to him would be insufficient to cover the deficiency, and there being certain Government securities and a small sum in cash belonging to the private estate of such deceased sharer in the hands of the Bank of Bengal, the Court, on an application made for the purpose, directed letters of administration limited to the Government securities and cash to issue, considering that the facts of the case warranted a departure from the rule laid down in *Ram Chandra Seal* (I. L. R., 5 Cal., 2).

THIS was an application for letters of administration to the estate of one Suttia Krishna Ghosaul, deceased, limited to certain Government securities of the value of Rs. 6,000 and Rs. 160 in cash.

The petitioners were Suttia Bhooson Ghosaul, the eldest son of the deceased, and Soudaminey Dabee his sole widow as guardian of two infant sons of the deceased. The deceased, who died in August 1880 intestate, left the petitioners him surviving, being entitled under a decree in suit No. 568 of 1871, dated 28th November 1872, to a 5/30th share in certain joint property, subject to the right of his mother Siboosondery to certain maintenance therefrom ;

the decree directing partition of the estate, and appointing certain persons Receivers and Commissioners of partition. In January 1878 an order was obtained appointing [553] F. J. Ferguson, Receiver, in the place of the Receivers appointed under the decree, and certain property was also thereby excluded from partition, and in March 1880 certain of the properties were ordered to be excluded from partition, such properties still remaining in the hands of the Receiver. On the 31st August 1880 the widow of the deceased was appointed guardian *ad litem* of her infant sons, and in September 1880 the four infant sons were added as defendants in the place of their deceased father in the suit of 1872.

By certain orders, dated 12th January 1881, and 17th December 1881, the Commissioners of partition appointed in the suit certified that a 5/30th share of the moveable and immoveable property had been allotted to the present petitioners, and such share was made over to the Receiver, but was subsequently made over to the widow of the deceased as guardian of the infant sons, on her giving security, the properties which were excluded from partition remaining as above-mentioned in the hands of the Receiver. By an order, dated 19th May 1881, the Receiver was directed to pay over the nett income of the joint estate in his hands to the parties according to their shares, and certain accounts were ordered to be filed, and from such accounts it appeared that the deceased in his lifetime had overdrawn from the joint estate a sum of Rs. 35,925, and that this sum was due and payable by his estate to the joint estate. By a decree in a suit between *Siboosoondery Dabee v. Bussomuty Dabee*, dated 3rd March 1881 (which suit was ordered to be consolidated with suit No. 568 of 1871), *Siboosoondery Dabee*, the mother of the deceased, was declared entitled to a 1/3rd share of the real properties allotted to the respective heirs of the deceased. [The amount to be received by *Siboosoondery* and the amount due from the estate of the deceased as overdrawn were stated to amount to more than the value of the properties allotted to the heirs of the deceased by the return of the Commissioners of partition.] On the 26th March 1881 *Soudaminy* gave birth to a posthumous son, *Suttyakanto Ghosaul*, and he was added as a party defendant to the suit No. 568 of 1871, and his mother was appointed his guardian *ad litem*, and on *Suttya Bhooson Ghosaul* attaining majority, *Soudaminy* was discharged from acting as his guardian.

[556] Beside the properties mentioned above, and those in the hands of the Receiver, the Receiver was in possession of a sum of Rs. 20,050 in Government paper, which was directed to remain subject to the payment of certain costs incurred; and in addition to the interest of the deceased in the joint estate, the deceased was at his death possessed of, as his own separate property, certain Government securities for Rs. 6,000 standing in his own individual name, a portion of which, Rs. 2,000, had been placed by him in the Bank of Bengal as security against overdrafts, and which sum, together with a cash balance of Rs. 160, was still in the hands of the Bank, and the remaining portion of which, *viz.*, Rs. 4,000, being in the hands of *Soudaminy*.

Such being the position of affairs regarding the share of the deceased in the joint family property and in his separate estate the petitioners above-mentioned (there having been no previous grant of probate or letters of administration taken out with regard to the estate and effects of the deceased), asked for a grant of letters of administration to the estate and effects of the deceased, limited to the Government securities for Rs. 6,000 and 160 lying in the Bank of Bengal, such application as regarded the widow of the deceased being *durante minoritate*.

Mr. *Stokoe* for the Petitioner.—The facts set out in the petition show that what has been allotted in severalty, and which is not in the hands of the Receiver, will be insufficient to settle the charge against the estate of the deceased, and that the interest of the parties that would have to be administered has virtually been sufficiently dealt with by the suits which have been going on, and that in effect there is no matter of administration to be performed with regard to the 5/30th share coming to the heirs of the deceased. Section 4 of Act V of 1881 applies to Hindus where administration is granted, therefore as we say there can be no object in vesting in us as administrators the property which is already in the hands of the Receiver, I ask the Court to except from the grant of letters of administration such properties, and to grant us letters limited to the Government paper for Rs. 6,000, and the cash in the hands of the Bank of Bengal; we should not be allowed to deal as administrators with the property in the hands of the Court.

[557] No doubt Mr. Justice PONTIFEX in the case of *Ram Chund Seal* (I. L. R., 5 Cal., 2) has decided that only general letters of administration can be granted to Hindus, but the question has been commented in on the case of *Grish Chunder Mitter* (I. L. R., 6 Cal., 483). It has already been adjudicated that the five children are entitled to the property, and it has been paid over to the mother as guardian *ad litem*, but I submit the property has been severed so as no longer to belong to Suttia Krishna Ghosaul's estate.

Cunningham, J.—It appears to me that the circumstances set out in the petition of the applicants are sufficiently special to take the case out of the operation of the rule laid down by Mr. Justice PONTIFEX in the case of *Ram Chund Seal* (I. L. R., 5 Cal., 2) and therefore I make the order as prayed.

Application granted.

Attorney for Applicants *Gillanders*

[10 Cal. 557]

PRIVY COUNCIL

The 23rd November, 1883.

PRESENT

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
AND SIR A. HOBHOUSE.

Burjore and Bhawani Pershad Defendants

versus

Bhagana.... Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Act X of 1877, s. 602—Extension of time for giving security
in appeal—Custom—Wajib-ul-arz.*

The words in s. 602 of Act X of 1877, relating to the time within which security is to be given, are directory only; and although they are not to be departed from without cogent reason, the Court from which appeal is preferred has the right of extending the time. In

this case, a satisfactory explanation having been given of delay in giving security until after the time limited by the above section had expired, held that the Court had rightly exercised discretion in extending the time. *In the matter of the petition of Soormukhi Koer* (I. L. R., 2 Cal., 272) approved.

The paternal grandmother of a deceased village shareholder claiming to inherit in preference to his male collateral relations, the issue was fixed with the assent of the pleaders on both sides, whether the plaintiff, as a female, [558] was excluded from inheriting by the custom of the family, or tribe. Held, that this was substantially a question of fact, and that on the evidence, which included the village *wajib-ul-arz*, the customary exclusion of females was not proved.

APPEAL from a decree (29th October 1880) of the Judicial Commissioner of Oudh, affirming a decree (8th July 1880) of the District Judge of Lucknow.

The suit out of which this appeal arose was brought by Bhagana, the respondent, the widow of Sadanand, formerly *kabuli-at-dar*, or shareholder, responsible for the revenue of a five annas four pie share in mouzah Rahem-nagar, pargana Bijour, in the Lucknow district. She claimed to have a declaration of her right on that share against the nephews of Sadanand. The latter had two brothers, from whom he was disassociated, and died in 1849 leaving a son, Suraj Buksh, born of the respondent Bhagana. Suraj Buksh inherited his father's property, and with him till his death in 1879 his mother Bhagana lived. He left a son, Pirthi Pat, who died in the same year, leaving a daughter. After the death of Pirthi Pat, whose name during his life was not entered in the Collectorate books as in possession, his grandmother continued to hold the land. But on the 30th January 1880 the sons of the brothers of Sadanand (deceased) obtained *dakhil kharij* or alteration of entry of names, from the tahsildar of Lucknow. Bhagana then brought the present suit, to which the defence was made that she, being a female, was excluded from the inheritance by the custom of the family and tribe, Pande Brahmins in Oudh.

In the Court of First Instance it was held that no custom to that effect had been proved, the *wajib-ul-arz* (or village administration paper signed at settlement), contradicting it, save as to certain specified female relations, *viz.*, daughters and unmarried women. The Judicial Commissioner, in affirming this judgment, observed that the evidence had not proved that, by custom, a grandmother could not succeed.

On this appeal—

Mr. J. H. W. Arathoon appeared for the Appellant.

Mr. J. G. W. Sykes for the Respondent

A preliminary objection was taken for the respondent, objecting that the Judicial Commissioner had without legal authority [559] extended the time for giving security; and that even if he had such authority, where a proper case was made out for the exercise of a judicial discretion, such a case had not been made out here. Mr J G W. Sykes contended that under s. 602 of Act X of 1877 the limit of time was enacted by law, and therefore could not be extended. In this case the appellants had already exceeded it when they made their application to have it extended. Whatever could be done for them could only have been on application to this Committee. He referred to Act VI of 1874, s. 8, and s. 11, cl. 6, and cited *In re Lalla Gopeechand* (I. L. R., 2 Cal., 128), *In re Funendro Deb Roy* (23 W. R., 220); *In re Soormukhi Koer* (I. L. R., 2 Cal., 272).

The latter case was distinguishable from the present. It decided that the requirements of s. 11 of Act VI of 1874 were not imperative, the Court having a discretion to allow security and costs to be deposited after the period

mentioned in the Act when the Court had been closed at the expiration of that period, allowing the deposit to be made on the day of re-opening. Now, provision for the case of the Court being closed had been made, and the appellants in the present case had not the same kind of excuse, their explanation being that, wrongly advised, they attempted to make the deposit in the Court of First Instance, which caused the delay.

Mr *J. H. W. Arathoon* for the appellant relied on the Full Bench decision in *Soorjmukhi Koer's case*

Their Lordships having intimated that the appeal should proceed--

Mr *J. H. W. Arathoon* was heard for the Appellants.

Counsel for the respondent was not called upon

Their Lordships' **Judgment** was delivered by

Sir R. P. Collier—This was a suit brought by Mussumat Bhagana against the defendants for the purpose of recovering a certain mouzah. The only question in the case was this, whether the Mussumat, who was the grandmother of one Pirthi Pat, succeeded to the real property of Pirthi Pat, or whether the male descendants [360] collateral to her husband, succeeded to that property. The parties were both represented by Counsel, and they agreed to this issue "*Is plaintiff, as a female, excluded from inheritance by the custom of the family and tribe*." On defendants' side. It appears to their Lordships that, this issue having been settled by the learned Judge by the consent of Counsel and the cause having been tried upon it, it is the only issue now before us, and the question to be determined is whether, the two Courts, that of the Subordinate and of the Judicial Commissioner, having found as a fact that the defendant had not sustained the burden of proof laid upon him, *viz*, that the plaintiff, as a female, was excluded from the inheritance, that finding shall or shall not be affirmed.

The question of the custom, or no custom in the family is substantially one of fact. If their Lordships could see that any proposition of law was mixed up with it they might be disposed to review it, but no such proposition arises upon the evidence, and further they are disposed to say that the conclusion of the Courts upon the evidence seems to them to have been right. The evidence was in substance that of a great number of members of the family, and strangers, of whom more might have been called, to the effect generally that there was such a custom in the family, which is a mere assertion by the witnesses of the question to be tried in the cause. But it would appear that all the witnesses founded their opinion upon one particular case, *viz*, that upon the death of Baijnath, the father of the husband of the plaintiff, instead of his widow or mother taking his uncles and nephews took. The Courts say that that being the only instance in the family, does not sufficiently prove custom. Further it is to be observed that that evidence was in a great degree contradicted by a paper called a *wajib-ul-arz*, which was put in, whereby the general contention of the defendants, which was that no female whatever could succeed, was, to a certain extent at all events, modified. The *wajib-ul-arz* is in these terms "If the deceased have two or more wives lawfully married then the property left by the deceased would be divided among the number of wives in this way that if there be one son from one wife, and two or more from the other, then the one son from the former would take one-half, and the two or more from the latter would take the other [361] half, sub-dividing it equally among themselves but a wife having no male issue shall receive no share, she shall, however, receive maintenance from the sons of the other wives who have inherited a share. In our family the custom is to give no share to daughters. If none of the wives lawfully

married to a deceased co-sharer have any issue, in such a case of course the childless widow shall have possession of the share of the deceased. If a widow being childless desire to adopt a son, she can adopt one of the nearest male members of her deceased husband's family. She shall not be competent to adopt her brother or brother's son. Women not lawfully married, and their issue, provided they bear good moral character, will be entitled to receive only food and clothing, but shall not receive a share." This *vajib-ul-arz* seems very much indeed to qualify the general statement of the witnesses that no female could succeed in the family, for it distinctly states that under some circumstances wives and widows succeed, although it does not distinctly state that grandmothers do.

On the whole, therefore, it appears to their Lordships that the finding upon this one issue, which was settled by both the parties and by both Courts, is right.

It should be stated that it appears in this case that Pirthi Pat had a daughter about seven years old, but by consent of both parties that daughter is excluded from consideration in the case, and the case has been treated as if that daughter had not existed. Their Lordships think it right to say that that daughter, being no party to this suit, is in no way bound by this decision, and they give no opinion with respect to what her rights may be.

Under these circumstances their Lordships are of opinion that the judgment appealed from was right, and they will humbly advise Her Majesty to affirm that judgment with costs.

It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this appeal. Their Lordships upon that point have to say that they concur in the view which was taken by the Full Bench of the Court in Calcutta, that the words in the Act which have been quoted relating to the giving of security are directory only, and, although not to be departed from without [562] cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion. Under these circumstances their Lordships do not give weight to the objection against the admission of the appeal.

Appeal dismissed

Solicitors for the Appellant Messrs *Young, Jackson and Beard*

Solicitors for the Respondent Messrs *Van Sandan, Cumming and Armitage*

NOTES

[This case has been followed in (1907) 11 C W N 1104 (1105), (1892) 15 All., 14 (16) 12 A. W. N 152, (1902) 1 L. B. R., 329 (330), (1910) 1 P. R., 44

As regards the circumstances under which the indulgence will be granted, see (1890) 11 Mad., 391 (395), (1909) 14 C W N., 420

See also the explanation of this case by MAHMOOD J., in (1884) 7 All., 79 (81, 93, 94)]

[10 Cal. 562]
APPELLATE CIVIL.

The 13th March, 1884.

PRESENT

MR. JUSTICE McDONELL AND MR JUSTICE FIELD

Abdool Adood and others . Defendants

versus

Mahomed Makmil and another . Plaintiffs

Onus of proof—Hindu customs amongst Mahomedans—No presumption when no allegation of custom made.

A and B were two brothers, Mahomedans, who lived together in commensality. A, whilst so living with his brother, purchased certain lands under a conveyance executed by the vendor and A. In a suit by the heirs of B against the heirs of A to obtain possession of such lands, in which they alleged they had been dispossessed by the heirs of A, the Court found the land to be joint family property and to have been purchased with joint funds. On appeal, the onus of proving that the land was purchased by A alone was put upon A, held, that there being no allegation that the parties had adopted the Hindu law of property, the Judge, by applying to Mahomedans the presumption of Hindu law, had cast the onus on the wrong party.

THE plaintiffs in this case sued to recover possession of certain lands from which they had been dispossessed by the defendants.

The plaintiffs alleged that the land in question had been bought by two uterine brothers (the father of the plaintiffs and the father of the defendants), who were Mahomedans, living in commensality with each other. That on the death of the plaintiffs' father, their mother and uncle lived together and held joint [563] possession of the land, and that on the death of their mother they took possession of the share to which they were entitled, but that the defendants had dispossessed them, and this suit was therefore brought by the plaintiffs for the purposes above-mentioned. Both parties to the suit were Mahomedans.

The defendants contended that their father had purchased the land when living separate from the plaintiffs' father, and that the conveyance had been signed by their father alone.

The Munsiff found that the land was purchased by the father of the defendants alone, at a time when he and the plaintiffs' father were living in commensality, and that therefore it must be considered to be joint family property, and he gave the plaintiffs a decree.

The defendants appealed to the Subordinate Judge, who found that the conveyance was executed in the name of the defendants' father, but as the two brothers lived in commensality, the defendants not having proved that the purchase was made by the defendants' father on his own account, the plaintiffs were entitled to a decree. He, therefore, upheld the decision of the Munsiff.

The defendants appealed to the High Court

* Appeal from Appellate Decree No. 1319 of 1882, against the decree of Baboo Ram Coomar Pal, Roy Bahadur, Subordinate Judge of Sylhet, dated 16th of May 1882, affirming the decree of Baboo Romesh Chunder Bose, Roy Bahadur, Munsiff of that district, dated 21st November 1881.

Munshi *Serajul Islam* for the appellants contended that the Judge was wrong in holding that, from the mere fact of the family living together, the property was therefore joint, the presumption of Hindu law ought not to have been applied to the case of Mahomedans, and that, by thus presuming, the onus of proof had been wrongly put upon the defendants.

No one appeared for the Respondents.

The **Judgment** of the Court was delivered by

McDonell, J.—This appeal is concerned with plot No 1 only. The parties are Mahomedans. The property in dispute was purchased by a conveyance executed in the name of the defendants' father. The plaintiffs, however, claim a share on the ground that, although the conveyance was in the name of the defendants' father, the family was at the time living in commensality, and the funds with which the purchase was made were joint funds.

The Munsif dealt with the question on the ground that the purchase was made from joint funds, and that, therefore, the plaintiffs were entitled to a share.

[564] The case then came on appeal before the Subordinate Judge. He first held that the suit in respect of this plot was barred by s 13 of the Code of Civil Procedure.

A review was then applied for and granted, and upon the review he changed his mind as to the applicability of s 13 and then proceeded to deal with the merits. He says in his judgment "True that the kobalas of purchase were executed in the name of the defendants' father, but as the two brothers lived together at that time, the defendants should have proved that the purchase in question was made by the defendants' father alone, but this they have not been able to do."

It is now contended before us that in this passage the Subordinate Judge has applied to Mahomedans a presumption peculiar to Hindu law, and that by so doing he has cast the burden of proof upon the wrong side, that is, upon the defendants instead of upon the plaintiffs.

We think that this contention is correct. The Munsif, as I have already said, although observing that the Mahomedans by living a long time amongst Hindus, had adopted the manners and customs of Hindus, did nevertheless decide the question, not upon any presumption of Hindu law, but upon evidence that the property was purchased with joint funds. There was no allegation, that by custom the parties to this suit had adopted the Hindu law of property, and this being so, we think that the Subordinate Judge was bound to decide upon the allegations and the evidence whether the property was purchased from joint funds. The burden of proving that it was purchased with joint funds was, of course, upon the plaintiffs, but by applying the presumption of Hindu law in the first instance, the Subordinate Judge has cast the burden of proof upon the defendants, and in this we think he has committed an error. We must, so far as regards plot 1, set aside the decree of the Subordinate Judge, and remand the case for a proper decision. The costs will abide the result.

Decree reversed in part and case remanded.

NOTES.

[See upon this subject, the very full judgment of Mr Justice BEAMAN in *Jan Mahomed v. Datu Jaffar* (1913) 22 I. C., 195 (Bom.), also (1903) 5 Bom. L. R., 355 (363)]

[565] ORIGINAL CIVIL.

The 21st February, 1884.

PRESENT :

MR. JUSTICE PIGOT.

Narain Chunder Dhur.....Plaintiff

versus

Cohen. Defendant.

Market rate—Ascertainment of market rate in suit on an agreement of indemnity—Evidence

Where the Court has had the advantage of having in evidence before it a record of the market rate of any particular day made up by a broker of intelligence and experience, such a record should be received as evidence of the particular state of the market on that day.

THIS was a suit upon an agreement which was entered into by Cohen to indemnify the plaintiff against any loss which might be sustained under a contract entered into between Narain Chunder Dhur and the Camberhatty Co., Limited. The facts were that Cohen, who was a broker, had informed the plaintiff that he knew of a contract for the purchase of six lacs of gunny bags, which contract he advised the plaintiff to take over, he (Cohen) being willing to give the plaintiff an indemnity against loss on the contract. The contract was taken over by the plaintiff, and the indemnity given by Cohen.

The contract resulted in a loss, and the indemnity was put in force against Cohen. His defence was that, even assuming the agreement to be an agreement of indemnity, the plaintiff was not entitled to ask for damages, inasmuch as he (Cohen) had, a month after the contract had been taken over by the plaintiff when the market rate had gone up, informed him that he (Cohen) had a purchaser who would take the contract off the plaintiff's hands.

Mr. Gasper and Mr. Sale for the Plaintiff.

Mr. Hill, Mr. Bonnerjee and Mr. Handley for the Defendant

During the hearing it was sought to prove the market rate of gunny bags on certain particular days, and for that purpose Mr. Delius, a member of the firm of Poppe, Delius & Co, brokers, was called and examined by Mr. Gasper, the witness giving the following evidence. "My firm makes out weekly quotation of rates of gunny bags. I have a return here for the 27th March 1882. [566] It was drafted by me or my partner, it is very difficult to say by which of us, written by my baboo, and signed by myself. The returns of the 3rd, 10th, 17th, 24th April, were all signed by me. They must have been made by me, because my partner was at home at the time. The return for the 20th March 1882 is signed by me; it must have been so, as my partner was at home. These returns are made out according to the tone of the market during the week, particularly on the closing day, and likewise the rates. It is difficult to explain how the market rate is ascertained. The contracts which we enter into constitute one of the elements from which these returns are made up. Many transactions are often made which we do not take notice of. We ascertain the market rate from the better class of buyers. We disregard speculators' contract, and purchases by bad buyers, as they can't buy except at higher rates than European buyers or first-class buyers. For instance, I know the rate at which my buyers will buy to-day, though the mills may be

asking more than those rates, still I know that I can get the bags at the rates my buyers will buy at. I strike the market rate from what the producers are asking and my buyers are willing to pay. Our quotations vary from 4 annas to 8 annas according to the state of the market within that basis. The quotations are made on the day previous to the date they bear."

Mr. *Gasper* submitted the witness could refer to the quotation.

Mr. *Hill* objected.

Pigot, J.—The question is what was the rate prevailing in the market at the time the memorandum was prepared for what I may call sound business. The returns prepared by this gentleman are, as Mr *Dehus* states, records made by him at the time of what he knew, or believed he knew, to be the fact with regard to the market rate of such transactions. The facts which were then present to his mind were—(1) What within his knowledge buyers were willing to offer, and what within his knowledge the producers or sellers were asking. Along with that there was the further fact, the transactions which were actually entered into, and upon these classes of facts, all of which are facts, he compiled this record. Now, the market rate of any day is nothing more than a compilation of the result of various facts connected with the trade of that day, [567] and what I desire to do in ascertaining the particular state of the market on any day, is not to cast on the Court the duty of gathering rates from contracts and from them to strike for itself the market rate, but I desire to hold that when the Court has the advantage of having in evidence before it, a record of the rates made by a gentleman of intelligence and experience on that day, it should have that advantage, the advantage of having the rates made out in that way, in preference to computing the rate for itself. I, therefore, admit the quotations.

Attorney for Plaintiff. Messrs. *Barrow & Orr*

Attorney for Defendant. Mr. *C F Pittar*.

NOTES.

[MARKET VALUE—EVIDENCE—

"It might be supposed that to know value is merely to know what other people say the thing is worth—merely to have heard them offering and accepting prices. But the answer is that these various instances of offers or acceptances of prices, averaged into a mean or probable figure, are what constitute value. The statements of persons declaring their estimates of the prices they would give or receive are not taken, on the credit of those persons, as trustworthy assertions of the fact of value, but merely as items of conduct which themselves make up that total fact of conduct which we call value. Thus, if A sits in a merchant's office and listens to the terms accepted and rejected for a dozen articles he acquires a first-hand knowledge of value, but if he goes in and asks the merchants to tell him the value of a given article, his knowledge is based on a belief in the truth of the merchant's assertion. In the former case his knowledge is not based on hearsay," *Wigmore on Evidence* (1901) Vol. 1, sec. 719, pp. 815, 816 citing from *STORY J* in *Alfonso v. U. S.*, 2 *Story* 426.

"It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires, in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business that qualifies him to testify," *ibid*, citing from *WEELS, J.* in *Whitney v. Thatcher*, 117 *Mass* 53, where brokers' testimony was admitted.

Price lists and market reports are not generally admissible *ipso facto*, though testimony based upon them may be, see *Wigmore*, sec. 1704, Vol. III (1904) and *Sup.* Vol. V.]

[10 Cal 567]

APPELLATE CIVIL

The 26th February, 1884.

PRESENT

MR JUSTICE McDONELL AND MR. JUSTICE FIELD.

Janoky Bullubh Sen.One of the Defendants

versus

Johiruddin Mahomed Abu Ali Sohai ChowdhryPlaintiff.

*Lien—Sale in execution of decree—Sec. 295 (Act XIV of 1882),
provisos—Lis pendens—Judicial lien*

Where two mortgagees, in execution of their several decrees, attached the same property, of which a moiety without further specification was respectively mortgaged to each of them, and subsequent to the attachments the property was sold in execution of one of the decrees *Held*, that notwithstanding the whole interests of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee, and that omission or neglect on the part of the Court executing the decree to give specific direction as provided by clause (b) of s. 295 of the Civil Procedure Code did not prejudice the rights of the unsatisfied mortgagee or discharge his encumbrance

ONE Nusiruddin borrowed two sums of money from the plaintiff and the defendant No 2 under two separate mortgage bonds executed in their favour on the same date. Both the bonds, after enumerating the several zamindaries in the possession of the mortgagor, continued in these terms "A moiety of all the abovementioned zamindaries bearing the abovementioned [568] *sudder jamas*, I do mortgage and hypothecate as security for repayment of amount covered by the bond with interest." Among the properties hypothecated was an 8 annas 3 pie 1 kag 9½ tils share of Jote Gokul. The loans not having been repaid, defendant No. 2 brought a suit and obtained a decree on his mortgage bond on the 23rd November 1877, and on the 8th June 1878 attached the mortgagor's interest in Jote Gokul. The plaintiff also obtained a decree on his mortgage bond and attached the same property (Jote Gokul) on the 11th February 1879. After these attachments, and on the 18th March 1879, defendant No. 2, in execution of his decree, brought to sale the mortgagor's interest in Jote Gokul, which was purchased by defendant No. 1. The plaintiff was then about to bring the property again to sale in execution of his decree, whereupon defendant No 1 objected, on the ground that he had purchased the entire interest of Nusiraddin in Jote Gokul, and that the same or any portion thereof cannot be resold to the prejudice of his rights. The Subordinate Judge summarily allowed the objection, and in consequence the plaintiff instituted the present suit, in order to enforce his lien and bring to sale that moiety of Jote Gokul which was mortgaged to him. The Court of first Instance, under all the circumstances of the case, decreed the claim of the plaintiff "to proceed against the mortgaged share of Jote Gokul" in execution of his decree. Thereupon defendant No. 1, the purchaser, appealed to the High Court

Mr. Pugh, Baboo Mohinee Mohun Roy, Baboo Saroda Churn Mitter and Baboo Mookoond Roy for the Appellant.

* Appeal from Original Decree No 91 of 1881, against the decree of Baboo Bhugwan Chander Chunderbatty, Rai Bahadur, Subordinate Judge of Rungpore, dated the 5th of January, 1881.

Mr. *M. Ghose* and Baboo *Koolodu Kinkur Nath Roy* for the Respondent.

The arguments sufficiently appear in the **Judgments** of the Court (McDONELL and FIELD, JJ.).

Field, J.—In this case one Nusiruddin Mahomed Chowdhry borrowed, on the 25th Assar 1279, corresponding with the 8th July 1872, two separate sums of Rs. 5,000 each, one from the plaintiff Johiruddin Mahomed Abu Ali Soher Chowdhry, and the other sum from defendant No. 2, Khaja Enayetoolla [569] Chowdhry, each of these loans was secured by a mortgage of one moiety of the mortgagor's share (consisting of 8 annas 3 pie 1 kag 9½ tils) in Jote Gokul. The loans not having been paid, defendant No. 2 brought a suit upon his mortgage bond, and on the 23rd November 1877 obtained a decree. In execution of this decree, he, on the 8th June 1878, attached the mortgagor's interest in Jote Gokul, and on the 18th March 1879 this interest was brought to sale and purchased by defendant No. 1, who is the appellant before us.

It has been contended by the learned counsel for the respondent, that what was sold was not the mortgagor's interest in the whole share which belonged to him, but his interest in a moiety of that share only. We think, however, that upon a true construction of the documents, we must take it that the whole interest was intended to be sold.

The plaintiff also brought a suit upon his mortgage bond, and obtained a decree on the 15th June 1878. In execution of this decree, he attached the same property, Jote Gokul, on the 11th February 1879, that is, after the attachment, but before the sale, in execution of the decree obtained by defendant No. 2. The plaintiff was then about to bring the property again to sale in execution of his decree, whereupon the defendant No. 1 objected, contending that he had purchased the property free of incumbrances, and that it was not competent to the plaintiff to bring it to sale a second time in execution. The Court in which the execution proceedings were pending allowed this objection, and, in consequence, the present suit has been instituted by the plaintiff to enforce his lien and bring to sale, in execution of his mortgage decree, that moiety of Jote Gokul which was mortgaged to him by the bond upon which that decree was obtained.

Two essential questions have been argued before us in this appeal. The first question is concerned with the contention unsuccessfully pressed upon the Court below, viz., that the decree which the plaintiff now seeks to execute had been substantially satisfied by reason of an *ujana* arrangement between the plaintiff and the heirs of the mortgagor.

We have heard the evidence upon this point, and we are of opinion that, although there are several matters which create a [570] suspicion that the defendant's contention may not be without foundation, yet it is impossible for us, upon the evidence, to say that this contention has been proved. On this point, therefore, we concur in the conclusion at which the Court below has arrived.

The second point is a much more difficult one. It is contended that when the property, Jote Gokul, was sold on the 18th March 1879, after the two attachments made under the two decrees to which I have already referred, it must be taken that the property was sold wholly unincumbered, wholly free, that is, not only from the mortgage of defendant No. 2, but also from the mortgage of the plaintiff in the present case, which, as has been stated, bound one moiety of the property. In support of this argument the learned counsel has relied upon certain cases to which I shall presently advert, and also upon the provisions of s. 295 of the Code of Civil Procedure.

Before dealing with these arguments it will be useful to state two propositions which appear to have been established by decided cases.

The first of these propositions is, that the mere taking of a money decree by a mortgagee, so long as that decree is unexecuted, will not destroy his mortgage lien, but that if the mortgagee who has obtained such a decree, proceed to execute it by bringing to sale the mortgaged property, the lien will be gone and the property will pass unincumbered to the purchaser. This proposition is supported by the following cases *Narsidus Jitram v. Joglekar* (I. L. R., 4 Bom., 57), *Hasoon Aira Begum v. Jawadaonnessa Satooda Khandan* (I. L. R., 4 Cal., 29), the Full Bench case of *Syud Enum Momtazooddin Mohamed v. Haran Chunder Ghose* (14 B. L. R., 408; 23 W. R., 187), *Rag Kishore Shaha v. Bhadoo Noshore* (I. L. R., 7 Cal., 78), and *Jonmenjoy Mullick v. Dossmoney Dossee* (I. L. R., 7 Cal., 714). In the Full Bench case in 14 B. L. R., 408, and in some other cases it was observed that the rights of third parties are not affected by proceedings in a suit brought by the mortgagee. And this brings us to the second proposition, as to which there [571] appears to be no doubt, namely, that the purchaser, at an ordinary execution sale of property subject to previous mortgage, buys the property subject to that lien, in other words, buys merely the right of redemption. This proposition is established by the following cases *Gopal Sahoo v. Gunga Pershad Sahoo* (I. L. R., 8 Cal., 531), *Lala Joogulkishore Lall v. Bhukha Chowdhry* (9 W. R., 244), *Kasimunnissa Bibi v. Hurannissa Bibi* (2 B. L. R., App., 6), *Kameessia Pershad v. Doulut Ram* (19 W. R., 83). See also Macpherson on Mortgages, pages 97 and 165. It would follow from the second of these propositions, apart from other considerations, that the appellant purchased the moiety of Jote Gokul, which was mortgaged to the plaintiff subject to the plaintiff's lien.

But it is contended that, because the plaintiff attached that moiety, while it was also under attachment in execution of appellant's decree, it must be taken to have been sold free from both incumbrances, and that plaintiff's lien has been transferred by the sale from the property to the purchase-money. Before considering the cases relied on in support of this argument, I may observe that the moiety mortgaged to plaintiff was not sold in execution of his decree. It would appear from the first proposition above stated that, in the case of a money decree, it is the sale which has the effect of extinguishing the lien. The only difference between a money decree and a decree for the specific enforcement of the lien (the plaintiff's decree is of the latter description) is that the former creates a judicial lien only from the date of attachment, while the latter creates such lien from the date of the decree. When the mortgagee sues for the specific enforcement of his lien, he is further protected by the principle of *lis pendens* against alienation from the date of instituting his suit. A mortgagee who obtains a decree in such a suit would appear to be a judicially secured creditor holding a stronger position than a mortgagee who obtains merely a money decree. If the latter does not lose his lien until the property is sold in execution of his own decree, it would seem improbable that the former is in a worse position.

[572] I now proceed to examine the cases, the first of which is that of *Syud Nudr Hossein v. Baboo Pearoo Thovildancee* (19 W. R., 255). The facts of this case, disencumbered from a good deal of intricacy, appear to be as follows. The respondent, Baboo Pearoo, had purchased at an execution sale the interest belonging to Meer Hossein in a mortgage decree obtained by a person who is called "the Mohunt" throughout the judgment. In other words, the respondent stood in the position of the original mortgagee who had obtained

the decree in the Court of the Principal Sudder Amin of Moorshedabad on the 14th April 1864. This decree directed "that the suit be decreed, and that the plaintiff do recover from the defendant the amount of claim with interest." It was not a decree enforcing any mortgage lien against any mortgaged property. The decree was transferred under a certificate for execution into the Dinagapore District, and the property, which formed the subject of the suit in appeal before the High Court, was attached in execution. While that attachment subsisted, one Poran Behee, who had obtained a decree against the mortgagor, took out execution against the same property and brought it to sale. At the sale the property was purchased by a certain person whom I may call "B." As a matter of fact, it was found that "B" had purchased with funds belonging to Mirza Mohamed, and the High Court, on this ground, ultimately held that the respondent was entitled to execute the decree against the property. But the contention with which we have to deal was this. It was urged that the respondent was entitled to execute the decree originally obtained by the Mohunt against the mortgaged property notwithstanding the sale under Poran Behee's decree. In other words, it was contended that the sale under that decree did not get rid of any lien that might be supposed to have been created by the Mohunt's decree of the 14th April 1864. Mr Justice PONTIFEX, who delivered the judgment, says (at the top of page 259) "I am of opinion that, as the form of mortgage or charge created by the bond of 28th Augrahan 1268 did not vest any estate in the Mohunt, but only established a lien as incident to the money debt, such lien continued [573] an incident of the debt when it passed from a contract debt into a judgment debt, and so continued when such judgment debt was subsequently assigned to Meer Hossein. Otherwise the right to the lien must have remained in the Mohunt." The instrument which created the charge in that case is not now before us, and it is impossible for us to say, therefore, whether the bond creating a lien, such as has been described by Mr Justice PONTIFEX, was, in any respect, like the mortgage deed in the present case.

Then, at page 260, Mr Justice PONTIFEX says "Moreover, in the case before us, at the date of the sale to Meer Hossein, the property over which the lien extended has already, in fact, been attached by the Mohunt under the decree of the 14th April 1864. It seems to me clear that an attachment under a money decree on a mortgage bond and the mortgage lien cannot co-exist separately in the property hypothecated, and that such an attachment must be treated, when existing, as an attachment enforcing the lien."

"This attachment existing at the date of Meer Hossein's purchase passed as an incident of the decree purchased by him, and as the property was sold on the 29th April 1865, pending such attachment, the lien was transferred from the property to the purchase monies, and, therefore, the property became thenceforth discharged from the lien."

It has been contended that the learned Judge here intended to lay down, as a general proposition, that when a mortgagee, who has obtained a money decree, proceeds to an attachment, his lien is gone. I think that the remarks of the learned Judge must be read with reference to the peculiar circumstances of the case which was before him. In that case, as has already been pointed out, the decree was not a decree to enforce the mortgage against the property, and I think that this makes a difference between that case and the case which is now before us. I have already pointed out that, as the bond in that case is not before us, we are unable to say what was the nature of that instrument. The facts of that case are not therefore so clearly analogous to the facts of the present case, that any principle there laid down must necessarily apply. The

question whether the property was sold in execution of the Mohunt's decree, as well as of that of Poran Bebee, [374] does not seem to have been considered. It would appear that the Mohunt or the assignee of his decree applied to have the sale proceeds detained in Court to satisfy his decree, on the ground that he had first attached, and this conduct might well be regarded as an admission that the sale was in execution of his own decree, as well as of that of Poran Bebee, certainly as an admission that the property had been sold free of his incumbrance which was transferred to the sale proceeds. The next case is that of *Raj Chunder Shaha v. Hui Mohun Roy* (22 W. R., 98). All I need say about this case is this, that the plaintiff there sought to obtain the sale proceeds. He did not seek to proceed against the mortgage property itself. By the prayer of his suit he elected to look to the sale proceeds instead of the mortgaged property for the realization of his mortgage loan.

Then we have been referred to the case of *Modhoo Soodum Singh v. Moun-dee Lall Shahoo* (23 W. R., 373). That case also is not in point. At page 375 Mr. Justice MITTER says, referring to the case in 19 W. R. "In other words, the rule of law laid down is this, that wherever a decree-holder, holding a simple mortgage, attaches the property hypothecated, the sale which follows, whether in the execution of his decree or that of any other person, has the effect of transferring the property hypothecated to the purchaser freed from the mortgage liability. It is not necessary for us in this case to go to that length."

All that need be said about this case is that, assuming the proposition laid down in the case in 19 W. R., 255, to be correctly stated by Mr. Justice MITTER, the Judges did not find it necessary on that occasion to adopt this view.

Then there is the further case of *Gopce Singh v. Kisha Lal* (25 W. R., 187). That case also is not in point, for Mr. Justice MARKBY says "Whether or not those objections are valid would depend upon the determination of the question, what were the rights that were really brought to sale. Both the plaintiffs and the defendants think that the properties were sold in execution of the plaintiffs' decree alone, and the lower Court has adopted that view. Notwithstanding that the parties are agreed upon this point, it is [375] open to us to put our own construction upon the sale proceedings which constitute the only evidence on the record bearing upon this question. These proceedings are two in number, one recorded on the day of the sale and the other on the 25th April 1873 confirming the sale. After perusing these proceedings, we think that the reasonable construction that we ought to put upon them is that all the properties were sold at the instance of all the mortgagees for the satisfaction of their decrees, and, therefore, free from their respective mortgage liens."

In the case now before us the property in dispute was not sold at the instance of both the mortgagees, but at the instance of one of them only, therefore, the facts are not analogous, and it may be said that, having regard to the language used by Mr. Justice MARKBY, the inference to be drawn is that, if the property had not been sold at the instance of all the mortgagees, it would not have been sold free from their respective mortgage liens.

It appears then to me that the cases which have been relied upon by the learned counsel do not establish the proposition contended for.

I have then to consider the effect of s. 295 of the Code of Civil Procedure. That section provides for a rateable distribution of the proceeds of an execution sale amongst decree-holders who, prior to the realization of assets by sale or otherwise, have applied to the Court for execution of decrees for money against the same judgment-debtor and have not obtained satisfaction. The section contains the following proviso. "Provided that when any property liable to be

sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold "

In the case before us the Court did not make any order that the property, Jote Gokul, should be sold free from the plaintiff's incumbrance, nor was there any express direction or notice to purchasers that the property was sold subject to such incumbrance. It is clear then that the Court omitted or neglected to give specific directions upon the subject of the plaintiff's incumbrance [576] when the property was sold in execution of the decree of defendant No 2. Is it reasonable that the plaintiff should be prejudiced by such omission or neglect ?

A further proviso to s 295 is contained in clause (c), which directs that when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied *first* to defray the expenses of sale, *second*, to discharge the interest and principal due on the incumbrance, *third*, to discharge the interest and principal due on subsequent incumbrances, if any. This proviso does not appear to have any application, as the moiety of Jote Gokul mortgaged to plaintiff was not sold in execution of any decree ordering its sale for the discharge of any incumbrance thereon.

It was observed, with reference to ss. 270 and 271 of the old Code, Act VIII of 1859, which, to some extent, correspond with s. 295 of the present Code, that the rule of procedure contained therein was not intended to interfere with the substantive rights of the parties. See the cases of *Hassoon Aina Begum v Jawadoonnissa Satooda Khandan* (I L R, 4 Cal, 29) and of *Raj Chander Shaha v Hur Mohun Roy* (22 W R, 98). It appears to me that this is a principle which may, with equal propriety, be followed in construing the provisions of s 295 of the present Code. I take it that this section was intended to afford an additional facility to decree-holders. I think that the Legislature could not have intended, without using express language to effectuate such intention, to take away any rights which belong to persons in the position of mortgagees.

In this view, seeing that no specific direction as to the plaintiff's mortgage was given at the time of the sale under which defendant No 1 purchased, I think we cannot say that the fact that the plaintiff did not avail himself, as he might have availed himself of the facility afforded by s 295, now prevents him from maintaining the present suit.

I may add, in conclusion, that if the effect of plaintiff having obtained a decree and then proceeded to attach was to destroy the lien which, if he had obtained no such decree, he undoubtedly could have enforced notwithstanding the auction purchase of the defendant, the plaintiff would be really in a worse position after [577] using reasonable diligence to enforce his claim than he would have been if he had lain by and done nothing.

No doubt, as said by Mr. Justice PONTIFEX in the case in 19 W R., "an attachment under a money decree on a mortgage bond and the mortgage lien cannot co-exist separately in the property hypothecated and the attachment must be treated as an attachment enforcing the lien." But when this enforcement is not carried on to a sale in execution of the decree under which such attachment was made, it is difficult to understand how the lien is lost. Under clause (b) of s 295 of the Code of Civil Procedure the Court had a discretionary power to sell, in execution of defendant No 2's decree, the moiety of Jote Gokul mortgaged to plaintiff free from his mortgage, if he was never [ever?] asked

for his assent, and the Court did not exercise its discretionary power. I do not see how we can now deal with the plaintiff, as if the Court had exercised its discretionary power with his assent.

I am, therefore, of opinion that plaintiff is entitled to enforce his lien against the moiety of the property mortgaged to him, and that this appeal should be dismissed with costs

McDonell, J.—I concur in holding that plaintiff is entitled to enforce his lien against the moiety of the property mortgaged to him, and generally for the reason stated by my learned brother

Appeal dismissed.

NOTES.

[See also 5 All , 566 , 26 All , 14 (17) , (1891) 16 Bom , 91 (108) (1902) 8 O C 86 (90)]

[10 Cal. 377]

APPELLATE CIVIL

The 4th March, 1881

PRESENT.

MR JUSTICE MITTER AND MR JUSTICE MACLEAN

Sheo Sohve Roy and others. . Defendants

versus

Luchmeshur Singh . . . Plaintiff.*

Limitation Act (XV of 1877), ss 45, 140, 142—Suit for possession—

Dispossession during unexpired ticca by plaintiff's predecessor—

Limitation—Expiry of lease.

In a suit brought by the plaintiff in 1880 to recover possession of certain lands from which his predecessor in title had been dispossessed, in which suit the Court of First Instance found that the defendant had dispossessed [578] the plaintiff's father in 1860, during the unexpired term of a lease granted by the plaintiff's father to a ticcadar,

Held, that the preponderance of authority in India was in favour of the view that limitation ran from the date of the expiry of the ticca, and not from the time when the defendant had been held by the Court of First Instance to have dispossessed the plaintiff's father.

THIS was a suit brought on the 31st December 1880 by the Maharajah of Darbunga to recover possession of 30 bighas of land which he alleged to be part of his permanently settled village of Ram Bhaddurpur, and from which he alleged he had been dispossessed by the defendants, who were the proprietors of the contiguous village Purwana, in 1277 (1870), and that the dispossession complained of occurred in the following manner, viz., that one Moni Dut Roy, one of the proprietors of mouzah Purwana, took a kutkina of mouzah Ram Bhaddurpur from the ticcadar of the said mouzah during the minority of the plaintiff, and whilst so in possession settled the land with one Kishen Jha

* Appeal from Appellate Decree No 52 of 1883, against the decree of A. W. Cochran, Esq., Officiating Judge of Tirhoot, dated 12th of September 1882, reversing the decree of Baboo Koylash Chunder Mukerji, Second Subordinate Judge of that district, dated 23rd of August 1881.

who ceased to pay rent in 1277, and that on this the dispossession took place.

The defendants contended that the whole of the disputed land belonged to their settled estate Purwana, the settlement having been made with them by Government in the year 1860, in the presence of the plaintiff's father, when an objection of the ticcadar of plaintiff's father to the settlement had been rejected, and that therefore the plaintiff's claim was barred by limitation under arts. 45 and 142* of Act XV of 1877

The Munsiff found that the plaintiff had proved his title to the land in suit up to 1849, but that the Collector's award made in April 1860 settling the land with the defendants and rejecting the claim made thereto by the ticcadar of the plaintiff's father bound the plaintiff's father, no steps having been taken to set it aside, that the defendants had therefore obtained possession in 1860 (prior to the death of the plaintiff's father, who died in October 1860), and throwing the onus on the defendant of proving that they had a right to hold the land by showing a 12-years' adverse possession, held that they had succeeded in so doing, and therefore dismissed the plaintiff's suit

The plaintiff appealed to the Subordinate Judge, who held that [579] the plaintiff had clearly shown that he had both possession and title in 1849, and therefore it was for the defendants to show that some time after that date and before the date of the Maharajah's death, in October 1860, their adverse possession began, that (for certain reasons given by him, which are unnecessary for the purposes of this report) dispossession by the defendants did not take place in 1860, but that it took place in 1870. He, therefore, reversed the decision of the Munsiff and gave the plaintiff a decree. In deciding that the lower Appellate Court had rightly placed the burden of proof on the defendants, the Subordinate Judge relied on the cases of *Radhu Gobind Roy Saheb v. Inylis* (7 C. L. R., 364), *Kali Churn Sahu v. Secretary of State* (1 L. R., 6 Cal., 725. 8 C. L. R., 90), *Monmohun Ghose v. Mothura Mohun Roy* (8 C. L. R., 126), remarking that he did not agree with the argument advanced by the defendants' pleader that these cases applied only to cases where possession could not for one reason or another be visibly exercised

The defendants appealed to the High Court

The Advocate-General (Mr. Paul) (with him Mr. Gregory and Bahoo Rajendro Nath Bose) for the Appellant, contended on the second branch of the cases, that possession adverse to a lessee was also adverse to the lessor—*Prosunomoyi Dasi v. Kali Das Roy* (9 C. L. R., 347)

Baboo Ram Charan Mitter for the Respondent, on the question as to whether limitation ran from the expiry of the ticca lease or from the date of dispossession, cited *Krishna Gobind Dhu v. Hari Churn Dhu* (1 L. R., 9 Cal., 367, 12 C. L. R., 19), *Womesh Chunder Goopto v. Raj Narain Roy* (10 W. R., 15)

Mitter, J.—The only point upon which we called upon the respondent to answer this appeal is the question of limitation. The Court of First Instance found that the dispossession of the plaintiff's predecessor in title took place in the year 1860. There was no appeal against that finding by the defendant

* [Art. 142 —

Description of suit	Period of limitation	Time from which period begins to run
For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance]

There was an appeal by the plaintiff-respondent before us, and the District Judge throwing [580] the onus of proof upon the defendant, came to the conclusion that it was not made out by him that the dispossession took place earlier than 1870. The District Judge in throwing the onus of proof on the defendant followed certain decisions cited by him, but these decisions have been since considered in a Full Bench case, *Mahomed Ali Khan v Khaja Abdul Gunny* (I L R., 9 Cal, 744), and they have been explained as referring to certain peculiar circumstances which distinguished them from ordinary cases where limitation is pleaded. In the Full Bench decision it was laid down as a general rule that the burden is on the plaintiff to make out that his claim is not barred by limitation. Therefore, if, upon another ground, we could not uphold the decision of the lower Appellate Court, it would have been necessary to remand this case to that Court for a finding upon the question of limitation, but it seems to us that, accepting the finding of the first Court, that the dispossession took place in 1860 which finding was not questioned by the defendant, the plaintiff's claim is not barred by limitation. It is an admitted circumstance in this case, that in that year the mouzah in which the land is alleged to be was not in the khas possession of the plaintiff's predecessor in title, but was in the possession of a ticcadar. It is also not disputed that if the 12 years be counted from the date when the term of the ticca came to an end, the plaintiff would not be barred by limitation. On the other hand, if the period prescribed by the law of limitation is to be computed from the date of dispossession as found by the first Court, the claim of the plaintiff would be barred by limitation. Upon this point, viz., whether the one or the other period of time is the proper point from which limitation is to run, there is a conflict of authority. They have all been placed before us, and we are of opinion that the preponderance of authority is in favour of the proposition that the claim is not barred by limitation. As we agree in that view we dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[ADVERSE POSSESSION AGAINST LANDLORD—

This subject was most exhaustively dealt with by Sir V BHASHYAM AYYANGAR in *Seshanna v Chukaya* (1902) 25 Mad 507; where the question was whether a tenant can set up adverse possession against the landlord. See 10 Cal, 1076 as to when the landlord can sue the trespasser. See also 21 Mad, 288 29 All 593 (1907) A W N, 185 4 A L J 726, (1894) 1 C W N 216.]

[581] APPELLATE CIVIL.

The 21st March, 1884

PRESENT ·

MR JUSTICE MITTER AND MR JUSTICE MACLEAN

Jadunundun Singh Plaintiff

versus

Dulput Singh and others Defendants ·

*Pre-emption—Ceremonies of “immediate demand,” and
“demand with intocation”*

A person claiming a right of pre-emption made the *talub-i-mowashibat* in the presence of witnesses, but when doing so was neither at the place, the subject of the right of pre-emption, nor was he in the presence of the vendor or vendee

Held, on second appeal, that the lower Appellate Court having found that the *talub-ish-had* was invalid on the ground that there was no evidence of a demand with invocation of witnesses having been made the right of pre-emption could not be claimed

THIS was a suit brought to enforce a right of pre-emption with regard to the share in certain properties of defendants 1 and 3, which share had been sold by them to defendants 4 and 5 under a bill of sale, dated 12th July 1878

The plaintiff, a Hindu of Behar, who described himself as the *shah-khalit* (a partner in the substance of the property sold) stated that he first heard of the sale on the 28th July 1878, from one Dashiuth Singh, and that he immediately on hearing this repeated thrice, “It is my right, I have purchased,” at the same time calling upon the persons present to bear witness to the fact, and that he then went to the vendor with the sum of Rs 99 and asserted his right, expressing his readiness to purchase, and having performed the *talub-ish-had* in due form tendered the purchase money which, however, the defendants refused to accept, whereupon he calling upon the persons present to bear witness went to the purchasers, and went through the proper ceremonies, but they refused to receive the consideration or return the bill of sale, and that he therefore brought this suit for the purposes abovementioned

The defendants contended that the plaintiff was not a *shah-khalit*, and that the parties to the suit being Hindus, amongst whom the [582] custom of pre-emption had never been in vogue, the suit would not lie, and further that the preliminary ceremonies of *talub-i-mowashibat* and *talub-ish-had* had not been duly performed. The Munsiff found that the plaintiff was not *shah-khalit*, nor was he a *shah-jar*, that the parties being Hindus of the province of Behar the Mahomedan law of pre-emption was therefore in vogue, that he had substantially, by immediately on hearing of the sale making a demand three times and offering the purchase money to the vendor and vendees before witnesses, complied with the Mahomedan law, it not being imperative that the precise words given in the Mahomedan law should be used, and that the evidence proved that due diligence had been used by him in asserting his right, and that therefore the preliminary ceremonies of *talub-i-mowashibat* and *talub-ish-had* had been duly performed, but held that the plaintiff being neither a *shah-khalit* nor *shah-jar* the suit must be dismissed.

* Appeal from Appellate Decree No 673 of 1883, against the decree of Baboo Tivolkhya Nath Mitter, Additional Subordinate Judge of Shahabad, dated 4th October 1852, affirming the decree of Baboo Bhagobati Churn Mitter, Munsiff of Arrah, dated 29th May 1879.

The plaintiff appealed to the Subordinate Judge, the defendant also appealing on the ground that the performance of the *talub-i-mowashibat* and *talub-ish-had* had not been proved.

The Subordinate Judge held that it was necessary that the *talub-ish-had* should be performed in the presence of the vendor or vendee, and that this *talub* should be performed in strict adherence to the Mahomedan law, that it was necessary that at the time of making this *talub* the pre-emptor should say that he had performed the *talub-i-mowashibat*, and that as the plaintiff had not proved that he told the vendor or vendee that he had performed this first *talub*, and there being no sufficient evidence to prove that he had called upon the bystanders to bear witness in language corresponding in substance with "be you my witness," etc., as laid down in the case of *Sham Lall Sahoo v Bhee Afsuroonissae* (22 W. R., 184), he dismissed the plaintiff's appeal and decreed the cross appeal.

The plaintiff appealed to the High Court.

Baboo Pran Nath Chowdhry for the Appellant

Baboo Mohesh Chander Chowdhry for the Respondent.

The **Judgment** of the Court was delivered by

Mitter, J.—We think that this appeal must fail. The lower [583] Appellate Court has dismissed the plaintiff's suit on the ground that the plaintiff had failed to prove that the second *talub*, i.e., the *talub* by invocation of witnesses, was properly made in accordance with the provisions of the Mahomedan law. The defect pointed out by the lower Appellate Court was that the *pre-emptor* did not invoke witnesses to bear testimony to the fact that he claimed the property as pre-emptor. In this second appeal, it is contended before us, that it was not necessary according to Mahomedan law, because on the evidence regarding the first *talub*, which has been believed by the Appellate Court, it was shown that the performance of the first *talub* was accompanied by the necessary invocation of witnesses, and in support of this contention, the case of *Koromali v. Amir Ali* (3 C L R., 166) has been cited. The decision, as reported in the Calcutta Law Reports, seems to a certain extent to support this contention, but if the decision of the lower Appellate Court upon this point, which was confirmed by this Court, be taken into consideration, it would appear that what was laid down is (and this is also in accordance with the Mahomedan law), that if the first *talub* be made in the presence of either the seller or the purchaser, or be made at the premises sold, and then invocation of witnesses takes place, a second *talub* by invocation of witnesses would be unnecessary. That is laid down in page 484 of 'Baillie's Mahomedan Law.' At page 483, Edition of 1865, he says "To give validity to the *talub-ish-had*, it is required that it be made in the presence of the purchaser, or seller, or at the premises which are the subject of sale." This shows that it is essential that this *talub* should be made in the presence of the purchaser, or the seller, or at the premises which are the subject of sale. And then at page 484 he says. "The *talub-i-mowashibat*, or immediate demand, is first necessary, then the *talub-ish-had*, or demand with invocation, if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the *pre-emptor*, at the time of hearing of the sale, was absent from the seller, the purchaser, and the premises. But if he heard it in the presence of any of these, and had called on [584] witnesses, to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other." That being so, we think that the contention raised before us on behalf of the appellant fails; because in this

case it is not shown that the first *talub* was made in the presence of either the seller, or the purchaser, or at the premises which constituted the subject of the sale. The appeal will be dismissed with costs.

Appeal dismissed

NOTES.

[This case was approved in (1890) 17 Cal 543 F. B. See also 10 Cal 1008 : (1911) 34 All 1; (1901) U B. R (1897-1901) Vol II, 535 (536)]

[10 Cal. 584]

APPELLATE CRIMINAL

The 17th April, 1884

PRESENT

MR. JUSTICE MITTER AND MR JUSTICE NORRIS

Jan Mahomed and Jabar MahomedAppellants

versus

Queen-Empress . Respondent

and

Waris Meah

versus

Queen-Empress *

Penal Code, ss. 24, 25, 464, 467, 471—Using as genuine a forged document with intent to defraud—A sunnud conferring a title of dignity is not a valuable security.

The accused, in order to obtain a recognition from a Settlement Officer that they were entitled to the title of "Loskur," filed a *sunnud* before that officer purporting to grant that title This document was found not to be genuine. The Sessions Judge convicted the accused under ss. 471, 464 of the Penal Code *Held, on appeal*, that even supposing the accused had used the document knowing it not to be genuine, they could not be found guilty, as the intention of the accused was not to cause wrongful gain or wrongful loss to any one, then intention being to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of "Loskur," and that this could not be said to constitute "an intention to defraud "

A *sunnud* conferring a title of dignity on a person is not a valuable security within the meaning of the Penal Code

ON the 4th March 1883 Jan Mahomed and Jabar Mahomed presented a petition to the Settlement Officer of Cachar in which they stated that their father Rizak Mahomed had received from the Rajah of Cachar a *sunnud* conferring on him the title of "Loskur," and that this *sunnud* had been lost, and asked that certain respectable people living in the neighbourhood might be examined, and that the petitioners' title might be recognized in the new settlement Subsequently on the 31st August they filed another

* Criminal Appeals Nos. 87 and 104 of 1884, against the judgment of H Muspratt, Esq Sessions Judge of Cachar, dated the 16th January 1884

[585] petition to the same end, with a *sunnu*d which they stated was in the name of their grandfather, and further stated that the petition of the 4th March was incorrect. The *sunnu*d then filed purported to bear the seal of the Rajah of Cachar

On the matter coming up before the Deputy Collector, Jan Mahomed and Jabur Mahomed were committed to the Sessions and charged under ss. 464 and 471 of the Penal Code, and at the same time he sent up one Waris Meah for having used as genuine a true pottah, but to which an addition had been made after his name of the letter signifying the title of "Loskur" and for having filed it before the Settlement Officer with the same view in end as the two other accused in the case firstly mentioned

The Sessions Judge found (agreeing with the assessors) that the appearance of the paper led to the conclusion that it was not so old as it purported to be, and that the seal, when compared with a seal of the Rajah on a true *sunnu*d filed in Court, was obviously a forgery and bore no resemblance to the true seal, and holding that the *sunnu*d was a "valuable security," as the Rajah sold the titles to persons under these *sunnu*ds, and that the accused in filing the *sunnu*d acted fraudulently, as they filed the *sunnu*d with intent to defraud the Settlement Officer into the belief that the forged *sunnu*d was a true document, and that they were entitled to be called "Loskur" in the new settlement papers, convicted them of fraudulently using as genuine a document which was a valuable security and which they knew to be a forged document and sentenced them each to rigorous imprisonment for 18 months, under ss. 471 and 464 of the Penal Code

With regard to the case against Waris Meah, the Sessions Judge, agreeing with the assessors, found that the accused had attempted by forgery to defraud the Settlement Officer and to make him believe that his title of "Loskur" had been recognized by the Rajah of Cachar, and that the said title should by right be entered in the new settlement, and that the pottah was a valuable security and gave to the accused a legal right to the land, he, therefore, convicted him of using as genuine a forged document which he knew to be a forged document, and under ss. 471 read with 467 of the Penal Code sentenced him to [586] six months' rigorous imprisonment and a fine of Rs. 50, or, in default, to a further period of six months.

The prisoners in these two cases appealed to the High Court.

No one appeared for the prisoners

The **Judgments** of the Court were delivered by

Mitter, J.— I do not think there is sufficient evidence in this case to prove that the Exhibit A is a false document. The Sessions Judge has relied upon some *roobakarees* which, on their bare production only, cannot be treated as evidence. Excluding these, the conviction stands mainly upon two grounds 1st, on a comparison of the seal upon the Exhibit A with that of another document proved to have been executed by the Rajah of Cachar—the Sessions Judge is of opinion that the two impressions of the seals do not tally, 2ndly, the appearance of the paper shows that it is not so old as it purports to be.

These grounds are, in my opinion, insufficient to support the conviction. It may be that the Rajah changed his seal, and this circumstance may account for the difference between the impressions of the seals

The second ground is based upon mere conjecture. Then, even granting that the Exhibit A is a forgery, I do not think that it has been shown that the appellants knew it to be so. Further, on accepting all the facts as correctly found by the Sessions Judge, I do not think that the appellants are guilty of

any offence under the Penal Code. The facts are simply these: The appellants in order to get a recognition from a Settlement Officer that they are entitled to the title of "Loskur," produced a *sunrud* purporting to have been granted by the Rajah of Cachar. The document is found not to be genuine. The question is, supposing the appellants used this document knowing it to be not genuine with intent to obtain recognition of their alleged "Loskur" title from the Settlement Officer, is it an offence under s 471 of the Indian Penal Code or under any other penal law of the country? The Sessions Judge found the appellants guilty under s 471 of the Indian Penal Code. In using this document, if they had no fraudulent or dishonest intention, they cannot be guilty under s. 471 of the Indian Penal Code.

[587] Section 24 of the Code defines the word "dishonestly." It is to the following effect: "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly.'" Now, the intention of the appellants was not to cause wrongful gain, or wrongful loss to any person.

The word "fraudulently" is thus defined in s 25 of the Code: "A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise."

In this case evidently the intention of the appellants was to produce a false belief in the mind of the Settlement Officer that they are entitled to the dignity of "Loskur," and in order to produce this belief they produced the *sunrud* "A," which has been found to be not genuine. Without defining precisely what would constitute "an intent to defraud," we are clear that it cannot be held in this case that the appellants produced the *sunrud* to "defraud" the Settlement Officer, and therefore it cannot be said that they used the document "fraudulently," as defined in s 25 of the Indian Penal Code. We are, therefore, unable to agree with the Sessions Judge that the appellants are guilty under s 471 of the Indian Penal Code. Nor does the act of the appellants in our opinion amount to any other offence. We, therefore, set aside the conviction and acquit the appellants.

Mitter, J.—In the appeal by Waris Meah, which is against the conviction by the same Sessions Judge, the same question of law arises. For the reasons given in Appeal No. 87 we are of opinion in this case also that, taking the facts found by the lower Court as correct, the appellant is not guilty of any offence. The Sessions Judge has convicted the appellant of using a document which he finds to be a valuable security. The document in question in this case is a *sunrud* of a similar description conferring a certain dignity upon the grantee. A document of this description cannot, in our opinion, be held to be a valuable security, as defined in the Indian Penal Code. We, therefore, set aside the conviction of the appellant in this appeal also.

Appeals allowed

NOTES.

[In (1899) 15 All. 210 this case was dissented from along with 19 Cal. 380. see also 28 Mad. 90 F. B. ; 25 Mad. 726 , 22 Bom 768]

[588] APPEAL FROM ORIGINAL CIVIL.

The 22nd April, 1884.

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND
MR. JUSTICE CUNNINGHAM

Koylash Chunder Doss and others. . . . Plaintiffs

versus

Tariney Churn Singhee and another Defendants

Specific performance—Contract—Letters—Earnest-money.

The defendant in the name of his wife wrote to the plaintiffs a letter, the material portion of which was as follows —

“ The value of your house, No 10, Rutton Mistry's Lane, has been fixed through the broker at Rs 13,125, agreeing to that value I write this letter Please come over to the house of my attorney between 3 and 4 this day with the title-deeds of the house, and receive the earnest There shall be no doing otherwise ”

The plaintiffs through their manager wrote in answer to the defendant's wife —

“ You having agreed to purchase our house for Rs 13,125 have sent a letter through the broker, and we are agreeable to it, and we will be present between 3 and 4 this day at your attorney's and receive the earnest ”

The plaintiffs and defendants met at the attorney's office in the absence of the attorney, and no inspection of title-deeds or payment of the earnest-money therefore took place

Held, in a suit for specific performance of the above contract, that the first letter contained no absolute proposal or undertaking to purchase, but merely fixed the price to be given for the house, leaving the inspection of title-deeds and the payment of earnest-money to be settled at the meeting asked for

That both parties having treated the payment of earnest-money as an element in the contract, the contract could not be completed till the amount of earnest-money had been ascertained

THIS was an appeal from a judgment of Mr. Justice PIGOT, dated the 29th June 1883.

The plaintiffs alleged that on the 3rd of September 1883 they agreed to sell to one Tariney Churn Singhee, in the name of his wife, Runginee Dossee, a certain house in Rutton Mistry's Lane in Calcutta for the sum of Rs. 13,125, these terms being settled by a broker named Hurro Chunder Ghose, who brought about an interchange of letters between the plaintiffs and the defendants, which letters ran as follows —

To Baboo KOYLASH CHUNDER DOSS and BABOO GIRENDRO NATH DOSS, Mohassoys.

[589] The value of your house, No 10, Rutton Mistry's Lane, in Puttuldanga, has been fixed through Sreejoot Hurro Chunder Ghose, broker, at Rs. 13,125, agreeing to this value I write this letter. Please come over to the house of the attorney, Baboo Mooraly Dhur Sen, this day between 3 and 4 o'clock in the afternoon with the title-deeds of the house and receive the earnest. There shall be no doing otherwise. Fms. 1289, 19th Bhadro

(Sd) RUNGINEE DOSSEE.

To Sroemutty RUNGINEE DOSSEE, Mohassoy

You having agreed to purchase our house, No 10, Rutton Mistry's Lane in Arcoly, for Rs. 13,125, have sent a letter this day through Sreejoot Hurro Chunder Ghose, broker, and we are agreeable to it, and between 3 and 4 o'clock in the afternoon this day we will be present at the house of your attorney, Sreejoot Baboo Mooraly Dhur Sen, Mahassoy, and receive the earnest. Finis 1289, 19th Bhadro

(Sd) KOYLASH CHUNDER DOSS.

GIRENDRO NATH DOSS.

The plaintiffs called at the defendants' attorney's office, and met the defendants in the absence of their attorney, and alleged that Tarney Churn Singhee on that occasion agreed to abide by his wife's letter, and promised to let them know the next day when the agreement should be carried out.

On the 5th September 1882 the plaintiffs wrote to the defendants calling on them to perform their contract, or in default threatened to bring a suit against them in two days' time

On the 7th the defendants' attorney wrote to the plaintiffs denying having entered into any contract. The plaintiffs then brought this suit for specific performance of the contract

The defendants contended that the broker had misstated the number of rooms in the house, and that the letters interchanged were merely preliminary to the signing of the necessary agreement of sale, and did not amount to an agreement or contract to purchase, and that if they did amount to a contract, such contract was obtained by fraud and misrepresentation of the plaintiffs' agent.

At the hearing the broker stated that with regard to the writing of the letters he had said to the defendants "If you have made up your mind to take this house give me a *pucra* contract that I may take it away," and that he considered the second letter to be the *pucra* contract.

No evidence was given by the defendants

[590] Mr Allen (with him Mr Trevelyan) for the Plaintiffs

Mr. Bonnerjee (with him Mr M P Gasper) for the Defendants, contended that no condition as to possession being mentioned in the letters, and there being a tenant in the house, there was no contract that could be specifically performed, the matter only being in the region of negotiation, no details of the contract having been given, and cited *Williams v Briscoe* (L R., 22 Ch. D., 441), *Rummens v. Robins* (3 de G. J. and S 88), *The South Wales Railway Co. v. Wythes* (5 de G. M and G, 880), *Hudleston v Briscoe* (11 Vesey. 583).

Mr Trevelyan in reply.

PIGOT, J., found that the letters contemplated a further writing being drawn up at the attorney's, and held that on the documents and facts it had not been proved that the defendants entered into the contract sued on, and therefore dismissed the suit

The plaintiffs appealed

The Advocate-General (Mr. Paul), Mr Allen and Mr. Doss for the Appellants.

The Advocate-General.—Section 4 of the Contract Act (cl. a) shows us that all that is required to make a contract is a proposal and an acceptance

Section 12 (cl. c) of the Specific Relief Act gives an example of a contract which may be specifically performed Now we find exactly those conditions in our contract, viz., in the letters

[GARTH, C J.—I fail to see any finality of the agreement, the letter asks you to accept the earnest-money, and there can, therefore, be no contract till the earnest-money is accepted.]

I say the earnest-money is immaterial to the contract, the case has not been decided on that ground, but because the letters are said only to amount to a preliminary agreement to a contract

The case of *Rossiter v Muller* [L R, 3 Ap. Cas, 1124 (1143)] lays down that such a correspondence amounts to a contract, and that the only essential requirements to form a contract are the parties, the subject-matter and the price, all of which we have in our letters

[591] [GARTH, C J—For three reasons the letters were never intended to be a contract, viz —

- (1) Earnest-money was intended to pass
- (2) The title-deeds were to be produced
- (3) The parties were to meet at an attorney's--doubtless to draw up some sort of an agreement]

Ridgway v. Wharton (6 H of L Cas., 238) shows that an attorney in drawing up a deed cannot alter the terms of the contract, the letters, therefore, form the contract

Bownewell v. Jenkins (L R, 8 Ch. D, 70) was a case where a plaintiff wrote saying "I offer such and such a share for your leasehold property, this offer being made subject to the conditions of the lease being modified to my solicitor's satisfaction." Modifications were made, and the Court of Appeal held that, notwithstanding the reference to a future contract, the letters constituted a complete contract

As regards the question of earnest-money in England earnest-money is a good legal symbol in cases where there is no written contract, but where there is a contract in writing, it is valueless, it has no legal significance. The Statute of Frauds does not apply to natives

But even supposing that it has a legal significance, the new *Beebloom Coal Co v. Bularam Mahata* (1 L. R, 5 Cal, 932) shows that uncertainty is no sufficient ground for a party being refused specific performance of a contract, so the fact that the amount of earnest-money was not settled is no ground for refusing us relief

As regards our taking the title-deeds the next day, we could not get specific performance till we had given a good title, but we were not bound to make out a good title the next day to the one on which the letters were sent, even if we were bound to take the title-deeds the next day and did not do so, that would only entitle the other side to at most to damages, but would not put an end to the contract. I rely on the letters and the evidence of the broker who alleged that the letters were to make the contract *pucca*—how can it be said that production of the title-deeds formed part of the contract—it is one of the matters **[592]** that arise after the contract has been made, the stage of contract is then passed.

Mr. Allen on the same side. As to what is necessary to complete a contract, see Fry on Specific Performance, p. 145, para. 324. This is a parol contract evidenced by the letters. *Fowle v. Fierman* (9 Ves., 351) shows that specific performance has even been given of letters which were not intended at the time to be a complete final agreement

Kennedy v Lee (3 Mer., 441) shows that all that is required to make a contract is that the amount and nature of the consideration to be paid and

received should be ascertained, together with a reasonable*description of the subject-matter of the contract In fact, that the parties should be at one—and when once at one, nothing can vary or alter such a contract.

Thomas v Dering (1 Keen, 729) establishes that, although there may be no intention at the time of making a contract, of making a complete contract, yet the Courts will enforce it

The Proprietors of the English and Foreign Credit Co. v Arduin (L R., 5 Eng. and Ir. Ap., 80) is an authority to show that the defendants are precluded from saying the letters are not a proper contract, we having understood their letter to be an unconditional acceptance

Hussey v Horne-Payne (L R, 4 Ap Cas, 311). *Roidly v. Fitzgerald* [6 H. of L Cas, 823 (876)] , *Sanderson v The Cockermouth and Workington Railway Co* (11 Beav, 497) were also cited

Mr. Bonnerjee for the Respondents cited *Williams v Bruscoe* (L. R., 22 Ch. D., 441) and *Rummens v. Robins* (3 de G J. and S, 88).

Judgments of the Court were delivered by GARTH, C.J , and CUNNINGHAM, J.

Garth, C.J.—This suit is brought to enforce the specific performance of a contract for the purchase of a house.

The lower Court held that the alleged contract was not proved and dismissed the suit

[593] The plaintiff has appealed to this Court, and he has relied in support of his case upon two letters, which passed on the 3rd of September 1882, as well as upon the conduct of the parties, and a conversation which occurred on the afternoon of the same day after the letters were exchanged.

The negotiation, it seems, was brought about by a house-broker named Hurro Chunder Ghose, who knew that the defendant was on the look-out for a house in the particular locality, and proposed to him to buy this one. After looking over a portion of the house, and hearing Hurro Chunder's description of it, the defendant, at Hurro Chunder's suggestion, wrote the following letter to the plaintiffs in his wife's name --

To Sreejoot Baboo KOYLASH CHUNDER DOSS, and Sreejoot Baboo GIRINDRA NATH DOSS, Mohassoys.

The value of your house, No 10, Rutton Misty's Lane, in Patuldaugah, has been fixed through Sreejoot Hurro Chunder Ghose, broker, at Rs 13,125 , agreeing to that value I write this letter. Please come over to the house of the attorney, Baboo Mooraly Dhur Sen, Mohassoy, this day between 3 and 4 o'clock in the afternoon with the title-deeds of the house, and receive the earnest

There shall be no doing otherwise Fms 1289, 19th Bhadro

Sree RUNGINEE DOSSEE, now residing in the house No. 49, Jhamapuker.

By the pen of Sree KISORY MOHUN GHOSE.

Upon receiving this letter from Hurro Chunder, the plaintiffs through their manager wrote the following letter to the defendant's wife .—

To Sreemuttv RUNGINEE DOSSEE, Mohassoy

You having agreed to purchase our house, No 10, Rutton Misty's Lane, in Alcooly, for Rs. 13,125, have sent a letter this day through Sreejoot Hurro Chunder Ghose, broker, and we are agreeable to it, and between 3 and 4 o'clock in the afternoon this day we will be present at the house of your attorney, Baboo Mooraly Dhur Sen, Mohassoy, and receive the earnest. Fms. 1289, 19th Bhadro

Sree KOYLASH CHUNDER DOSS

and

Sree GIRINDRO NATH DOSS.

By the pen of Sree MOHINDRO NATH MOOKERJEE. .

The plaintiffs contend that these letters constituted, and were intended to constitute, a *pucca* or binding agreement. The defendant, on the other hand, contends that they were only intended as commencing the negotiation, which was to have been [594] completed by the payment of the earnest-money, and the execution of a regular *byna* contract.

At the trial, however, no evidence was given on behalf of the defendants. The learned Judge decided against the plaintiffs on their own showing, and I think that he was right.

It seems to me that the real question is, whether the two letters, which were exchanged on the 3rd of September, do, in fact, constitute a complete and binding agreement.

For the purpose of determining this question, we must gather the intention of the parties from the letters themselves, and not from what was said or intended before the letters were exchanged.

In consequence of some doubt being suggested during the argument, as to whether the letters had been correctly translated, we sent for one of the Court interpreters, and asked him to translate them in open Court. His translation agreed substantially with that which had been previously furnished, and by the aid of it the construction which I put upon the defendant's letter is this.

"As the value of your house has been fixed by Hurro Chunder, the broker, at Rs. 13,125, and as I agree to that value, I write this letter to request that you will come to the house of my attorney, Mooraly Dhur Sen, between 3 and 4 o'clock to-day, bringing with you the title-deeds of your house, and receive the earnest-money. If you will not fail me in this, I will not fail you."

The letter in answer appears to mean this

"As you have agreed to purchase my house for Rs. 13,125, and have sent me your letter to that effect, we agree to your proposal, and will be at the house of your attorney to-day between 3 and 4 o'clock, and receive the earnest-money."

Mr. Allen has contended that the first portion of the defendant's letter is an absolute proposal by him to buy the house for the sum named, independently of all other considerations, and that the remainder of the letter forms no part of the proposal, but merely suggests the time, place and manner in which the proposal is to be carried out.

If this were really so, I should quite agree with Mr. Allen that [595] the case would come within the principle of *Rossiter v. Miller* (L. R., 3 Ap. Cas., 1124) and the other authorities to which he has very properly called our attention. But I cannot take that view of the letter. It contains, as it seems to me, no absolute proposal or undertaking to purchase the house, what had been done at that time, with the aid of the broker, was merely to ascertain the proper price, and all that the defendant meant to say was "so far as price is concerned, I am quite content with that which my broker has fixed--and if you are also content, I beg you will come to my attorney's office with your title-deeds, when we arrange matters, you shall receive the earnest-money."

His intention, as it seems to me, was that the matter should be finally settled at the attorney's office, and two very important matters were left for that occasion--namely, the inspection of the title-deeds, and the amount and payment of the earnest-money. It was very proper that the defendant should not commit himself to any binding contract, till he knew something, at any rate, of the nature of the plaintiff's title, and as regards the earnest-money,

it must be observed that both parties treat that as an element in the bargain. How then could the contract be said to be *complete and binding*, until the amount of the earnest-money had been ascertained

In point of fact, no meeting took place at the attorney's office, because the attorney was not there, and the defendant refused to consult any other attorney, but suppose the meeting had taken place, and parties had been unable to agree as to the amount of the earnest-money, how could it possibly have been said that they had arrived at any binding agreement.

Mr. *Allen* tried hard to escape from this difficulty in one of three ways

1st.—By the argument, which I have already mentioned, that the payment of the earnest-money did not affect the contract itself, but only the way in which it was to be carried out

But it seems to me that both parties treated it as an element in the contract, and if so, the contract could not be complete until the amount of the earnest-money was ascertained

[596] 2ndly —He argued that the Court could ascertain the amount of the earnest-money, as it has ascertained in several cases the price of the property sold.

But the amount to be paid for earnest-money must, from its very nature, be a matter of agreement between the parties, it cannot be ascertained by the Court, for the best of reasons, because it is paid not on the *completion* but on the *making* of the contract, or at any rate at some time before the completion

3rdly —Then lastly, Mr. *Allen* argued, that assuming the earnest-money to have been an element in the contract, his clients were content to waive it. But no notice of any waiver appears to have been given, and even if it had been, the defendant had by that time repudiated the contract. If the contract was incomplete and not binding on the 3rd of September, nothing that was afterwards done by the plaintiffs could have made their position any better.

I am satisfied, on the whole, that looking to the letter itself, the defendant never made or intended to make any absolute proposal to purchase the property. I think he never intended to bind himself to anything, till his attorney knew something of the plaintiff's title, and the amount of the earnest-money had been ascertained.

As soon as these additional matters had been adjusted, the earnest-money would have been paid and a *byna* contract prepared. That is undoubtedly the usual course in native transactions of this kind, and it seems to me that what was said by the plaintiffs' manager in giving his evidence strongly confirms that view

Then lastly, Mr. *Allen* contended that what was said by the defendant when the parties met afterwards at Baboo Mooraly Dhur Sen's office was sufficient to constitute a binding contract, according to the plaintiffs' manager's evidence, the defendant said "By the letter you have given me, you have bound yourself to sell the property to me, and by the letter I have given you, I have bound myself to take the property"

Even assuming this to be true, I think it makes the plaintiffs' case no better. It was no new promise, but only a reference to [597] the letters which had passed; and I don't think it would justify us in putting a different construction upon the letters, than that which they bear upon the face of them. Besides which, as the amount of earnest-money was not then fixed, the words said to have been used by the defendant would not relieve the plaintiffs from that difficulty.

But even if I were disposed to take a different view of the evidence of the plaintiffs' manager, I think we should clearly be bound, before deciding in the plaintiffs' favour, to give the defendant an opportunity of contradicting this statement, and going generally into his case.

The learned Judge, as we understand, dismissed the suit upon the plaintiffs' own evidence, and without calling upon the defendant to go into his case. As it is, I agree with the Court below and think the appeal should be dismissed with costs on scale 2.

Cunningham, J.—I also think that the original Court was right. The main argument in the appeal was that as the parties to the contract, the subject-matter and the price were all ascertained, there was a binding agreement from which neither party was at liberty to recede. This rule, however, cannot be applied without qualification to the present case. The cases to which reference has been made—*Ridgway v. Wharton* (6 H. L., 238), *Rossiter v. Miller* (L. R., 3 Ap. Cas., 1124), *Bournewell v. Jenkins* (L. R., 8 Ch. D., 70); *Crossly v. Maycock* (L. R., 18 Eq., 180), *Chinnock v. Marchioness of Ely* (4 de G. J. & S., 638)—in my opinion, establish the rule that, if the material ingredients of the agreement are ascertained, and if there be a distinct offer on one side, and a distinct acceptance on the other, a contract arises, notwithstanding that the parties may have recorded their intention that it shall be put into a more formal shape by a solicitor. But, on the other hand, if on the true construction of the correspondence and evidence it appears to have been the intention of the parties that they are not to be bound till the agreement has been put into a formal shape and approved by them, then the parties ought not to be bound till that formal document has been executed. In the present instance I think that the proper construction [598] to be put on the letters is that the defendant did intimate his intention not to be bound till the deeds had been produced at his attorney's and with his attorney's approval the *byna-putro* executed, and the *byna* or earnest-money paid.

I concur on the ground on which the original Court held this to be the right construction, and especially on the fact that neither of the letters was written by the contracting parties, and that the request in the defendant's letter to the plaintiffs to come over to the house of Mooraly Dhur with the title-deeds was not agreed to in the plaintiffs' letter, nor was in fact complied with. I concur accordingly in thinking that the original Court was right in dismissing the appeal.

Attorney for Plaintiffs *G. C. Dhur*

Appeal dismissed.

Attorney for Defendants *Mooraly Dhur Sen*

NOTES

[CONTRACT—WHEN CONCLUDED—

See the Notes of Messrs. Pollock and Mulla to sec. 7 of the Indian Contract Act, 1872, 3rd Edn. at pp. 44, 45.

Upon the conditions in this case as to inspection of title deeds, and the payment of purchase-money, they observe as follows:—"It looks as if there had been some misapprehension here. In English practice, at any rate, a contract for purchase of land is not suspended until the title has been shown: there is a complete contract as soon as all the terms—including special conditions, if any, as to title—have been agreed upon, subject to the purchaser's rights to rescind, or to compensation, if a title is not shown according to the contract, and often by agreement, to the vendor's right to rescind if he cannot remove any objection. It looks very much as if some well-known customary proportion of earnest-money was really intended by the parties, but apparently there was no proof of this."]

[599] APPELLATE CIVIL.

The 26th March, 1884.

PRESENT

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Omrao Mirza.Plaintiff

versus

M. Jones..... .Defendant.

Mahomedan law—Waqf—Endowment—Valuation of suit—Removal of trustee—Court-fees' Act, Act VII of 1870, s 7, cl. (3), and sub-clause (f), and clauses 3 and 6 of art. 17, schedule II

IN a suit for the removal of the defendant from the management of certain trust funds on the ground of misconduct, the plaintiff stamped his plaint with a Court-fee stamp of Rs. 10, and valued the suit at Rs. 7,000 "for the purpose of jurisdiction "

Held, that the Rs. 7,000 must be taken, under the circumstances, to be the plaintiff's interest in the subject-matter of the suit, and that the Court-fee must be estimated upon that sum.

Delroos Banoo Begum v Ashgur Ali Khan (15 B. L. R., 167) followed

THE question which arose in this case was as to the proper Court-fee payable on the institution of the suit. The plaint stated as follows:—"The value of the *waqf* which the plaintiff seeks in this suit cannot be ascertained by any money value. Consequently, this suit is brought on payment of a Court-fee of Rs. 10, and this suit is approximately valued at the sum of Rs. 7,000 for the purposes of jurisdiction." The facts of the case and the argument made use of on both sides are fully set forth in the judgment appealed from, which is as follows —

"Eliza Jones, deceased, the widow of the late Nawab Maharajuddawla of the Oudh family, by her last will and testament, dated the 14th November 1852, made over Government securities to the value of five lacs of rupees to her brother and two sisters or their last survivor, on condition that they should never dispose of them, that the interest on three lacs of rupees should be expended on the necessary expenses connected with her tomb and the tomb of her husband, and that with the interest of two lacs of rupees they should enable pilgrims to go to Mecca, etc., and that after the death of her heirs, the Government should carry out the above trusts.

"The defendant is the last surviving sister of the said testatrix and has been managing the trust for some time. The plaintiff, as one of the near-[600]est relations and next heir of the testatrix, charges the defendant with waste and misconduct of omission, commission and misappropriation of the said sum of money, and asks for the following relief in this suit, namely —

"(ka) To enquire how the defendant has been using and spending the said Government securities of five lacs of rupees or the interest thereon.

"(kha) If on such enquiry it be found that she is not performing the religious duties with the said interest as required or according to the injunctions

* Appeal from Original Decree No. 328 of 1882, against the decree of Baboo Nafur Chunder Bhutto, Rai Bahadur, First Subordinate Judge of 24-Pergunnahs, dated 12th of August 1882.

contained in that will, then to appoint another proper person (in her stead), or to make over the said Government securities to the Government, so that the religious duties intended by the testatrix may be fulfilled.

“(ga) To compel the defendant to make good any portion of the said sum, or the Government securities that will be found to have been misappropriated by the defendant, and to make over the same either to the person appointed by the Court or to the Government, as the case may be.

“(gha) To prepare a scheme, if necessary, to give full effect to the provisions of the said will

“(gna) To order the defendant to pay the plaintiff all the costs of this suit

“(cha) And to pass such just and proper order as may be required by the circumstances of the case, so that the intentions of the testatrix as regards the religious duties may be properly carried out.

“The plaintiff values such a suit at Rs 7,000 only, and affixed a Court-fee of Rs. 10 only on the plaint. That valuation is clearly for purposes of jurisdiction, and has nothing to do with the amount of Court-tees to be levied. The defendant, amongst other objections, urges that the will has been under-valued, and that the proper Court-fee stamp has not been affixed on the plaint. It is evident that this point must be settled before any other question can be gone into.

“After hearing counsel on both sides, I am of opinion that the case does not fall within the sub-articles III and VI, article 17, schedule II of the Court-fees' Act. At very first sight it is apparent that sub-article III does not apply, for no declaration whatever, such as a declaration of the validity or invalidity of the will or any of its provisions or even interpretation of any of its provisions, is prayed for. It may be that the case may require interpretation of some of the provisions of the will for the purpose of seeing whether any of the prayers can be granted, but that is not what is “prayed for.” Besides, in suits of this kind any consequential relief is conceivable, such relief is expressly and directly prayed for in prayers (kha) and (ga) in which the plaintiff seeks for the removal of the defendant from the office of manager, trustee or *mutwali*, and appointment of another in her stead, or for the transfer of the *wagf* or trust property to the hands of the Government, and the realization from the defendant of any sum found to [601] have been misappropriated by her. As regards the provision of sub-article VI, the subject-matter in this suit is not such that its “money value” cannot possibly be estimated. The whole sum of five lacs of rupees, together with interest which has accrued thereon, is the subject-matter of this suit, for under prayer (kha) it is asked that the whole of that amount may be transferred to another person or to Government. Again, in prayer (ka) an account of the original sum and receipts and disbursements of the interest is sought for. Now, for accounts there is an express provision in sub-clause (f), clause IV, s 7 of the Court-fees' Act. Sub-article VI of article 17 in sched II of the Act does not apply to the suit at all, because for its application two conditions are necessary, namely (1) the impossibility of estimation of the money value of the subject-matter, (2) a want of a provision expressly applicable to the case. But there is a provision elsewhere directly applicable to cases of accounts, etc., and hence sub-article VI does not apply.

“So far as the taking of accounts is concerned, the plaintiff had undoubtedly the right to exercise his own discretion in valuing the relief sought for under the last two paragraphs of clause IV of s. 7. But under the last paragraph, the Court has yet power to see whether such discretion or option has been properly exercised or not under s 51 of the present Procedure Code, which

corresponds to s. 31 of Act VIII of 1859 therein referred to. Section 3 of the present Code makes s. 54 applicable. If this were, however, a suit for accounts only, I might take Rs. 7,000 as the value of the relief, though that value has been given for purposes of jurisdiction only, and that too apparently under no principle whatever.

"But it appears to me that this is a suit for 'moveable property other than money, where the subject-matter has a market value' within the meaning of clause III, s. 7, for Government securities indisputably come under that category, and their transfer to other hands is expressly sought for in prayer (*kha*). It is said that so far as the plaintiff is concerned, the subject-matter of the suit has no value at all, for he has no interest therein, nor does he claim any interest of his own. That may be the case, but if he has any right to bring such a suit, he stands in the same position as one who sues in his own right and for his own private benefit or in some representative character, such as the guardian of a minor, so far as Court-fees are concerned. The law does not say that the relief must be a personal relief to the plaintiff.

I hold therefore that inasmuch as the Court may have to order that the whole amount of Government securities worth Rs. 5,00,000 be taken away from the defendant and made over either to the plaintiff or some one else or to the Government according to the case and the prayers in this plaint, this is a suit "for moveable property other than money when the subject-matter has a marketable value." This suit must be valued at Rs. 5,00,000, [602] and stamp-fees paid according to that value. The prayer for accounts is merged in the general prayer for the whole of the subject-matter. Plaintiff to value the suit and pay the Court-fees accordingly in the course of two months."

Before the expiration of the time allowed by the Subordinate Judge for payment of the additional fee, the plaintiff obtained a rule in the High Court under s. 622 of the Code of Civil Procedure, calling on the defendant to show cause why the order of the Subordinate Judge should not be quashed, but on the 13th of July 1882 this rule was discharged on the ground that the proper course for the plaintiff to adopt was to wait until his plaint should be rejected by the Subordinate Judge under s. 54, cl (a) of the Code of Civil Procedure. On the 12th of August 1882 the plaint was rejected, and thereupon the plaintiff preferred this appeal on the following grounds --

(1) That the Court below ought to have held that the plaint falls within clause 3 or clause 6 of art 17^e of schedule II of the Court-fees' Act, and was therefore properly stamped, (2) that the Court below has misconceived the true nature of the suit, and has erred in supposing that the inquiries which the plaint asks for in any way alter the character of the same, (3) that the Court below ought to have held that this was only a declaratory suit, where no consequential relief was asked for, (4) that the Court below has erroneously supposed that the suit asks for the appointment of your petitioner as trustee,

*[Art 17, cl 6 --

Number.

Proper fees

Plaint or memorandum of appeal in each of the following suits --

6. Every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.

Ten rupees]

(5) that the Court below is wrong to hold that the sub-clause (f) of s. 7* of the Court-fees' Act is applicable to any portion of the suit, (6) that the Subordinate Judge has erred in holding that the suit falls within cl. 3, s. 7† of the Court-fees' Act, and that the plaint should have been stamped with Court-fee payable for Rs 5,00,000.

Baboo Chunder Madhub Ghose and Baboo Korunasindhu Mookerji for the Appellant

Mr Hill and Munshi Seraqul Islam for the Respondent.

The following **Judgments** were delivered —

Prinsep, J.—The matter raised in this appeal relates to the assessment of Court-fees on the plaint. The suit, as we under-**[603]**stand it, is a suit for removal of the defendant from the management of certain trust funds on proof of his misconduct. The Subordinate Judge has held that the Court-fees payable should be assessed on the value of the trust property—that being, in his opinion, the subject-matter of the suit.

It appears to us that the subject-matter in this suit is not the *corpus* of the trust property, but the right to retain the control over it. Under such circumstances, the suit would ordinarily fall within sch. II, art. 17, cl. 6 of the Court-fees' Act. But in the present matter we have the fact that the plaintiff has valued the subject-matter of suit for the purposes of jurisdiction, as he states, at Rs. 7,000. We regard this value as not being merely for the purposes of jurisdiction, but also as affording a basis for the assessment of Court-fees. We accept the principle laid down in the case of *Delroos Banoo Begum v Ashqui Ali Khan* (15 B L R, 157)

But the circumstances of that case are very different from those of the case now before us, so far as we can gather the facts from the papers printed in the paper-book. In the case of *Delroos Banoo Begum v. Ashqui Ali Khan* (15 B L R, 157), it would seem that the *mutwali* was in receipt of certain emoluments derived from a specific share of the income of the *waqf* property, whereas it is not stated in the case before us that the manager is in receipt of any such emolument. Taking, however, the sum of Rs 7,000, stated in the plaint, we think that the Court-fees should be assessed at least on that amount. The case will be returned to the Court of the Subordinate Judge who will proceed with the trial, provided that the plaintiff deposits the proper amount of Court-fees within fourteen days from this date.

O'Kinealy, J.—I concur in the decision arrived at by my learned brother, for I think the case falls within the principle laid down in the case of *Delroos Banoo Begum v Ashqui Ali Khan* (15 B L R., 157). At page 187 of the report in delivering the judgment of the Court, GLOVER, J., said "The plaintiffs ask for distinct and important consequential relief, they ask not only that the defendant may be declared to have wasted the endowment and thereby to have betrayed her trust, but also that she may be **[604]** turned out of her *mutwaliship*, and they, the plaintiffs, be appointed in her room. The plaintiffs say

Computation of fees payable in certain suits.

*[Sec 7 — The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows. —

For accounts

(f) — For accounts—according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought, and the provisions of the Code of Civil Procedure, section thirty-one, shall apply as if, for the word 'claim,' the words 'relief sought' were substituted.]

For other moveable property having a market-value.

† [Sec. 7 cl (3) — In suits for moveable property other than money, where the subject-matter has a market-value—according to such value at the date of presenting the plaint.]

that what they claim does not admit of being properly estimated by a money-value, but this is not so. Under the *tanhatnama* the *mutwals* were to receive six twenty-eighths of the produce of the estate, a very considerable sum, and the plaintiffs' claim to this share as an appurtenance to the office of *mutwal* was easily to be estimated in money. I am of opinion that the plaint ought to have been engrossed on a stamp of proper value." By this I understand the Court was of opinion that the suit should be valued according to the interest of the plaintiff in the subject-matter of the suit, and in this case the plaintiff has valued it at Rs 7,000.

Appeal allowed

NOTES

[COURT FEES ACT 1870—REMOVAL OF TRUSTEE—

In 19 All, 60, 104 it was held that art 17 (6) was applicable, *see* also 21 All, 200
See the criticism of Mr *Jagannatha Iyer* upon this case in his Court Fees Act (1904,, pp. 213—215]

[10 Cal. 604]

CRIMINAL REFERENCE

The 24th March, 1884

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS

Queen-Empress

versus

Batesar Mandal.*

False statement before a Registrar—Prosecution under the Registration Act (III of 1877), s. 82, cl (a) and s 83—ss. 72 and 73.

Where the accused was tried for intentionally making a false statement in the course of certain proceedings taken before a Registrar *Held*, that even assuming that such proceedings were taken under s 72 of the Registration Act, and not as they should have been under s. 73, the appearance of the accused before the Registrar and his taking no objection to the form of the proceedings will cure the irregularity for the purposes of a criminal trial under the provisions of the Registration Act Nor under similar circumstances will the want of verification of a petition of appeal on the part of the applicant, as provided by s 73 of the Act, oust the jurisdiction of the Criminal Court

Reg. v James Berry [28 L. J (M C) 86, 8 Cox C C, 121], *The Queen v Thomas Fletcher* (L R, 1 C. C. R, 320), *Turner v. Postmaster-General* (5 B and S, 756), *The Queen v Hughes* (L R., 4 Q.B D., 614; 14 Cox C C., 285), *The Queen v Smith* (L R, 1 C. C. R 110, 11 Cox C. C., 10) followed

[605] *Held*, also, that except as directed by s 82 of Act III of 1877, the Magistrate has no authority on his own mere motion to frame a charge against the accused in consequence of evidence, given in the course of the trial by the Registering Officer, in respect of certain statements made before him during registration proceedings

IN this case one Batesar Mandal was alleged to have executed a *kabulhat* in favour of the Maharajah of Durbhanga, and his presence or testimony being

* Criminal Reference No 17, and letter No. 29, from F Cowley, Esq, Sessions Judge of Purneah, dated the 25th February 1884

necessary for the registration of the document, he was summoned before the Sub-Registrar, and, after having been duly affirmed, denied having signed the *kabuliat*, registration of which was accordingly refused. In due course the manager of the Maharajah presented a petition to the Registrar purporting to be an appeal, with the following declaration at foot. "I do declare that what is set forth in this petition is true and correct to the best of my knowledge and belief.—(Signed) Abdul Wahid, Mukhtar." After the petition had been filed, it was marginally marked in the Registration Office, "Appeal No. 15 of 1883." The Registrar, after the necessary inquiries and the examination of Batesar Mandal and others, gave this decision "I have not the slightest doubt that the witnesses of the respondent and the respondent himself have deliberately given false evidence in the case. The appeal is decreed and the *kabuliat* is directed to be registered. Batesar Mandal is directed to give security for his appearance on the 10th instant before the Magistrate to whom he and his six witnesses are made over with a copy of the judgment.' Pursuant to this order the accused afterwards appeared before the Joint Magistrate. In the course of the investigation by the Joint Magistrate into the alleged false statement made before the Registrar, the Sub Registrar was examined as a witness, and in consequence of his evidence the Magistrate on his own motion further charged the accused with having made a false statement before the Sub-Registrar. When the case was ripe for judgment a petition was presented to the Sessions Judge, praying him to send for the record and refer the case to the High Court. The Sessions Judge referred the case to the High Court. Mr. Gasper for the accused contended (1) that, as regards the charge, the whole proceedings before the Registrar were *coram non judice*, inasmuch as they were taken by way of [606] appeal and not as they should have been under s. 72 of Act III of 1877, (2) that inasmuch as the application made to the Registrar had not been verified in manner required by law for the verification of complaints, the whole proceedings before that officer were null and void, (3) that as regards the charge of giving false evidence before the Sub-Registrar, inasmuch as there was no sanction whatever for the prosecution, the Joint Magistrate had no authority to frame a charge against the accused.

The Judgment of the Court (TOTTENHAM and NORRIS, JJ.) so far as it is material for the purpose of this report, ran as follows —

With regard to the first point we were, during the argument, inclined to think that Mr. Gasper's contention was well founded, but upon consideration and on examination of the authorities we are of opinion that it cannot be sustained. For the purpose of this case we assume that the proceedings before the Registrar were taken under s. 72 of the Act and not as they should have been under s. 73, and that what the Registrar heard was an appeal and not an application. Now, no doubt, the accused, when he appeared before the Registrar, might have pointed out this irregularity, and might have asked the Registrar to make no order or to dismiss the appeal, but he appeared, made no objection to the form of the proceedings, and must be held to have waived the irregularity. Under these circumstances we are of opinion that upon the authority of *Reg v. Barry* [28 L J. (M C) 86, 8 Cox C. C., 121], *Queen v. Fletcher* (L. R., 1 C C R., 320), *Turner v. Postmaster-General* (5 B. and S., 756), *Queen v. Hughes* (L. R., 4 Q. B D., 614. 14 Cox C. C., 285), the accused may properly be charged with giving false evidence at the enquiry before the Registrar. We are also of opinion that the accused waived any irregularity in the verification of the petition of appeal treating that document as an application under s. 73, and that the second contention by Mr. Gasper fails. See the cases above cited and *Queen v. Smith* (L. R., 1 C. C. R., 110. 11 Cox C. C., 10).

As to the third point raised, we are of opinion that the Joint Magistrate had no authority to frame the second charge. The [607] prosecution for the offence of giving false evidence before the Sub-Registrar was neither commenced by him, or by any of the officers mentioned in s 83, nor was it sanctioned by any or either of them. These being our views on the case the Magistrate will proceed to dispose of the first charge against the accused as he may think proper, having regard to the evidence before him, of the sufficiency of which we offer no opinion. The proceedings on the second charge must be set aside.

Additional charge quashed

[10 Cal. 607]
APPELLATE CIVIL

The 17th April, 1884

PRESENT

MR JUSTICE McDONELL AND MR JUSTICE FIELD

Khadem Ali Plaintiff

versus

Tajimunnissa and others Defendants

Restitution of conjugal rights—Registration of Mahomedan marriages—Bengal Act I of 1876, s 6, sch A—Copy of entry in register—Evidence.

A husband and wife, Mahomedans, registered their marriage under Bengal Act I of 1876, setting out in the form prescribed in schedule A to the Act, as "a special condition" that the wife under certain circumstances therein set out might divorce her husband.

These circumstances occurred, and the wife divorced her husband. *Held*, in a suit by the husband for restoration of his conjugal rights, that the "special condition" was a matter which, under the provisions of the Act it was the duty of the Mahomedan Registrar to enter in the register, and that therefore a copy of the entry in the register was legal evidence of the facts therein contained.

THIS was a suit brought by one Khadem Ali against Tajimunnissa, his wife, for restitution of conjugal rights. The wife's father, defendant No. 2, her brother defendant No. 3, and some other relatives were also made defendants.

The plaintiff alleged that his wife's father and brother took his wife to their house promising to send her back in 15 days, but that they failed to do so. Defendants Nos 2 and 3 contended that the plaintiff had maltreated his wife and had driven her away, and [608] that she, therefore, divorced him as she was entitled to do under "a special condition" of the register of her marriage, drawn up in compliance with schedule A of Bengal Act I of 1876, which set out in art 14 that the wife might divorce the husband if he maltreated her, or took away her ornaments. A copy of this register was put in evidence.

Defendant No. 1, the wife, alleged that a quarrel having arisen between her and the plaintiff's mother (with whom she never agreed), plaintiff had

* Appeal from Appellate Decree No 1936 of 1882, against the decree of Baboo Kristo Mohun Mukerji, First Subordinate Judge of Chittagong, dated the 24th of June 1882, reversing the decree of Baboo Poorna Chunder Roy, Munsiff of Dakshinputtiah, dated 27th of December 1880.

assaulted and maltreated her, and that she had therefore divorced him and had gone to live with her relatives.

The Munsiff found that the defendants had failed to prove any quarrelling in the husband's house, and that their witnesses gave such unreliable evidence as to the assault and as to any divorce having taken place, whilst, on the other hand, he found that the defendants had taken the wife away from her husband, he therefore gave a decree in favour of the plaintiff.

The defendant No. 1 appealed to the Subordinate Judge, who himself examined the plaintiff and defendant No. 1, and on the evidence of defendant No. 1 he found that she had been cruelly maltreated by her husband, and held that under the special conditions above referred to she had rightfully divorced him; he, therefore, reversed the decree of the Munsiff. The plaintiff appealed to the High Court.

Munshi *Serajul Islam*, for the Appellants, contended that the recital in the register of the Marriage Registrar ought not to have been used in evidence, as the register had not been duly proved, and that it could not be used as evidence that the parties had agreed that the wife should be at liberty under certain circumstances to divorce her husband.

Baboo *Aukhil Chunder Sen* for the Respondent.

Judgment of the High Court was delivered by

Field, J.—The only point upon which we need make any observation in this case is the contention that a copy of a register kept under the provisions of Bengal Act I of 1876, was not admissible in evidence to prove that the parties had agreed that the wife would, under certain circumstances, have the right to divorce her husband. Section 6 of the Act directs that every [609] Mahomedan Registrar shall keep certain books, and amongst them Book I, which is a register of marriages in the form "A" contained in the schedule annexed to the Act. Now, the 14th clause of form "A" is "Special conditions, if any." It is clear, therefore, that the special condition relied upon in this case was a matter which, under the provisions of the Act, it was the duty of the Mahomedan Registrar to enter in the register kept in accordance with the directions of the Act.

This being so, we think that the copy of the entry in the register was legal evidence.

We have heard the learned vakil on the other points raised in the case, and we do not think there is any ground upon which we can interfere.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[In (1892) 19 Cal. 689 19 I. A., 157 which was a suit for dower settled on a Mahomedan lady at the time of her marriage, the Privy Council held the register of marriages admissible and relevant evidence (as regards the amount of dower) within the meaning of the 32nd section of the Indian Evidence Act of 1872, as having been made by the *Muhtahid* in the discharge of his professional duty. This particular register (referring to the register admitted in the suit) appears to have been kept since the annexation of the province, and all marriages are recorded in it; it contains columns for the names and descriptions of the parties, the names of the vakils of the bride and bridegroom respectively, and the amount of the dower, together with the date of the marriage.]

[10 Cal. 609]
APPELLATE CIVIL*The 24th April, 1884*

PRESENT.

MR JUSTICE WILSON AND MR JUSTICE TOTTENHAM

Nursing Narain Singh and another Defendants

versus

Roghoobur Singh . . . Plaintiff

Execution sale—Money decree—Mortgage decree—Notice—Civil Procedure Code (Act XIV of 1882), s 287

A creditor obtained two decrees against his debtor, one being a mortgage decree to enforce his lien on certain property, and the other a simple money decree. In execution of the second decree the property over which the judgment-creditor had a lien was sold and was purchased by a third person. Subsequently, in execution of the first decree, at the instance of the judgment-creditor, this same property was advertised for sale, but on the auction-purchaser objecting, the judgment-creditor brought a suit against him to enforce his lien on the property in the hands of the auction-purchaser. *Held*, that it lay on the plaintiff, in order to entitle him to recover in the suit, to show that the defendants purchased with notice of the lien.

Held, further, that the fact that for some purpose at some time or other the judgment-creditor informed the Court of the mortgage is not evidence of notice on the auction-purchaser.

ONE Hanuman Dutt Singh borrowed two sums of money from [610] Roghoobur Singh, the plaintiff in this suit—one on the 9th Aughran 1273 F, and the other on the 11th. The debts not being repaid, the plaintiff, after the death of Hanuman Singh, brought a suit against his sons as heirs, Rughunandan Singh and others, and obtained on the 31st December 1873 a decree to enforce his lien on 2½ gundas share out of a 2-anna *putti* of mouzah Syedpore Sulha in respect of the loan of the 11th Aughran. The plaintiff also obtained a money decree against Rughunandan and others on the 15th July 1876 in respect of the other loan. In execution of the latter decree 2½ gundas share out of the 2-anna *putti* which formed the subject of the mortgage decree was brought to sale on the 7th January 1878. Execution was then taken out on the decree of the 31st December 1873, and the mortgaged share of 2½ gundas share out of the 2-anna *putti* was advertised for sale, but on the petition of the defendants, auction-purchasers under the money decree, the sale was stopped and the plaintiff brought a suit to enforce his lien on the property in the hands of the auction-purchasers. The Court of First Instance dismissed the claim, on the ground that, although the plaintiff had by a petition of the 29th November 1877 brought the mortgage alleged by him to the notice of the Court, it did not appear that “the fact of the mortgage was proclaimed at the time of the sale in such a manner as to make the defendants, the purchasers, aware of it.” On appeal, the Subordinate Judge decreed the claim, and thereupon an appeal was preferred to the High Court.

Baboo *Rasbehari Ghose* for the Appellants

Mr. C *Gregory* for the Respondent.

The **Judgment** of the Court (WILSON and TOTTENHAM, JJ.) was delivered by

Wilson, J. (TOTTENHAM, J., *concurring*)—We are unable to concur in the view taken by the lower Appellate Court in this case

* Appeal from Appellate Decree No. 665 of 1883, against the decree of Baboo Bolak Chand, Subordinate Judge of Bhagulpore, dated 22nd of December 1882, reversing the decree of Syed Abdul Karim, Munsif of Begnsaraie, dated 20th of January 1882.

It appears that the plaintiff held two decrees against the same person : one, a mere money decree, and the other, a mortgage decree. In execution of his money decree he caused to be sold the property which was the subject of his mortgage decree, and [611] he now in this suit proposes to proceed on his mortgage decree against that property in the hands of the auction-purchaser.

The law, it appears to us, has long been settled on this matter, that one who has caused the property of his judgment-debtor to be sold in execution cannot afterwards set up any claim of his own against that property unless he shows that the purchaser purchased with notice of his claim. Several cases have been referred to before us which seem to show that. The first case is the case of *Dullab Sircar v. Krishna Cumar Bakshi* (3 B. L. R., 407, 12 W. R. 303), the second, which is to the same effect, is the case of *Dooler Chund v. Mussamul Oomda Begum* (24 W. R., 263), and there is the more recent case of *Tukaram Bia Atmaram v. Ram Chandra Bia Budaram* (1 L. R., 1 Bom., 314). Those cases were all decided when the former Procedure Code was in force. The matter is even stronger under the Code now in operation, because s. 287 of the present Code expressly requires that every incumbrance to which the property is liable shall be inserted in the sale proclamation. The law, therefore, remains the same now as then, the reason for it being somewhat stronger. It lies, therefore, on the plaintiff, in order to entitle him to recover in this suit, to show that the defendant purchased with notice of his claim, and the Subordinate Judge came to the conclusion that he did purchase with notice. That finding, of course, would be binding upon us if there was any evidence on which it could properly be based. But it is admitted by the pleaders on both sides that there is no evidence bearing on the matter except that which is referred to in full by the Munsif in his judgment at page 5 of the Paper-book under the head "finding on the first issue." The Munsif says "The onus of proving whether the defendants did or did not purchase the 2½ gundas *barani* share of mouzah Syedpore Sulha with knowledge of the debt alleged by the plaintiff is on the plaintiff. But he has not filed any documentary evidence to show that the lien was proclaimed at the time of sale of the *barani* share aforesaid, and it is admitted that there was no oral evidence on the subject at all. If such proclamation be not shown, the mere filing of the [612] petition, dated the 29th November 1877, made by the plaintiff is not enough to prove the said proclamation, because it appears from the above copy that the plaintiff had brought the mortgage alleged by him to the notice of the Court. But it has not at all been shown on behalf of the plaintiff that the fact of the mortgage was proclaimed at the time of the sale in such a manner as to make the defendants, purchasers, aware of it." The only fact, therefore, which is in evidence and which could have any bearing on this matter in the plaintiff's favour, is that, on the 29th November 1877, at what stage of the proceedings it does not appear, he filed a petition in which he informed the Court of his mortgage. If there were a charge against the plaintiff of having deliberately and fraudulently concealed his mortgage, no doubt this matter would be of considerable importance. But the fact that, for some purpose at some time or other, he informed the Court of the mortgage is not evidence upon which the conclusion could be arrived at that the defendants purchased with notice.

For this reason we think that the decree of the Subordinate Judge must be reversed and that of the Munsif affirmed.

The appellant will have his costs in this and the lower Appellate Court

Appeal allowed.

NOTES.

[For similar cases, see (1900) 14 C. P. L. R. 17 (30); (1900) 5 C. W. N. 497, (1892) 16 Mad. 412 (418).]

[10 Cal. 613]

APPELLATE CIVIL

The 24th April, 1884.

PRESENT

MR. JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

Aushootosh Chandra and another... ..Petitioners

versus

Tara Prasanna RoyOpposite Party

Compromise and decree thereon—Application to set aside compromise—

Review of judgment—New suit

For the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court, there are two available modes of procedure—(1) by suit; (2) by a review of the judgment sought to be set aside, the latter being the more regular mode of procedure. *Lalji Sahu v The Collector of Tirhoot* (6 B L R, 49), *Mewa Lal Thakur v. Bhujhun Jha* (13. B L R, Ap 11), *Galbert v Endean* (L R 9 Ch D 259) followed

THIS was a rule obtained by Aushootosh Chandra and his brother calling upon one Tara Prasanna Roy to show cause why a [613] compromise entered into by them with Tara Prasanna Roy should not be set aside. There were two appeals pending in the High Court between these parties—Aushootosh Chandra and his brother were appellants in the one, and respondents in the other, and Tara Prasanna respondent in the one, and appellant in the other. Before the hearing of these appeals negotiations for a compromise were set on foot, on the faith of which Aushootosh Chandra and his brother applied to the Court on the 31st January 1884, stating that, the matters in dispute between them had been settled out of Court, and asking that their appeal against Tara Prasanna might be dismissed and the appeal of Tara Prasanna decreed. Orders were made for decrees to be passed accordingly; but as the applicants did not set out in their petition the terms of the compromise, no terms were embodied in the decree. Subsequently, Aushootosh Chandra and his brother presented a petition to the Court to set aside the decrees, stating that the condition of the compromise provided that a sum of money was to be advanced to them by Tara Prasanna on a certain date, and that this term had not been complied with and that several decree-holders who were to have been satisfied by that money had consequently come in and were about to sell the properties of the petitioners. The High Court thereupon issued a rule against Tara Prasanna to show cause why the terms of the compromise should not be set aside, and the rule came on for hearing on 24th April 1884. Both sides put in affidavits—the petitioners supporting by their affidavit the petition on which the rule was obtained, and Tara Prasanna Roy affirming that it was a term of such advance that the petitioners should show a clear title to the property on which the advance was to be made and that they had not done so.

The Advocate-General (Mr. Paul) and Baboo *Rash Behary Ghose* for the Petitioner.

Mr. *Evans* and Baboo *Troylocky Nath Mitter* for the Opposite Party.

The **Judgment** of the Court (WILSON and TOTTENHAM, JJ) was delivered by

Wilson, J. (TOTTENHAM, J., *concurring*)—This was a rule obtained ob-[614]tained to show cause why a compromise should not be set aside. It was shown that

* Civil Rule No 272 of 1884

there were two appeals pending in this Court between the same parties, in one of which the present applicants were appellants and in the other their opponent was appellant. It appears that a petition was presented by the present applicants stating that the matters in dispute in those appeals had been settled by compromise out of Court, and asking in substance that their appeal should be dismissed, and that in the case in which they were respondents a decree should be made against them, and orders were made for decrees to be passed accordingly. The petition did not set out the terms of the compromise. The terms, therefore, could not be embodied in the decrees. The compromise was only referred to. It is now stated that the facts are such that the present applicants are entitled to have that compromise disregarded, and to have the appeals proceed.

Now, the first question which we have to consider is, supposing the facts to be of such a nature as they are alleged to be, can we entertain this application in its present form? We think we cannot. The mode in which such a miscarriage, as is said to have occurred in this case, is to be dealt with has been considered on more occasions than one, and it seems to be clear that there are two modes in which the matter can be dealt with. In the first place, a suit will lie to set aside the whole transaction. It is not necessary for us to consider whether in the present case, if a suit were brought, it ought to be brought in the Mofussil or in the Original Side of this Court. It is for the parties to consider that. On the other hand, it has also been held that there is another and a more proper mode of procedure, by applying for a review of judgment.

In the case of *Lalji Sahu v. The Collector of Tirhoot* (6 B. L. R., 649) a decree had been made founded on a compromise. An application for a review was made, and facts were brought to the knowledge of the Court, showing that the compromise ought to be treated as a nullity, and the Privy Council appear to us clearly to treat that application for review as a proper mode of raising the question whether the compromise ought to be treated as a nullity or not. A similar [615] question came before this Court in the case of *Mewa Lal Thakur v. Bhughun Jha* (13 B. L. R., App. 11). That was a case in which the decree was obtained by fraud, and the parties had proceeded by a suit to set it aside. The case was heard by Mr. Justice PHEAR and Mr. Justice MORRIS, and judgment was delivered by Mr. Justice PHEAR, who said "It seems to us that this suit has been to a considerable extent misdirected. It has already been mentioned that the immediate aim of the plaintiff is to get a decree, which was formerly passed against him by a competent Court, set aside on the ground that it was obtained by fraud and collusion. But the proper course for obtaining such an object as that is to go to the Court which passed the decree either within the time specified in s. 119 of the Civil Procedure Code, if the circumstances are such as would justify action under that section, or at any time (so that it be done with due diligence), if the ground upon which the decree is sought to be set aside be a good ground for reversing and altering the judgment upon which the decree was passed."

These decisions seem to us to be authorities for saying that a mode of proceeding in such cases is by a suit, but that the more proper mode is by an application for review. The question which is now before us arose before the Court of Appeal in England in the case of *Gilbert v. Endean* (L. R., 9 Ch. D., 259). In that case the very procedure adopted here was adopted by the parties. A compromise had been arrived at in the course of a suit, and an application was made by motion to set aside that compromise and to allow the suit to proceed, as if the compromise had not been made. The Vice-Chancellor

allowed the application. In the Court of Appeal it was pointed out that such an application was not the right mode of procedure. We think that is so in this country also, and the proper course is that which we have already pointed out. It occurred to us that we might possibly treat this application as an application for review. But whether we can do so without straining matters unduly we think it unnecessary to say. It is undesirable in the interests of the applicants. The materials are very scant, and it might very well happen that the [616] Judges by whom the application might be dealt with might feel bound to dismiss the matter on that ground. We think it better, therefore, to leave the parties to make a fresh application for review if so advised. If they elect to make that application it ought to be made on very much better materials than those before us, and that the whole of the facts in the matter on the best evidence available should be before the Judges before whom the application is made.

Rule discharged

NOTES.

[MODE OF ATTACKING COMPROMISE DECREE-

Under the C. P. C 1908, sec 96, sub-clause 3 no appeal lies from a decree passed by the Court with the consent of parties. This provision was not contained in the previous Codes and it gives effect to the previous case-law, making, however, a departure in the case of matters extraneous to the subject-matter of the suit, which were held appealable (30 Mad 421, 26 Bom 76, 34 Cal, 456) See 36 Bom 77, 26 Cal 891, 5 C W N 877, 6 C W N 82.

In the case of *Mussammatal Gulab Koen v Badshah Bahadur* (1909) **13 C.W.N. 1197** **10 C.L.J. 420** MOOKERJEE and CARNDUFF, JJ, exhaustively dealt with this subject and as regards this case it was there observed -

"An examination of the grounds of the decision of this Court in the case just mentioned (10 Cal 612), shows *first* that the decision of the Judicial Committee relied upon by the learned Judges is not an authority in support of their view, *secondly*, that the observations in the case of 22 W R. 213 upon which reliance was placed were not necessary for the purpose of the decision in that case, and that their binding effect has been very much weakened by the decision of their Lordships of the Judicial Committee in two subsequent cases, and *thirdly* that the observations of Sir GEORGE JESSEL in *Gilbert v Endeau* 9 Ch D 259 do not support the view that a consent decree can be reviewed on the ground of fraud, though they no doubt support the proposition that such a decree can be attacked in a new action on the ground of fraud. It may further be observed that the consent decree in the case of 10 Cal, 612 was not impeached on the ground of fraud, and the case therefore cannot be treated as an authority upon the question as to the appropriate mode in which a consent decree can be vacated on that ground." In that case the following conclusions were drawn on a review of the authorities, (1) a consent decree may be impeached either by an application for review or by a regular suit, (2) a regular suit is the preferable and the appropriate, though not the exclusive remedy in a case in which a consent decree is assailed on the ground of fraud, (3) when a consent decree is assailed on the ground of fraud, misrepresentation, mistake, coercion, undue influence, or any similar grounds, it ought to be attacked by an original suit, (4) a previous unsuccessful application for review is no bar to such a suit. All the previous cases like 24 Cal., 908, 26 Cal, 891 3 C W N, 670, 5 C W N 877, 6 C W N., 82, 34 Cal, 83, 11 C W N., 579, 10 C W N, 529 2 C L. J., 508, 11 Bom., 708 were fully reviewed in this case.]

[10 Cal. 616]
PRIVY COUNCIL.*The 28th and 29th November, 1883.*

PRESENT.

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH AND SIR A. HOBHOUSE.

Abdul Hye.Plaintiff

versus

Mir Mohammed Mozaffar Hossein and another.Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Statute 13 Eliz., c. 5—Fraud upon creditors—Hibba—
Equity and good conscience.*

Whether or not the Statute 13 Eliz., c. 5 * which may or may not extend to or operate in the "mofussil" is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, its principles, and those of the common law for avoiding fraudulent conveyances, have received effect in the Indian Courts, and have properly guided the decisions of the Courts in administering law according to justice, equity and good conscience

A *hibba* having been found on the evidence to have been made not *bona fide*, nor on any good consideration, and by it creditors being delayed in their just rights, the maker having intended to protect his property thereby from those who at the time were his creditors. *Held*, that the *hibba* was void according to equity and good conscience

APPEAL from a decree (23rd April 1880) of a Divisional Bench of the High Court, varying a decree (9th May 1878) of the District Judge of Dacca.

This appeal arose out of proceeding in execution of a decree, and raised the question whether properties which were admitted [617] to have belonged, at one time, to the judgment-debtor, who had died before these proceedings were taken, had ceased to belong to him in his lifetime, in virtue of a *hibba* executed by him in favour of his son. This instrument was alleged to have been merely colourable, and made for the purpose of protecting his property from his creditors. The property in dispute consisted of villages in the zillas of Dacca and Daulatpur formerly belonging to Abdul Ali, who died in 1867. Against Abdul Ali the respondents, as representatives of his deceased wife, Ifthakharunnissa, obtained a decree in 1866 for Rs. 52,913, for dower due. In execution of this decree the respondents took the proceedings out of which this appeal arose. In answer to the respondents' petition for attachment of these villages, the appellant, a grandson of Abdul Ali, objected that they formed no part of his estate, having been given in a *hibba*, dated 4th October 1849, to his son, Wahed Ali, father of the appellant. Wahed Ali, who was 18 years old in 1854, executed on the 11th March 1853, *ikrarnamas*, stating, among other things, that Abdul Ali had remained, notwithstanding the *hibba*, in possession and management of the villages. Afterwards, in 1859, Wahed Ali sued his father to have the *ikrarnamas* set aside, and to have effect given to the *hibba*. This suit was dismissed by the District Court of Dacca, on the ground that the gift was purely nominal and invalid for want of possession given. The High Court having reversed this decision, it was restored by the Judicial Committee, which held that it was not necessary to come to any conclusive finding as to the effect of the *hibba* of 1849, further than that it was *benami*, or more probably to be followed by a family settlement—*Ameeroonissa Khatoon v. Abedoonissa Khatoon* (L. R., 2 I. A., 87, 15 B. L. R., 67). The

* By Statute 13 Eliz., c. 5, all covinous conveyances, gifts, and alienations of lands or goods, whereby creditors may be in anywise disturbed, hindered, delayed or defrauded of their just rights, are utterly void.

Committee held that the *ikrars* provided that the father should have possession and control of the property during his life, and that, accordingly, the form of a suit to enforce rights which others might have under them to any share of the profits, accruing during his lifetime, would be one charging him in the character of manager.

Meantime the respondents, then minors acting by their guardian, obtained the above-mentioned decree of 1866.

[618] Execution proceedings having extended over a lengthened period, in 1878 the District Judge of Dacca had them before him for orders. He disallowed objections taken by Ameerounissa Khatoon, mother of Abdul Hye, on her own, and on her son's, account. On appeal to the High Court a Divisional Bench (MITTER and WHITE, JJ.), holding that a decision was required as to whether or not Abdul Hye derived title under the *ikrars*, remanded the proceedings. Another District Judge of Dacca, who had succeeded to the office after 1878, then gave the finding in part set forth in their Lordships' judgment. This was followed by the decision of a Divisional Bench of the High Court (WHITE and MACLEAN, JJ.) to the effect that the *hubba* of 4th October 1849 was a contrivance on the part of Abdul Ali to defraud his creditors, and should be treated, therefore, as a nullity.

On this appeal—

Mr. C. W. Arathoon, for the Appellant, contended that the objections raised on behalf of the minor appellant to the sale of the properties ought to have been allowed. Under the operation of the *hubba* of 1849, and the subsequent *ikrars*, a family arrangement had been constituted, and whatever share the appellant might have on the family estate was derived from his father, Wahed Ali, so that he had a right to insist upon the validity of the *hubba*. This was consistent with the language of the judgment in *Ameerounissa Khatoon v. Abedoonissa Khatoon* (L. R., 2 I A, 87, 15 B. L. R., 67).

Mr. R. V. Doyne and Mr. J. Hunter for the Respondents were not called upon.

Their Lordships' Judgment was delivered by

Lord Fitzgerald.—It is fortunately unnecessary to state in detail the complicated transactions and the very protracted litigation which characterize the case now before their Lordships. The present proceeding relates to the execution of a decree against Abdul Ali, obtained so far back as 1866 by some of the representatives of his deceased wife, Ifthakharunnissa, and in respect of which a very considerable sum is still due.

The main question for consideration is whether certain property which the decree-holders have attached, and which they [619] seek to sell, formed part of the assets of Abdul Ali at the time of his death, and is liable to his creditors, and the answer to this question depends on whether a certain *hubbanama*, dated 19th Assin 1256 (4th October 1849), made by Abdul Ali, in favour of his son, Wahed Ali, is *benami*, or is fraudulent and void as against his creditors, and in order to determine these questions, it is necessary to examine the position of Abdul Ali and the condition of his family when that gift was executed.

Abdul Ali was a zemindar, and prior to 1849 had married twice, first Ifthakharunnissa, and secondly, Nurunnissa, by whom he had a son, Wahed Ali, and a daughter.

In October 1849 he was under a considerable liability for the dower of Ifthakharunnissa, so large that after her decease two of her representatives (the present decree-holders) obtained a decree as for their share for Rs 62,000.

He was in 1849 the owner of a variety of small properties, collectively of considerable value, but probably not more than sufficient to enable him to meet

his engagements ; and being thus situated, he appears, voluntarily and without any consideration, to have made the *hibbanama* of the 4th October 1849.

That instrument is as follows :—

“ To the Worthy of Remembrance,

“ Sriman Meah Wahed Ali of good behaviour.

“ Deed of gift of jumma lands executed by Moulvi Abdul Ali —As it is known that in such times as these there is no certainty of any man's life, and as I am now past 55 years of age, and that I have only you, my minor son, and a daughter, Srimati Fukurunissa Khatoon, who is now without husband or offspring now in existence, and as on my death it would not be to be wondered at that you and your sister should fall to quarrelling about the property left behind by me, and as my daughter aforesaid having had from her husband zemindaries and talooks, many properties, and is therefore well provided for, and I having already bestowed by regular deeds some of my property to my wife, Srijuta Nurunnissa Khatoon, and being in undisturbed possession with full rights of the remainder of the zemindaries and talooks which I own and possess ” (the properties are here enumerated), “ I of my own free will and plea-[620]sure, being in sound health and of my full knowledge, and as it would be difficult for you to live well and comfortably without my giving you all those talooks and zemindaries, do hereby confer upon you the above-mentioned 10 annas 13 gundas 1 cowri 1 krant share of pergunnah Nurullapore, and the 7-anna share of pergunnah Idrakpore, in separate and respective shares, and in pergunnah Chunder-dip, the kharija talooks of Jowar Lalwa Banekachi, in their entirety, and I cause you to be put in possession thereof. You shall therefore enjoy possession of all dwelling grounds, garden lands, cultivated and waste lands, homesteads, orchards, churs and sandbanks, new formations and reformatations, roads and pasturages, with trees, rivers and water-courses, ponds and tanks, water and forest privileges, and proceeds of fruits, haunts, markets, ghats (river crossings), bazars and all matters therein connected with the said talooks and zemindaries, with tenants, zaerats, talookdars, howladars, and all other rent-holders, rents in their entirety, to excavate or to fill up, to settle thereon dwellings, plant orchards and gardens, and by collections of the revenues and by a transfer from the former names to your own of all those talooks and zemindaries, at the office of the Collectorate, and becoming full owner in right of me, with power to give or to sell, and you and your heirs in succession shall enjoy possession thereof, and the rights of myself and my heirs therein are hereby abandoned and cease. To which effect I have executed this deed of gift.

“ Dated the 19th Assin 1256.”

This grant appears to have been duly registered, but the instrument remained in the hands of Abdul Ali, and never appears to have been in possession of or under the dominion of the grantee.

Wahed Ali was then but ten years of age, and his father, Abdul, continued in the possession and apparent ownership of the property granted, and took and received and applied to his own use the whole of the income and profits. He appears to have continued in such possession to the time of his death.

The property comprised in the gift seems to have been substantially the bulk of Abdul's then assets, and certainly, if that gift was to take effect, he left himself without the means of meeting his then existing liabilities.

[621] The gift was not followed or completed by any actual change of possession, or of management, or apparent ownership.

On the 24th Jeyt 1258 (6th June 1851) Nurunnissa, the second wife of Abdul and mother of Wahed, also executed a *hibbanama* in favour of her son Wahed of considerable property obtained from her husband Abdul or inherited

in her own right, but no question arises on this instrument in the appeal now before their Lordships.

Wahed being still a minor, and shortly before he attained 18, was made to sign two *ikrars*, both dated 29th Falgoon 1259 (11th March 1853), that from Wahed Ali to his father recites the *hibba* of the 19th Assin 1256 (4th October 1849); and that his father, mother, and "half-mother" being alive, full brothers and sisters and half-brothers and sisters might be born to him. After further reciting that as Abdul, by reason of his gift to Wahed, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift, it then contains an agreement by Wahed to maintain his sister Fakhurunnissa, and any other sisters or half-brothers to be afterwards born in joint mess during their minority, and on their coming of age to allow them certain fixed stipends for maintenance. He also agreed, in case any full-brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition. "And thus I do make my brothers and sisters co-sharers in the property received by me in gift and the profits thereof." The *ikrar* concludes by declaring that during the father's lifetime the whole of the property named in it will remain in the father's charge, and under his management and control.

Some time after the signing of these *ikrars*, Abdul married Ameerunnissa, mother of the minor appellant.

After Wahed attained 18 he signed a third *ikrar*, dated 16th Aughran 1263 B. E. (30th November 1856), in which, after reciting the two *hibbas* from the father and mother, it thus refers to the two former *ikrars*. "That I being your only son, and on account of your having no other son possessed of all your affections, you had, so as to prevent that any disputes could arise with [622] any one in future, bestowed upon me by your favour, and through the execution of a deed of gift dated the 19th Assin 1256, your ancestral zemindaries, specified in the schedule. Besides this, having settled upon my late mother, Nurunnissa, as her marriage dower, your zemindari of Tuppah Hawali Jehanabad, and your talooks, etc., my mother aforesaid as the owner thereof bestowed them upon me through a deed of gift dated the 24th Joistee 1258, and I being the owner and in possession of that property, worth, in accordance with the deed of gift, Rs. 80,000 I did formerly give and execute, as addressed to you and to my mother, separate *ikrars* (agreements) to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should during your lifetime remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that should uterine brothers to me be born, the property, received in gift from my mother should be enjoyed by all of us in equal shares and promising, should I have sisters or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with Ameerunnissa, who is stated to be a lady of good family, that provision had been made for the children of the former marriages by the earlier *ikrars*, and that it was proper to make some provision for her and any children to be born of Ameerunnissa. It then states an agreement by Wahed to make allowance to the daughters of the marriage, and that should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." Wahed then grants an allowance to Ameerunnissa of Rs. 150 per month for her table, and Rs. 500 a year, her clothes. The *ikrar* contains a statement that the father was in possession of the property by virtue of the former *ikrars*, and concludes by declaring that it will remain in his control and management.

during his lifetime, and that neither Wahed nor his heirs should interfere or lay any claim thereto.

Soon after this last marriage of Abdul Ali disputes arose in the family, which resulted in a suit being filed in 1865 by Wahed against his father, to obtain possession of the properties conveyed [623] to him by the *hibbas*, and to have it declared that the said *ikrars* were not executed by him but were forged documents.

Abdul Ali's defence to this suit was that the *hibbas* had not been executed *bonâ fide*, but for the purpose of diminishing his credit.

Pending the litigation Wahed died in August 1866, and Abdul died in June 1867, leaving his widow Ameeroonissa and her two sons, the appellant Abdul and his brother Lotif, surviving. Lotif died soon afterwards.

After the death of Abdul the decree-holders sought execution against his assets, and, *inter alia*, against parts of the property included in the *hibbanama* of 19th Assin 1256 (4th October 1849), which they contend is *benami*, that is to say, they allege that it was a transaction not intended to operate according to its tenor and effect, but merely as a cover from creditors, and further that it was fraudulent and void against creditors. If they are correct in those contentions that instrument cannot stand in their way, the property remained the property of Abdul, and the *ikrar* under which the appellant claims is equally inoperative against them. Their Lordships pass by a mass of litigation and a labyrinth of complicated questions which arose from time to time between the parties, and which will be found clearly described in the judgments pronounced from time to time in the progress of the cause by Mr Justice MITTER and other Judges, and their Lordships desire to confine their observations to the questions which arise on this appeal.

The questions which their Lordships have to determine are, whether the gift of 1849 was one of those known as a *benami* transaction, or was it otherwise fraudulent and void as against the decree-holders, whose decree was obtained in respect of a pecuniary liability existing at the time of the grant and still undischarged.

Their Lordships have considered those questions quite irrespective of the statements, or declarations, made by Abdul *post litem motam* in the litigation between him and Ahmed, [Wahed?] and where his object was to defeat his own deed.

On a fair and full consideration of the state of circumstances existing at the time of that *hibba*, and the course [624] of conduct pursued afterwards, their Lordships are clearly of opinion that it was *benami* to this extent, that it was a mere pocket instrument, not intended to operate according to its tenor and effect, but by which property was put in the name of Wahed but for the benefit of Abdul.

The possession remained with Abdul, and he appears during his life to have acted as uncontrolled owner and for his own sole benefit. There is some remarkable documentary evidence too from which it appears that after the *hibba*, there having been from time to time accretions to the lands comprised in the *hibba*, and which according to the law of India follow the principal, those accretions were claimed by Abdul, and he obtained grants of them to him and his heirs.

The *hibba* was not, and could not, be dealt with as a family settlement, there does not appear to have been any occasion for it, and the grantee was a boy of ten, who is afterwards made to sign an *ikrar*, by the concluding provision of which it is declared that the property is to remain in the control and management of Abdul during his life, and that neither Wahed nor his heirs should lay claim thereto.

But, supposing the *hubba* to be operative as between the parties, their Lordships have still to consider whether it is to be upheld as against creditors.

By Statute 13 Eliz., c. 5, all covinous conveyances, gifts, and alienations of lands or goods whereby creditors might be in anywise disturbed, hindered, delayed; or defrauded of their just rights, are declared utterly void.

Whether or not that statute (which may not extend to or operate in the *mofussil* in India) is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience.

Mr. Justice WHITE, in delivering the judgment of the High Court, observes 'What was the position of Abdul Ali when he executed the *hubba* of 1849? At that time he had hanging over [625] his head a larger liability under the *kabinnama*, or deed of dower, which forms the subject of the present suit, and which he had executed when he married his first wife Iftakharunnissa. She had died leaving a married daughter, who has since died leaving infant sons. The decree-holders, who are only some of the heirs, claim a 2 annas share of the dower, and have been held entitled to Rs. 62,000 odd. The entire liability under the *kabinnama* was, therefore, not far short of five lakhs of rupees."

It is not necessary to adopt the whole of that statement. It is sufficient to say that the liability was very large.

The Judge of the District Court at Dacca makes use of the following remarkable language. "However binding the documents may be as among the parties to them, we are beyond all doubt dealing with a gigantic fraud as regards third persons. Until, however, we get a law directed against voluntary and fraudulent conveyances, we must go on searching in each case for specific proof of fraud, etc., generally, as now, finding that proof insufficient." But in observing on that passage, Mr. Justice WHITE, in the Appellate Court, observes "If the *hubbas* are found, upon proper evidence, to be a contrivance to defraud creditors, they will not stand in the way of the decree-holders executing their decree against the properties mentioned in the *hubbas*. The Statute 13 Eliz., c. 5, which was enacted for the purpose of rendering conveyances in fraud of creditors void, is considered to be in affirmance of the general principles of the law by which fraudulent transactions are liable to be vacated at the instance of those affected by the fraud. This statute has been universally applied within the territorial jurisdiction of this Court on its Original Side, and whether it has or has not been applied by name in the *mofussil*, the principle on which it is founded has been frequently asserted there, and is in accordance both with Hindu and Mahomedan law."

Then Lordships observe then that in the primary Court, where the Judge had the witnesses before him, he treats the transaction as a gigantic fraud as regards third persons.

The Judges of the High Court of Bengal arrived at a similar conclusion on the facts of the case. Their Lordships would be slow to differ from these tribunals thus concurring on conclusions [626] of fact, and they do not find it necessary to do so. They have come to the conclusion that the *hubba* of 1849 was a covinous instrument, not made *bonâ fide* or on any good consideration, and by which creditors (the holders of the decrees) have been delayed in their just rights; and, taking the whole transaction together, they are of opinion that the intention of the settler was to protect the property from those who were his creditors at the time.

Their Lordships are of opinion that according to equity and good conscience the *hibba* is fraudulent and void as against creditors, and that the decree appealed from is right, and should be affirmed, and the appeal dismissed; and will so humbly advise Her Majesty

The costs must follow the event

Appeal dismissed

Solicitor for the Appellant Mr T L. Wilson

Solicitors for the Respondent Messrs. Barrow and Rogers

NOTES.

[The Transfer of Property Act, 1882, repealed 13 Eliz c 5, 27 Eliz C 4, and the substance of those statutes are reproduced in sections 42 and 53 of that Act

See also the following cases -- 10 Cal , 951 (962) , 11 Bom , 666 (675) , (1898) 23 Bom 146 (170) , (1898) 23 Bom 406 (411) , (1900) 25 Bom , 202 (208) , (1900) 13 C P L R 180 (182) , (1904) 17 C P L R , 24 (26) , (1898) 2 O C 149 (170) , (1901) P R 6]

[10 Cal. 626]

PRIVY COUNCIL

The 5th December, 1883

PRESENT

**LORD FITZGERALD, SIR B PEACOCK, SIR R. P COLLIER,
SIR R. COUCH AND SIR A. HOBHOUSE**

Hardi Narain Sahu . . . (Defendant) Appellant

versus

Ruder Perakash Misser (a minor) by
Abdul Hve and others . . . (Plaintiff) Respondent.

[On appeal from the High Court at Fort William in Bengal.]

Rights of purchaser of co-sharer's interest in joint family property - Formal objection to minor's representative

When the right, title, and interest of a co-sharer in joint family estate are sold in execution to satisfy a decree against him personally, the purchaser acquires merely the right of the judgment-debtor to compel a partition against the other co-sharers. *Deendyal Lal v Jugdeep Narain Singh* (L R , 4 I A , 247 I L R , 3 Cal , 198) referred to and followed

A money decree having been made against the father of a family, and the decree-holder having caused to be attached the family estate, and brought to sale the father's right, title, and interest therein. *Held*, that by the sale, not the father's share, but that interest which he had, viz , the right which he would have had to a partition, and to what would have come to him under it, passed to the purchaser

The family, governed by the Mitakshara, consisting of father, mother, and minor son, at the time of the decree, the Court below had decreed [627] to mother and son, one-third each, leaving one-third to the purchaser. A second son was born, and the mother died pending this appeal, the two sons becoming parties in respect of her share. *Held*, that on this appeal, preferred by the purchaser, the decree should stand, the appellant having got quite as much as he would have got if the decree had been more correct in form, as he had obtained all that he would have been entitled to on a partition, without being left to demand it

The suit having been brought by a manager, appointed by the Court of Wards on behalf of an infant who had a right to sue, an objection to the manager's authority was disallowed, as merely technical

APPEAL from decrees (23rd April 1881 and 9th September 1881) of a Divisional Bench of the High Court, reversing a decree (25th July 1877) of the Judge of the Bhagulpur district.

The appeal related to the question, what were the rights of a purchaser at an auction sale of the right, title, and interest of a co-sharer in a joint family estate. The family, governed by the Mitakshara, consisted (at the time when the judgment under appeal was given) of a father, mother, and minor son. The property was half a village in the Monghyr district, mouzah Singhôl, the whole village having belonged to Jai Perkash Misser, from whom it was inherited by his two sons, one of whom was Shib Perkash Misser, the father of the minor plaintiff, Ruder Perkash Misser. Each brother took half of mouzah Singhôl, on a partition in 1871. Shib Perkash Misser, after that date, became indebted to the appellant Hardi Narain, a mahajan, who, on 4th March 1873, obtained a decree against him for Rs. 6,939, and in execution attached, caused to be put up for sale, and himself bought the right, title, and interest of Shib Perkash in eight annas of mouzah Singhôl.

Meantime, in the same year, Shib Perkash Misser made a gift of his interest in the family property, dated 30th July 1873, in favour of Ruder Perkash his minor son. And in 1873, upon an application made by the minor's mother, Dhanapati Koer, the Judge of the Bhagalpur district, on the 1st September in that year, made an order directing the Collector of the Monghyr district to take charge of the minor's estate. This Collector, having done so, appointed Abdul Hye to be the manager of the minor's estate.

[628] In April 1867 the minor, by his manager, brought the suit out of which this appeal arose, alleging that from the date of his birth, in 1866, he had acquired rights in the family estate, the half of mouzah Singhôl, which being the property of a joint family, and without specification of shares, was not liable to be sold in execution of the decree against his father. He, therefore, claimed to recover possession with mesne profits.

The defence was that the sale was binding on the plaintiff, who was bound to pay the debt of his father, the family estate being liable to be sold, as it had been, in satisfaction of the decree. It was also objected that the minor was not legally represented by the Court of Wards under s. 12 of Act XL of 1858.

Afterwards, on a petition for the appointment of the manager, Abdul Hye, to represent the minor in this suit, the District Judge, on 7th June 1877, recorded that it was unnecessary to pass an order thereon, as the Collector was the proper person to represent the minor.

Issues having been fixed, raising the questions whether the plaintiff was duly represented, and whether the attachment and sale had deprived the minor of his interest in the half of mouzah Singhôl, regard being had to the nature of the debt on which the decree was obtained, the Judge of the Bhagalpur district dismissed the suit. His reasons were (1st) that the plaintiff, under the Mitakshara, was not entitled to maintain this suit, which was for the recovery of the whole of the ancestral family estate, one-half of mouzah Singhôl, during the father's lifetime, also (2ndly) that the said family estate had been sold in execution of a decree as (in the Judge's view of the law) it lawfully might have been, for the payment of the debts of the father, not proved to have been incurred for any immoral or unlawful purpose. On appeal to the High Court, a Divisional Bench (MITTER and TOTTENHAM, JJ) refused to allow an objection that the order of the District Judge, directing the Collector under s. 12 of Act XL of 1858 to take charge of the minor's property, was wrong, holding that this did not affect the case as now presented to the Court. They also rejected another contention that this suit could not be decided **[629]** on the merits because, as it was alleged, the plaintiff was bound by an order,

passed upon his father's petition, refusing to set aside the sale under s. 256 of Act VIII of 1859. Their judgment proceeded thus :

"As regards the grounds upon which the lower Court has dismissed the suit, it seems to us that the District Judge is clearly wrong in holding that under the Mitakshara law, the plaintiff during his father's lifetime is not competent to maintain this suit for the whole of the share of the property in dispute, which belonged to the joint family. On the other hand, the suit would have been open to objection, if he had brought it for an undivided share of the family property (*vide* XII, Weekly Reporter, page 478).

"It is not absolutely necessary in this case to determine whether the debts, for the satisfaction of which Shib Perkash's property was sold, were of such a nature as would be binding upon the sons. It seems to us that what was sold in execution of decree against Shib Perkash was simply his rights and interests in the disputed property, and that the present case is governed by the ruling of the Judicial Committee in *Deendyal Lal v. Jugdeep Narain Singh* (L R., 4 I A., 247, I L R., 3 Cal, 198)."

The judgment concluded as follows.—

"We do not think that, for the purpose of determining what the interest of Shib Perkash is in the disputed property, the respondent Hardi Narain should be referred to a separate suit. Following the decision of this Court in Special Appeal No 1728 of 1877, decided on the 11th April 1878 (an unreported case), we think the matter may be enquired into and finally determined in this suit. In that enquiry the mother of the minor is a necessary party, and in her absence we refrain from expressing any opinion as to the contention raised before us, that the family being governed by the Mithila law, the father is entitled to a double share. In the lower Court the respondent Hardi Narain alleged that the family is governed by the Mithila law and there is nothing in the record which would go to show that he gave up that contention. There is no difference between the Mitakshara and the Mithila law, so far as the questions [630] disposed of by our present judgment are concerned. Therefore we have treated the case with reference to those questions, as if it was governed by the Mitakshara law. There may be some difference between the two schools of Hindu law as regards the question of the father's share in a partition of ancestral property. But upon that point, as we have already said, we express no opinion now. For the purpose of disposing of that question, we remit the following issues for the determination of the lower Court. —

"First—Is the family of the plaintiff governed by the Mithila or the Mitakshara law?"

"Second.—If governed by the former law, whether Shib Perkash was the eldest born son of his father, and what is his share in mouzah Singhôl?"

"In the trial of these issues, the mother of the plaintiff is a necessary party, and accordingly we direct her to be made a party to the suit."

The successor in office of the District Judge having made the return that the family was governed by the Mitakshara, the same Bench of the High Court gave judgment as follows.—

"We are of opinion that the finding of the lower Court, that the plaintiff's family is governed by the Mitakshara law, is correct. Upon the evidence there is no room for doubt that the plaintiff belongs to a tribe of Brahmins called Shukaldipi, living in various parts of Northern India, quite separated in social intercourse from the other tribes of Brahmins. Although they are scattered over a large tract of country, they are not blended with the tribes of Brahmins of the districts in which they reside. A short description of their tribe is to be found at page 102, Sherring's 'Hindu Tribes and Castes.' 'The Shukaldipis are found,' says Mr. Sherring, 'in considerable numbers in their primitive seat,

yet many families have migrated to other parts of the country. They do not, however, form alliances with other Brahmins, though they freely intermarry amongst themselves.'

"Although there are some discrepancies and contradictions in the depositions of the witnesses examined by the plaintiff, [631] yet all are agreed upon this point, that the Shukaldipis are governed by the Mitakshara law. The two witnesses examined by the defendant also prove that Shukaldipi Brahmins residing in countries on the south of the Ganges are governed by the Mitakshara law. Although the plaintiff's family resides in a country governed by the Mithila law, yet the two facts clearly established in the case, viz, (1) that it belongs to a tribe of Brahmins who do not intermarry with the Mithila Brahmins, and (2) that the aforesaid tribe of Brahmins is generally governed by the Mitakshara law, are almost conclusive proof that the plaintiff's family is governed by this latter law. Therefore, the father's interest in the family property must be defined by the Mitakshara law.

"It has been contended before us, that since the institution of the suit, another son has been born to Shih Perkash, and that he is entitled to a share on partition. But this contention is not valid. The property that passed to the defendant by the auction sale was the share and interest of the father seized and attached in execution of decree in the month of April 1873 [see *Suraj Bums Koer v. Sheo Persad Singh* (L R, 6 I A, 88, I L R, 5 Cal, 148, 4 C. L R, 226)] The defendant is, therefore, entitled to the share which would have been allotted to the father if a partition of the family property had taken place then. And as under the Mitakshara law the mother is entitled to a share on partition, the property is to be divided into three equal parts, one share being allotted to the defendant, and the remaining two to the minor plaintiff and his mother, respectively. There is no prayer for partition of the estate by metes and bounds. Nor is it essentially necessary to effect such a division to constitute a partition under the Mitakshara law. A partition under that law may be effected by defining the extent of the rights of the several members. We, therefore, award to the minor Ruder Perkash and his mother two-thirds share of the property in dispute, and direct that each of them do recover possession of their respective shares in the property in dispute. Under the circumstances of the case, we think that each party should bear his own costs in this litigation in all the Courts "

[632] The decree which followed upon the foregoing judgment was afterwards amended, upon a review, by the addition of an order for mesne profits. After this appeal had been preferred to Her Majesty in Council, Dhanabati Koer, the wife of Shih Perkash Misser, died leaving another son, born after the date of the decrees under appeal. The parties on the record were altered accordingly.

On this appeal—

Mr. R. V. Doyne and Mr. C. W. Arathoon appeared for the Appellant

Mr. J. D. Mayne and Mr. C. C. Macrae for the Respondent.

For the appellant it was objected that the order of September 1873, directing the Collector to take charge of the minor's property having been incorrect, this suit was not properly brought in the name of the manager. It was argued that as the minor would not have been bound by an adverse decree made in a suit brought in his name by a person not having a title to sue, so also this suit could not be maintained with this defect in it.

For the respondent it was answered that if the Collector was not guardian of the infant on behalf of the Court of Wards before the order of 7th June 1877, he thereupon became guardian *ad litem*.

Their Lordships decided that the objection was untenable. Reference was made to s. 578 of the Code of Civil Procedure, Act X of 1877. For the appellant it was then argued that the judgment of the High Court could not be upheld. As regards the liability of the family estate to be sold in execution of the decree of 4th March 1873, that estate was then and had been during the time when the debts were incurred, in the hands of the father, Shib Perakash Misser, as manager. He being competent to contract debts, binding on his son, and rendering the family estate liable, had done so. Ancestral property was not exempted from liability in respect of a man's debts because a son was born to him, the legal obligation being imposed on the son to pay his father's debt unless incurred for any immoral or illegal purpose. Reference was made to *Swag Bunsu Koer v Sheoprosad Singh* (L R, 6 I. A., 88, 1 L R., 5 Cal., 148, 4 C. L R, 226) and *Girdharee Lal v. Kantoo Lal* (L R, 1 I. A., 321), where, as here, a Hindu family consisted of [633] father and son, the father was manager of the joint property, and was guardian of the son and the father's act of getting into debt bound the share of the son in the family property, save in the excepted case of debts improperly incurred, which had not arisen here. The father could impose, and by his getting into debt had imposed, the burden of satisfying the decree. That shares in ancestral estate might be so charged as that upon partition they went to creditors appeared from the decisions of the High Court. Reference was made to *Deendyal Lal v. Jugdeep Naram Singh* (L R, 4 I. A., 247, 1 L R, 3 Cal, 198). But it was distinguished that in this case "the right, title, and interest" of the father in the family estate was his interest as a manager who had incurred debts binding on the other members of the family.

Reference was also made to *Umbica Prosad Tewary v Ram Sahai Lal* (I.L.R., 8 Cal., 898).

As regards the interest of the deceased wife and mother. It was a question whether she could be said to be entitled to a share under the Mitakshara, see chapter I, ss 7 and 11. It was true that the wife of the father had been held entitled to a share on a partition taking place between a father and a son in *Sumrun Thakoor v Chunder Mun Misser* (1 L R, 8 Cal, 19). But, in the absence of a partition (and here there was no partition except so far as the High Court treated the family estate as subject to partition), the wife was entitled only to maintenance, not to a share.

For the respondent it was submitted that the question being what was the interest of the father, when his "right, title, and interest" were brought to sale, it could be ascertained by determining what share he would obtain upon a partition. Each member of the family had an equal interest, and the extent of that interest was determinable by what they would receive upon partition. The appellant by his purchase acquired only the right, title, and interest of the respondent, Shib Perakash Misser, in the eight annas of mouzah Singhol, which was an undivided one-third share therein.

Reference was made to the judgment of MITTER, J, in *Umbica Prosad Tewary v. Ram Sahai Lal* (I.L.R., 8 Cal, 898) and *Ramphul Singh v. Deg Narain Singh* (I L R, 8 Cal., 517).

[634] The minor plaintiff would have been entitled to a decree for possession of the whole family estate subject to the declaration that the respondent, as purchaser, had acquired the *undivided* one-third share, and was entitled to take the whole subject to a deduction of that share, or those shares, which (as in *Deendyal's* case) belonged to the other co-sharers. In this case, however, the High Court, avoiding circuits of procedure, had directed a partition declaring the minor to be entitled to possession with mesne profits.

The plaintiff had, therefore, got no more than he was entitled to, the appellant suffering no loss, but receiving what otherwise he would have had to resort to a partition in order to obtain.

Mr *R. V. Doyne* replied, contending that it could not be insisted that the proceedings were of the same effect as a partition

At the conclusion of the arguments their Lordships' **Judgment** was delivered by

Sir Richard Couch—Three questions have been raised before their Lordships in the hearing of this appeal. The first was disposed of in the course of the argument. It was this. That the suit was brought by the manager appointed by the Court of Wards on behalf of the infant plaintiff, and that the manager had no authority to represent the plaintiff in it. Without considering whether he had authority or not, their Lordships were of opinion that, if the plaintiff had a right to sue, the objection was only a formal one, and could not be allowed to be raised in the present appeal.

The next and the principal question in the case was, what right or interest in the property, which is the subject of the suit, was acquired by the appellant, Hardi Narain, by his purchase at the sale in execution of a decree which he had obtained against the father of the respondents, Shub Perkash Misser? It appears that Shub Perkash Misser was indebted to Hardi Narain, partly on account of a mortgage, and partly for further advances, and that Hardi Narain brought a suit against him in order to recover the debt, and obtained a decree on the 4th of March 1873. The decree was the ordinary one for the payment of the money, and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt, and the decree [635] had been obtained upon the mortgage and for a realization of the debt by means of the sale of the mortgaged property. It is a simple money decree, which states that the claim was to recover Rs 6,335, principal and interest, and is. "That a decree be passed in plaintiff's favour for the amount of claim and interest on the principal for the period pending judgment of the case, and costs with interest on the entire amount, at the rate of eight annas per cent per mensem from to-day till realization." The property was attached on the 1st of April 1873, and the attachment being by an order prohibiting the defendant from alienating the property, it purported to be, as it must have been, an attachment of the entire eight annas, but what was attached and subsequently sold really was the right, title, and interest of the father, against whom the decree had been obtained, in the eight annas, and it is clear from the terms of the sale certificate that this is what was sold and purchased by the appellant. The sale certificate, which was given after some questions had been raised by the father with respect to the regularity of the sale, and the sale had been confirmed by the High Court, which questions it is not necessary to consider—stated that an application had been made, and the sale proclamation was issued—"and the said property was on the 5th August 1873 sold for Rs. 6,800; and whatever rights and interests the said judgment-debtor had in the said property were purchased by Baboo Hardi Narain, decree-holder, auction-purchaser." It then went on, after speaking of the payment of the purchase-money, to say. "Therefore this sale certificate is granted to Baboo Hardi Narain, decree-holder, auction-purchaser, and it is proclaimed that whatever rights and interests the said judgment-debtor had in the said property having ceased from the date of the auction sale passed to the said decree-holder auction-purchaser." Therefore what was purchased on that occasion were the, rights and interests of the father, and this is precisely like the case of *Deendyal*

Lal v. Jugdeep Narain Singh (L. R., 4 I. A., 247, I. L. R., 3 Cal., 198), where their Lordships held that, the purchase being as it was here, by the person who had obtained the decree, only that passed which the father, the person against whom the [636] decree was obtained, had. The judgment in that case defines what is actually sold. At page 253, speaking of the decision of the High Court at Calcutta in the Full Bench case which is so often referred to, their Lordships say "So long as Bhagwa lived"—that is, the man against whom the decree was obtained—"he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate." The bond-holder had sued on his bond, obtained a decree, taken out execution against the joint property, and become the purchaser of it at the execution sale. The interest which is purchased is not, as Mr. *Doync* argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. *Doync's* argument that the father was entitled to a half. What the father was entitled to, and what the purchaser became entitled to, was what the father would get if a partition had been made, which was only a third of the eight annas share. According, therefore, to the authority of *Deendyal Lal v. Jugdeep Narain Singh* (L. R., 4 I. A., 247, I. L. R., 3 Cal., 198) the present appellant became entitled only to the one-third, treating it as if the sale was to operate as a partition at that time.

The case of *Deendyal* has been recognized in a subsequent case of *Suraj Bunsu Koer v. Sheo Prosad Singh* (L. R., 6 I. A., 88, I. L. R., 5 Cal., 148, 4 C. L. R., 226), in which that decision was acted upon, and which case is also applicable to the present.

The other question which has been raised before their Lordships is this. The High Court, when the case came before it on appeal—having satisfied itself that the present appellant, by his purchase, took only the interest which the father had, and if a partition had been made at the time of the sale the mother would have been entitled to a third, and the son, who was then living, would have been entitled to another third—directed that the mother should be made a party to the suit, it having been found that the rights of the parties were governed by the Mitakshara law. The mother having been made a party, the High Court then made what in effect is a partition of the property which was the subject of the suit, making a decree that the [637] mother and the son should each recover one-third, leaving the remaining third in the appellant's possession. After the decree and pending this appeal, the mother died, and a second son having been born, the two sons are now parties to this appeal in respect of her share. The question which has been raised is whether the decree which has been made by the High Court ought to stand or not.

According to the judgment of their Lordships in *Deendyal's* case, the decree, which ought properly to have been made, would have been that the plaintiff, the first respondent, should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perakash Misser, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one-third, instead of being turned out of the possession of the whole and left to demand a partition.

Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was neces-

sary or proper. The decree is not strictly right, but the appellant does not suffer by that. He gets all that he would be entitled to if a partition were made.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The appellant will pay the costs

Appeal dismissed.

Solicitor for the Appellant Mr. T. L. Wilson

Solicitor for the Respondent Mr. H. Treasure

NOTES.

[I THE AUTHORITY OF THIS CASE—

This case like *Deendyal's* case was misunderstood until the Privy Council decision in **13 Cal. 21**. It was erroneously believed to lay down that where the suit was against the father alone, and in execution, 'the right, title and interest' of the father was sold, his interest alone passed by the sale and not that of the son also—(1884) 9 Bom., 305, (1885) 8 Mad., 376, (1885) 9 Mad., 188, (1885) 9 Mad., 343, (1884) 8 Bom., 481, 489

The case of **13 Cal., 21**, showed that these are not proper tests to apply, viz. whether the decree was a money-decree or a mortgage-decree, whether the son was a party or not—(1886) 8 All., 205, 495, (1886) 9 Mad., 424, (1887) 11 Mad., 64, 12 Mad., 142, 11 Bom., 37, 12 Bom., 625, 691, 15 Bom., 87, (1895) 20 Bom., 385, 21 Bom., 616, 15 Cal., 70; 17 Cal., 589

See the Notes to **3 Cal. 198**, in the **Law Reports Reprints** where this subject is fully dealt with

As regards the question, when the decree may be impeached in execution see (1909) 32 Mad., 429, 19 M. L. J., 401

As regards general presumptions one way or the other respecting the extent of interest passing to the purchaser, see (1892) 14 All., 190, (1890) 15 Bom., 87

II THE RIGHTS OF ALIENEE FROM COPARCENER -

The alienee obtains the interest existing at the date of the alienation—3 Cal., 198, 5 Cal., 148, 10 Cal., 626, 23 Cal., 262, 25 Mad., 690, (1911) **21 M. L. J., 246**, overruling 14 Mad., 408, and this is to be ascertained by *partition*, the alienee, according to the recent Madras case, not being a tenant in common with the coparceners - (1913) 15 M. L. T. 186 *dissenting* from 35 Mad., 47

III FORM OF DECREE -

See also (1887) 9 All., 672

IV CLASS GIFTS-

It has been held that the English rule in *Leake v. Robinson* is not applicable, and the gifts to a class will not fail merely by reason of its failure in the case of some members thereof—**38 Cal., 468 P. C.** 15 C. W. N., 393

As regards gifts to the next generation, see (1881) 6 All., 560, according to which they operate on the interest of the donor, whatever be the effect as regards those born thereafter, see also 32 Cal., 992, 9 C. W. N., 749, 1 C. L. J. 482]

The 24th April, 1884.

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD

Joytara and another..... Plaintiffs

versus

Ramhari Sirdar and another. Defendants

Will—Stridhan—Maintenance to widow not expressed nor denied by will

The right to maintenance being one given to a widow by the Hindu law, that right cannot be taken away except by express language to that effect

A gift of *stridhan* is not equivalent to a provision for maintenance

ONE Joytara Bih and her daughter, the former being the elder widow of one Huridhun Sirdar (deceased), sued the younger widow of Huridhun and her children to obtain maintenance at the rate of Rs 8 per mensem out of the estate of the deceased Huridhun

The defendants contended that the deceased had left a will, and that under the tenth paragraph of that will there was a gift to Joytara, in the following words—"of gold and silver ornaments and clothes and the cash and the money due to her by others as belonging to the funds, which she possesses either known to the family or not," and that there being no separate provision in the will for the maintenance of Joytara and her daughter they were not entitled to claim it

The Munsiff held that the will made no provision for the plaintiff's maintenance, but that they were entitled to obtain it under the Hindu law, and he therefore decreed the suit in favour of the plaintiffs, allowing maintenance at the rate of Rs. 3 and Re 1-8 per mensem, respectively, to the mother and daughter.

The defendants appealed to the Subordinate Judge, who held that, inasmuch as the will allowed no maintenance to the widow, she was not entitled to claim it, but held that the daughter, who was unprovided for by the will, was entitled to obtain maintenance until the time of her marriage, and he fixed Rs 2 per mensem as the maintenance payable to her.

[639] The plaintiff, Joytara, appealed to the High Court.

Moulvi *Scrapul Islam* for the Appellant contended that the lower Court was wrong in holding that the effect of the will was to exclude the widow from maintenance, and that the maintenance allowed to the daughter was too small.

Baboo *Grish Chunder Chowdhry* for the Respondent.

Judgment of the High Court was delivered by

Field, J.—We think this appeal must succeed with respect to the claim for the widow's maintenance. The Subordinate Judge argues that, because

* Appeal from Appellate Decree No. 2132 of 1882, against the decree of Baboo Kali Doss Dut, Second Subordinate Judge of Tipperah, dated 21st of July 1882, modifying the decree of Baboo Behari Lal Mukerjee, Munsiff of Ramraigam, dated 27th December 1881.

there is no express provision for maintenance in the will, the widow is not entitled thereto; and he considers further that, as she was allowed to retain certain clothes and ornaments, it was unnecessary to give her any maintenance in addition. We think that a gift of *stridhan* is not equivalent to a provision for maintenance; and the right to maintenance being one which the widow has under the Hindu law, that right cannot be taken away unless by express language to this effect. We therefore set aside the decree of the Subordinate Judge and restore that of the Munsif, making an allowance of Rs. 3 a month to the widow as maintenance.

As to the daughter's allowance, we see no reason to interfere. The appeal will be decreed with costs to the appellant in proportion to the amount as to which she succeeds.

Appeal allowed.

NOTES

[The award of maintenance and the extent thereof depends on the independent means of support possessed by the widow —(1902) 29 Cal , 557 6 C W. N , 530 , (1899) 21 All., 232.

A Hindu can dispose of his property by will, free of his widow's claims for maintenance, so long as he leaves sufficient property therefor —(1890) 17 Cal , 886 , (1888) 15 Cal , 292 (306) , (1889) 12 Mad., 490 (494) , *see also* (1908) 12 C W N , 803 , (1908) 36 Cal , 75 (right on partition may be defeated)]

[10 Cal. 639]

APPELLATE CIVIL

The 24th April, 1884.

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD

Wooma Pershad Roy and others.. . . Defendants
versus

Grish Chunder Prochundo Plaintiff

Hindu law—Inheritance—Insanity

In order to exclude a person from inheritance under the Hindu law, on the ground of insanity, it is sufficient to prove insanity at the time when succession to the property opens out

THIS was a suit to obtain possession of 1 anna 15 gundas share in taluq Kismut Durgapur by right of inheritance, and to [640] set aside a putna

Appeal from Appellate Decree No. 2119 of 1882, against the decree of Baboo Gonesh Chunder Chowdhry, Subordinate Judge of Rajshahye, dated 24th July 1882, affirming the decree of Baboo Probode Chunder Dut, Munsif of Natore, dated the 31st of August 1881.

pottah. One Rama Nath Sidhanto was the original owner of the share. After his death, his two daughters, Gourmoni and Kalimoyee, came into possession of the property in the ordinary course of succession. Kalimoyee died leaving a son, Sossi Saran. Subsequently, on the death of Gourmoni, who left no issue, the plaintiff, as the grandson of the original owner's brother, claimed the property from the heirs of an alleged putnidar of Gourmoni, alleging, among other things, that Kalimoyee's son, Sossi Saran, being insane at the time of Gourmoni's death, was incapable of inheriting. The defendants alleged that Gourmoni had granted to their father a putni of these lands, and that since their father's death and the death of Gourmoni they had been in possession, and had paid rent first to Sossi Saran and afterwards (on his disappearance) to his wife as the mother and guardian of his infant sons, that Sossi Saran was not insane.

The Munsif found that Gourmoni had no power to alienate beyond her lifetime, and that Sossi Saran was insane at the time of Gourmoni's death, and was therefore incapable of succeeding to the property of Rama Nath. He, therefore, gave a decree in favour of the plaintiff.

The defendants appealed to the Subordinate Judge, who dismissed the appeal, holding that Sossi Saran was insane at the time of Gourmoni's death, adding "that he may not have been a perfect idiot, but I think there can be little doubt that his mind was deranged, and that he was unfit for the ordinary intercourse of life, and as such was incapable of inheritance."

Baboo Sreenath Das and Baboo Mohesh Chunder Chowdhry for the Appellants

Mr. Evans, Baboo Mohini Mohun Roy and Baboo Kishori Mohun Roy for the Respondents

• The Judgment of the High Court was delivered by

Field, J --The first point raised in this appeal is, that insanity at the time when the inheritance falls in is not, according to the Hindu law, a disqualification for inheriting, but that according to that law it must be shown that the person who is sought to be disqualified was insane from his birth. We find [641] that this question has been concluded by authority. See the case of *Dwarka Nath Bysak v Mahendra Nath Bysak* (9 B. L. R., 198). It was then decided on appeal from the Original Side, that insanity at the time when the succession opens out is sufficient to disqualify. We find that the same point had been previously decided by two learned Judges of this Court in the case of *Brāja Bhukan Lal Ahluw v Bichan Dobi* (9 B. L. R., 204, note). It was held the other day by a Division Bench of this Court in the case of *Ram Sahye Bhukkut v Lala Laljee Sahye* (I L. R., 8 Cal., 149, 9 C. L. R., 457) that under the Mitakshara law a person who is at the time insane is not entitled to share upon a partition in a joint family. This case though not a direct authority, supports the view taken in the two previous cases already referred to. We must, therefore, decide against the appellant upon the first point.

Then it is contended that there is no sufficient finding to support the judgment of the Court below. It is said that the Subordinate Judge has not found that degree or that kind of mental derangement which would be sufficient to create disability. The Subordinate Judge proposes to himself as the second issue to be tried whether, at the time of the death of Rama Nath's daughter, Gourmoni, her sister's son, Sossi Saran, was insane, and he answers this by saying in his judgment "It appears to be clearly and satisfactorily proved that Sossi Saran was insane at the time of Gourmoni's death." He then goes on to add a few remarks and finishes up by saying: "I think there

can be little doubt that his mind was deranged, and that he was unfit for the ordinary intercourse of life." It is said that his being unfit for the ordinary intercourse of life is not evidence of insanity. We think the Subordinate Judge did not mean to say that it was. The observation that he was unfit for the ordinary intercourse of life was added on to the finding that his mind was deranged, and might well be meant to imply that this was the consequence of mental derangement. We think there are no grounds for this appeal, which must therefore be dismissed with costs

Appeal dismissed

NOTES.

[See also the following cases —(1881) 8 Cal . 149 , 919 , (1883) 5 All . 509 , (1872) 9 B L. R . , 198 , (1905) 28 All . 247]

[642] CRIMINAL MOTION

The 22nd April, 1884

PRESENT

MR JUSTICE MITTER AND MR JUSTICE NORRIS

In the matter of Jhabbu Singh and others

Petitioners

*Limitation—Act XV of 1877, s 12—Exclusion of time in
obtaining copy of judgment*

Certain accused persons were convicted on the 29th February 1884, and made their first application for a copy of the judgment on the 25th March, tendering stamped paper for such copy on the 26th and 29th March. The copy was prepared on the 30th, and the prisoners, who had been admitted to bail on the 5th March, presented their appeal on the 7th April 1884, which was rejected as being out of time. *Held*, that the appeal ought to have been admitted.

ON the 29th February 1884 two men were convicted of robbing and sentenced to six months' rigorous imprisonment. On the 5th March they presented a petition through a Mukhtar, stating that they had been unable to appeal because they were unable to obtain a copy of the judgment (at that time they had as a matter of fact made no attempt to do so), but that they would appeal as soon as they obtained a copy, and they further asked to be admitted to bail. The Sessions Judge released them on bail. The prisoners applied for a copy of the judgment on the 25th March, the stamp sheets of paper for the copy being filed on the 26th and 29th March, on the 30th March the copy was ready for delivery. The memorandum of appeal with the judgment were presented on the 7th April 1884, the portion of the order of the Subordinate Judge refusing to receive the appeal ran as follows "It appears at first sight that the appeal is out of time, it should have been presented by the 30th March, it remains to be seen how many days are to be deducted in calculating the period of thirty days allowed by law."

"On examining the copy of judgment, I find that the application for the copy was made on the 25th March, the requisite stamped sheets were filed on the 26th and 29th, and the copy was ready for delivery on the 30th. How many days are there to be deducted?"

* Criminal Motion No. 123 of 1884; from an order of W H. Page, Esq. Officiating Sessions Judge of Bhagulpore, dated the 8th April 1884

"In my opinion only two, because by 'the requisite stamped sheets' is meant the full number of stamped sheets required. [648] But the appellants' pleader asks, how could the appellant know the number required? I answer that he had had from the date of his release to the date of his application for copy (nearly three months) to find out. The appellant says he had not funds, but if he had applied from the jail for a copy he would have received it without any cost. If he had applied for a copy within a few days of his conviction, I should have said that he had a right to claim a deduction of the whole time. I find that the appeal is presented out of time and therefore decline to receive it."

The prisoners applied to the High Court under the revisional sections of the Code of Criminal Procedure. *

Baboo Juggut Chunder Bannarjee and Baboo Taruck Nath Dutt for the Applicants.

No one appeared for the Crown.

The **Opinion** of the High Court was delivered by

Mitter, J.—We think that the appeal was within time and should have been registered. We accordingly direct it to be registered and heard by the Sessions Judge.

Order reversed.

[10 Cal. 648]

CRIMINAL REFERENCE.

The 4th April, 1884

PRESENT

MR JUSTICE PRINSEP AND MR JUSTICE O'KINEALY

Queen-Empress

versus

Nga Tha Moug and others *

Burmah Courts—Transfer of case—Criminal Procedure Code, s. 178—Reference to High Court—Burmah Courts' Act (Act XVII of 1875), s. 80

The local Government has no power under s. 178 of the Code of Criminal Procedure to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon, but the local Government has the power to transfer a case from the district of Rangoon to the Sessions Division of Pegu.

THIS was a reference under s. 80, cl (b), of the Burmah Courts' Act (Act XVII of 1875) from the special Court constituted by that Act. The question referred was whether the local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the

* Criminal Reference No. 1 and letter No. C. R. 9-1 from Registrar, Special Court of British Burmah, dated Rangoon, the 10th January 1884

Recorder of Rangoon. The facts of the case are fully set out in the opinions of the Judicial Commissioner of British Burmah, [644] Mr. Jardine, and of the Recorder of Rangoon, Mr. Egerton Allen, which are as follow:—

Mr. Jardine.—The prisoners in this case were prosecuted before a Magistrate having jurisdiction in the town of Rangoon, the town being a district in which the Recorder of Rangoon exercises the powers of a Court of Session under s. 60 of the Burmah Courts' Act of 1875. The same section declares that for the purposes of s. 64*a* of the Code of Criminal Procedure the Court of the Recorder shall be deemed to be a High Court, and s. 61 confers on the Recorder all the powers of a High Court under the Code of Criminal Procedure in respect to the proceedings of the Magistrates of the town.

Under s. 3 of the Criminal Procedure Code of 1882, the reference to s. 64*a* must be taken to be made to s. 527 of the same Code. In other respects s. 1 of the same Code preserves the special legislation of the Local Courts' Act where there is no specific provision to the contrary.

The Magistrate committed the prisoners for trial before the Recorder's Court. No doubt about the jurisdiction of the Recorder to hold the trial seems to have been suggested, and no reference was made to the Judicial Commissioner under s. 185, nor any proceeding taken to quash the commitment under s. 215.

The learned Recorder wrote to the Secretary to the Chief Commissioner to request that the local Government will be pleased, under the provisions of s. 178 of the Criminal Procedure Code, to direct the transfer of the cases to the Pegu Sessions division for trial by the Sessions Court of that division.

The order of the Chief Commissioner is contained in a letter of 20th September 1883 from his Secretary to the Recorder, directing that the cases be tried in the Sessions division of Pegu. Upon this the learned Recorder forwarded the record to the Commissioner of Pegu who, under s. 35 of the Burmah Courts' Act, "is deemed to have the powers of a Sessions Judge." The Commissioner tried the prisoners in his Sessions Court sitting at Rangoon, the prisoners appealed to me as a Judicial Commissioner, and I admitted their appeals, and then referred them to the special Court for disposal, as I had doubts about the validity of the order of transfer and the jurisdiction of the Commissioner to determine the merits of the appeals.

I am of opinion that s. 178 does not deal with transfers of cases from one Court to another, a separate chapter 44 is given to such transfers. So far as the present case is concerned ss. 526 and 527 apply. Under s. 526 the High Court can only act for specific reasons, the power of transfer being evidently one which ought to be rarely exercised under s. 527, the equivalent of the old s. 64*a*. The order of the transfer must come from the Governor-General of India in Council.

Section 178 appears to me to allow the local Government to direct the trial of cases in a place outside the local jurisdiction of the trying Court, or in a separate portion of the local jurisdiction. For example, if the Commissioner of Arakan is directed by the Government under s. 10 of the Courts' Act to hold his Civil Court in Rangoon, the Government might also under s. 178 order the same officer to hold trial of Arakan criminal commitments at Rangoon. The same as to the Recorder's Court under s. 45 of the local Act. In this way I would try to reconcile s. 178 of the Criminal Procedure Code with ss. 70 and 77 of the local Act, and s. 527 of the Criminal Procedure Code. Section 77 gives the Chief Commissioner a power to transfer any criminal case pending in the Recorder's Court to the special Court but

not to any other Court, the principle of the law being apparently that the transfer shall not be to an inferior Court. The special Court is superior and the Commissioner's Court inferior in powers to the Recorder's Court.

I am bound to take notice of a construction of the local Act by Mr. R. Crosthwaite, Judicial Commissioner in 1880, when the Chief Commissioner passed an order under s. 59 of the local Act transferring to the Judicial Commissioner's Court a criminal case pending for trial in the Recorder's Court *on a due commitment*. At that time the Judicial Commissioner sat in a jurisdiction transferred from the Commissioner of Pegu and with the powers of a Sessions Judge. Mr. Crosthwaite held that s. 59 did not apply to criminal cases, and it does not seem to have occurred to either him or the local Government that s. 63 of the Criminal Procedure Code then in force (the equivalent of s. 178) was in any way relevant. The concluding part of Mr. Crosthwaite's judgment in that case (*Queen-Empress v. Abdul*) explains his view of the effect of s. 60 of the Burmah Courts' Act, and as I am of the same opinion I quote the passage —

"The last clause of s. 60 of the Act was apparently intended to provide for cases like the present as well as for others, for it enacts that for the purposes of s. 64a of the Code of Criminal Procedure, the Court of the Recorder shall be deemed to be a High Court. The present case then may, under this section, be regarded for the purpose of s. 64a of the Criminal Procedure Code as pending before a High Court, and if it is necessary to transfer the case the Governor-General in Council can do so under s. 64a. The transfer cannot, perhaps, be made to the Judicial Commissioner because he cannot try criminal cases as a High Court, and the transfer must be made from one High Court to another High Court. But as to this I need give no opinion. There is, it seems to me, a remedy provided for difficulties of the present description by the last clause of s. 60, and if under that clause the Governor-General can only transfer the trial of a criminal case from the Court of the Recorder to a chartered High Court, it is very possible that the Legislature so intended that, and it did not intend that any Court other than a chartered High Court should exercise the jurisdiction over European British subjects conferred by the Act upon the Recorder.

"I am of opinion then that, as the terms of s. 59 plainly do not relate to the transfer of criminal trials, and that as the provisions of s. 60 give [646] the Governor-General in Council the power to transfer criminal trials from the Recorder's Court where it is expedient to do so, the construction contended for would be bad in itself, and would be opposed to other provisions of the law, and I therefore conclude that I have no jurisdiction to try this case and I am bound under these circumstances to decline to try it."

The Court of the Recorder is the creature of the local Act and is unique in its powers, some of these being those of a Court of Sessions, others those of a High Court, and these considerations appear to me to give force to Mr. Crosthwaite's reasoning. If the Legislature had intended to give greater power of transfer than what s. 77 gave already, I think it would have used clearer words for that purpose. The Recorder's jurisdiction in many respects resembles the Original Side in a Presidency Town.

As my learned colleague differs in opinion, we must refer the point to the High Court of Bengal, and I would do this before disposing of the merits.

Mr. C. F. Egerton Allen.—"Whether the local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon."

In my opinion the local Government may, acting under the provisions of s. 178 of the Code of Criminal Procedure, direct that a case committed for trial to my Court acting as a Court of Session may be tried by the Court of the Sessions division presided over by the Commissioner of Pegu, subject to the proviso to s. 178

There can be no doubt that the Court of the Recorder of Rangoon is differently constituted from any other criminal Court, and therefore it is impossible to apply the section of the Criminal Procedure Code to it in all respects. But with regard to s. 178 it seems to me applicable in this way, that when the Court sits as a Court of Session it applies but not when it sits as a High Court.

In cases where I sit as a High Court, if it was desirable to transfer for trial elsewhere, a case committed to me, I think such transfer would be made not by the local Government, but by the Governor-General in Council

As I read Mr Crosthwaite's judgment the point was not decided by him, his opinion only being given. The point for decision before Mr. Crosthwaite was whether the local Government could transfer a criminal case from the Recorder's Court to a Court of Session under the provisions of s. 9 of the Burmah Courts' Act, and he held it could not be done as that section applied to civil and not to criminal cases.

The point referred by the learned Judge of the special Court was "whether the local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon"

The Advocate-General (Mr *Paul*) for the Crown

The Deputy Legal Remembrancer (Mr. *Kilby*) for the other side

The **Judgment** of the Court was delivered by

[647] Prinsep, J.—This case arises out of a reference by the special Court of British Burmah made under s. 80, cl. (b), of the Burmah Courts' Act

The point submitted for decision is stated to be whether the local Government has power to transfer for trial to the Court of Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon

We would, however, premise by stating that the point on which the Judges of the special Court in British Burmah have differed is not accurately expressed, in so far as it has arisen from the case before them. We find rather from the record that the case really for our decision is whether the local Government has power to direct that a case duly committed to the Recorder of Rangoon in which the accused are natives shall be transferred and tried in any Sessions division, or, as in the present case, in the Sessions division of Pegu

By s. 60 of the Burmah Courts' Act the Recorder is empowered to exercise the powers of a Court of Session within the local limits of his ordinary civil jurisdiction. Thus we understand to be the powers of a Court of Session as defined in Chapter III of the Code of Criminal Procedure. In order to provide for the passing of sentence of death, which when passed by a Court of Session is subject to the confirmation of a High Court, it is provided that when a sentence of death is passed by the Recorder as a Court of Session it shall be subject to the confirmation of the special Court. These are the general powers of the Recorder's Court, except as regards the trial of European British subjects, in other respects it is deemed to be a High Court, and not a Court of Session. Clause 3 of s. 60 of the Burmah Courts' Act declares that for the purposes of s. 64a of the Code of Criminal Procedure, that is, s. 527 of the present Code of Criminal Procedure, the Court of the Recorder shall be deemed

to be a High Court Under s. 61 the Recorder is given the powers of a High Court under the Code in regard to revision of proceedings of the Magistrates within his local jurisdiction. And under s. 62 of the same Act the Recorder is given the powers of a High Court for the trial of, or otherwise with reference to, European British subjects and persons charged jointly [648] with them. Looking, therefore, at these sections it appears to us that in the exercise of revisional jurisdiction or in the transfer of cases triable by him from his Court to any High Court, and in all matters connected with the trials of European British subjects and persons charged jointly with them, the Recorder possesses all the powers of a High Court But in other respects he exercises only the powers of a Court of Session

This is a case which does not fall within s 527 of the present Code of Criminal Procedure, nor is it a case connected with the revisional jurisdiction of the Court of the Recorder, nor is it a case in which a European British subject, or persons charged jointly with him, is to be tried

Therefore, in our opinion, it falls within the jurisdiction which the Recorder possesses, acting merely as a Court of Session Under s 178 of the present Code of Criminal Procedure "the local Government may direct that any case or class of cases committed for trial in any district may be tried in any Sessions division" In regard to such cases Rangoon is a district, and the Recorder's Court is the Court of Session of the Sessions division. The conclusion is therefore inevitable that under this section the local Government is empowered to direct that any ordinary case (such, for instance, as the case before us) committed for trial by the Recorder's Court at Rangoon shall be transferred for trial by the Sessions division of Pegu But if the local Government went further and directed that the case should be tried by a particular Court, we think that such direction and order cannot be sustained, as it is beyond s 178 of the Code It has been urged against this view that under s. 77 of the local Act the Chief Commissioner may direct that any criminal case pending in the Court of the Recorder of Rangoon shall be transferred to and tried before the special Court, and that hence we should presume that it was not the intention of the Legislature that any such transfer should be made to a Court of Session. But the answer to this objection is obvious The special Court has been created by the local Act, it is not recognized by the Criminal Procedure Code, and if it were intended to transfer a case from the Recorder of Rangoon to the Judicial Commissioner, it could only be done by the special provisions contained in the [649] local Act This does not, as appears to have been held by the Judicial Commissioner necessarily or by implication, lead to the conclusion that the Legislature never intended any case committed to the Court of Rangoon should not be tried in another Sessions division

Strictly speaking, therefore, the answer we should give to the reference by the special Court should be that the local Government has no power under s. 178 of the Criminal Procedure Code to transfer for trial to the Court of the Commissioner a criminal case duly committed for trial by the Court of the Recorder of Rangoon, but that the local Government has the power to transfer a case from the district of Rangoon to the Sessions division of Pegu.

Attorney for both parties The Government Solicitor, Mr *R. S. Upton*.

NOTES.

[See (1886) 10 Rom., 263, where the jurisdiction of the Court at Aden over the island of Perim was in question.]

[10 Cal. 649]

APPELLATE CIVIL

The 24th April, 1884

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND

MR. JUSTICE BEVERLEY

Kashi Nath Chukerbati . . . Plaintiff

versus

Brindahun Chukerbati . . . Defendant

Evidence of oral agreement—Fraud—Act I of 1872, s. 92 proviso 1—Contract—Unlawful consideration—Act IX of 1872, s. 23 †

Plaintiff sued to recover rent under a *kabuliat*. The defendant admitted execution of the *kabuliat*, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs. 282 out of the purchase money and to obtain for him from the purchaser a *mourasi pottah* of the land. It never having been intended that any rent should be payable under the *kabuliat*.

Held, that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties.

THIS was a suit to recover rent from the defendant under a registered *kabuliat*.

The defendant denied that the plaintiff was the owner of the land, but admitted the *kabuliat*, contending that there was an oral agreement between himself and the plaintiff that no rent should be paid or received, and stated that the *kabuliat* was executed in order [630] to enable the plaintiff to sell the land (which was in the possession of the defendant) to some third person, the plaintiff giving the defendant out of the purchase money so to be obtained Rs. 282, and obtaining for him from the purchaser a *mourasi pottah* of the homestead lands.

The Munsif, disbelieving the defendant's witnesses, decreed the suit in favour of the plaintiff.

* Appeal from Appellate Decree No 2400 of 1882 against the decree of Baboo Uma Charan Kastogiri, First Subordinate Judge of Tipperah, dated 28th of September 1882, reversing the decree of Baboo Behari Lal Mookerji, Acting Munsif of Ramraigam, dated the 11th of November 1881.

† [Sec. 23.—The consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that if permitted, it would

What considerations and objects are lawful and what not. defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.]

The defendant appealed to the Subordinate Judge, who held that evidence of the oral agreement was admissible under the 2nd and 3rd provisos to s. 92* of the Evidence Act; and believing the evidence of the defendant's witnesses as to the fictitious character of the *kabuliat*, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Moulvi *Serajul Islam* for the Appellant contended that evidence of the oral agreement was inadmissible, and that the defendant having admitted the *kabuliat*, the suit ought to have been decided in plaintiff's favour

Baboo *Gopinath Mookerji* for the Respondents.

Judgment of the High Court was delivered by

Garth, C.J. (BEVERLEY, J., *concurring*).—We think that the Subordinate Judge is substantially right in the conclusion at which he has arrived.

The suit was brought by the plaintiff for the rent of certain land upon a *kabuliat* given by the defendant, which fixed the rate of rent for two years at Rs. 16, and which *kabuliat* is admitted to have been given by the defendant to the plaintiff.

The defendant's answer, as alleged in his written statement, was this, that the plaintiff was not the owner of the land at all, and had nothing to do with it; and that the real owner was the defendant himself, who, as well as his father before him, had been in possession of it for many years, but that he, the defendant, had, in collusion with the plaintiff, given this *kabuliat* to the plaintiff in order that the plaintiff might sell it to some third person for a high price, paying the defendant Rs. 282 out of the price, and obtaining also for him from the purchaser a *mourasi pottah* for the homestead land. *

The Munsif did not believe this story of the defendant, but the Subordinate Judge found that it was true. There was some [631] contradictory evidence, but he found as a fact that the *kabuliat* was executed in order to enable the plaintiff to sell the land, which really belonged to, and was in the possession of, the defendant, for a large price, and to give the defendant out of the purchase money Rs. 282 besides securing him the homestead under a *mourasi pottah*. In other words, he found that this agreement was not a *bona fide* lease, but a fraudulent and collusive transaction entered into between the parties, for the purpose of enabling the plaintiff to cheat some third person, and that there never was any intention that rent should be paid by the defendant.

The word "fraudulent," it is true, is not used by the Subordinate Judge. He merely deals with the question, whether evidence ought to have been admitted for the purpose of contradicting the plain language of the *kabuliat*. But there is no doubt, we think, what he intends to find, and there is no doubt, if the plaintiff's story is true, that the transaction was a gross fraud.

That being so, any evidence given for the purpose of proving the fraud would be admissible. Section 23 of the Contract Act says: that where the consideration or object of an agreement is forbidden by law, or is fraudulent, the consideration or object of it is said to be unlawful and the agreement itself is void, so that neither of the parties can enforce it against the other.

* [Sec. 99, *Proviso 2* —The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.]

Proviso 3.—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved.]

Then the section of the Evidence Act which shows that under these circumstances evidence was admissible to prove fraud is s. 92, which, after stating that "no evidence of any oral agreement or statement shall be admitted as between the parties to any instrument in writing for the purpose of contradicting, varying, adding to, or subtracting from its terms," enacts in the first proviso that any fact "may be proved for the purpose of invalidating any document on the ground of fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party," and so on

It is clear, therefore, that the transaction, which is found by the Subordinate Judge to have been entered into, is a fraudulent transaction, and that evidence of the fraud was admissible

The appeal must, therefore, be dismissed with costs

Appeal dismissed

NOTES.

["The fraud must be contemporaneous and not subsequent fraud; it must be a fraud which prevented the insertion of the alleged agreement in the deed and not fraud which consists in the false denial of the agreement. For, if fraud of the latter description is to be allowed to make oral evidence admissible to contradict a document, it would render the section nugatory, the object of the section evidently being to avoid falsehood and perjury in the great majority of cases, even at the risk of allowing fraud to go undetected in a few instances," *per Dr. Fash Behari Ghosh* in his *Mortgages*, cited in 25 Cal., 603, at 606.]

[632] APPEAL FROM ORIGINAL CIVIL

The 10th May, 1884.

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND
MR JUSTICE CUNNINGHAM

Ramey... (Plaintiff) Petitioner

versus

Broughton . . . (Defendant) Opposite Party

Limitation Act XV of 1877, ss. 4, 5, and 12, sch II, Art 151—Appeal—Time requisite for obtaining a copy of the decree

A plaintiff wishing to appeal from a decision passed against him on the Original Side of the High Court, dated 16th August 1883, presented for filing his memorandum of appeal to the Registrar on the 5th September 1883, but by reason of the decree not having been signed

* Review of Judgment of GARTH, C.J. and CUNNINGHAM, J. in Original Appeal No. 33 of 1884, dated 22nd February 1884.

on that date, no copy of the decree was presented therewith. The Registrar refused to accept the appeal.

On the 6th September the decree was signed, and on the 7th an office copy thereof was obtained by the defendant's attorney, who, on the 8th September, served a copy at the office of the plaintiff's attorney. On the 12th September, the plaintiff applied for an office copy, which he obtained on the 13th, and on the 15th tendered such copy and his memorandum of appeal to the Registrar. The Registrar refused to accept the appeal, unless under an order of Court, it being, in his opinion, out of time.

On the 6th December 1883 a Judge sitting on the Original Side admitted the appeal. The appeal subsequently came on for hearing, when the defendant contended that the appeal was barred, it not having been filed within twenty days from the date of the decree. The Court held that the appeal was so barred.

Held on review, that the plaintiff having allowed five days to expire after the decree was signed before applying for a copy, and not having filed his appeal, after so obtaining a copy, at the earliest opportunity possible, such a delay, being entirely unaccounted for, could not be held to be "time requisite for obtaining a copy of the decree," and that, therefore, the appeal was out of time.

IN 1882 the plaintiff brought a suit against the Administrator-General (the administrator of the estate of one Louis Ramey, deceased) to have it declared that he was the son and legal personal representative of the said Louis Ramey, and for the construction of a document alleged to be the last will and testament of the deceased, and for possession of the estate of the deceased and for an account.

[653] The suit came on for hearing before Mr. Justice NORRIS, and was dismissed on the 16th August 1883.

No appeal having been filed against the decree within the twenty days allowed for such appeal, the property, the subject of the suit, was advertised for sale, and the sale fixed for the 15th September 1883.

It appeared, however, that on the 5th September 1883 (the last day on which such appeal could have been filed), the plaintiff's attorney presented the memorandum of appeal to the Registrar, but the Registrar refused to file the same, inasmuch as no office copy of the decree was filed therewith. On the same day the plaintiff's attorney made enquiries at the office of the Registrar as to the original decree in the suit, and was informed that the decree was not then prepared.

On the 6th September the decree was signed, and on the 7th September a copy of the said decree was obtained by the defendant's attorney, who, on the 8th September, served a copy at the office of the plaintiff's attorney, but the latter did not for some reason become informed of the fact, and was not aware that the office copy was ready up to the 12th September, when he immediately applied for an office copy. On the 13th September such office copy was obtained, and on the 15th September the grounds of appeal, with such office copy, were tendered for filing, but were rejected as being out of time, the Registrar refusing to accept them after time without an order of Court being obtained granting permission therefor.

On the 6th December 1883 an application was made before Mr. Justice PRIGOT for the admission of the appeal, and on the above facts being stated to the Court, the appeal was admitted, and on the same date the appeal was duly filed, and notice thereof was served on the defendant's attorney.

On the 13th December 1883 the defendant obtained a rule calling upon the plaintiff to show cause why the memorandum of appeal should not be taken off the file, but on the 7th December the rule was discharged on the ground that the Appeal Court (before which the appeal would be heard) was then

sitting, the order of discharge being made without prejudice to any application which might be made to the Appellate Bench to take the memorandum of appeal off the file.

[654] No such application was made to the Appellate Court, but on the appeal coming on for hearing the objection was taken that the appeal was barred by limitation, and the Chief Justice, and Mr Justice CUNNINGHAM, before whom the case was heard, decided that the appeal was barred.

The plaintiffs subsequently on the 20th February 1884 obtained a review of such judgment, at the hearing of the rule, Mr *Phillips* (with him Mr. *Amer Ali*) appeared for the plaintiff.

Mr. *Phillips*.—We were taken by surprise when the appeal was called on.

In the first place the Court had intimated that no long case would be taken, and consequently counsel had abstained from preparing themselves and had made other engagements, and were, when the appeal was called on, actually addressing other Benches of the Court.

In the second place the plaintiff had no notice that the point of limitation would be raised, and therefore was not prepared to deal with it.

That point ought not to have been taken without previous notice. It lies upon the other side to show why the admission of the appeal by Mr. Justice PIGOT was wrong, and that must be made out upon some materials, consequently we ought to have had notice that it was intended to raise the point.

The appeal was, we submit, in time, and the memorandum ought not to have been refused by the Registrar, and was rightly admitted by the Judge.

The Act excludes from the time allowed for an appeal "the time requisite for obtaining a copy of the decree appealed against." This necessarily implies that the time requisite for the decree to come into existence should be excluded, since no copy can be obtained until the decree comes into existence in a form in which it can be copied. Moreover, any other construction would involve absurdity. Suppose a decree is drawn up twenty-five days after the judgment, *i.e.*, twenty-five days after the time has begun to run, the appellant would be barred before the decree exists in a form in which it can be copied. The exclusion of the "time necessary to obtain a copy of the decree," if that expression is treated as meaning only the time requisite, [635] *after the decree has come into existence*, for obtaining a copy, would be of no use to the appellant, since he is already barred. It would be useless to say you can exclude the two or three days necessary to obtain a copy.

[GARTH, C.J.—If the appellant had applied for a copy while the twenty days were running he would not be barred.]

But the Act does not make any such provision, and such an application could not make a longer time "requisite for obtaining a copy," it would shorten the time, and why should the appellant be required to ask for a copy of that which does not exist? Is not that a mere useless form?

Until a decree is drawn up the Legislature does not expect the parties to make up their minds whether they will appeal. But, if the construction suggested is adopted, parties cannot have their memorandum of appeal ready by the end of the twenty days, and must file it in order to comply with the Act, although the appeal will not be received by the Registrar, inasmuch as the appellant cannot annex thereto a copy of the decree. That happened in this case. We presented our memorandum of appeal within the twenty days, but without a copy of the decree, because it was not then drawn up.

Besides, the judgment may be ambiguous and the minutes of decree may have to be spoken to, and why should an appeal be prepared, which may be unnecessary, if the ambiguity is removed? Or the decree may be probably wrong, and the party in whose favour it is may not care to draw it up.

I submit that the Legislature intended the period to be a reasonable period after the decree is finally settled and drawn up to enable parties to judge whether they will appeal, and did not intend the period to be shortened by such accidents as the earlier or later drawing up of the decree, accidents depending upon the press of work in the Court offices. Still less did it intend that the party in whose favour the decree passes should be able, by delaying the drawing up of the decree, to deprive his antagonist of part or the whole of the time allowed him for consideration whether he should appeal. Why should the Legislature, which intends to protect parties against harassing appeals, protect a party who has not thought fit to have a decree in his favour drawn up?

[636] The Advocate-General (Mr. Paul) for the Defendant

The Judgment of the Court was delivered by

GARTH, C.J. (CUNNINGHAM, J., *concurring*) — This was an application made by Mr. Phillips on behalf of the plaintiff (the appellant) for a review of our judgment on an appeal from the Original Side.

The appeal came on for hearing on the 22nd of February last, and an objection was taken by the respondent that the appeal was barred by limitation. We thought that the objection was well founded, and dismissed the appeal.

Mr. Phillips then applied for a review upon the grounds *1st*, that the appellant's counsel were taken by surprise, and were not prepared to argue the point of limitation; and, *2ndly*, that we had made a mistake in supposing that the appeal was barred, and that the point of limitation had not been properly understood or argued at the hearing.

We consider that, strictly speaking, Mr. Phillips ought not to have been allowed to argue the second point at all, because it was fully argued at the hearing, and there was no sufficient reason for our allowing it to be re-argued. But as the question is undoubtedly an important one, and we were most anxious that no available argument should be excluded, we have allowed Mr. Phillips to go fully into both points, and we only now observe that in strictness he had no right to be heard upon it, in order that the fact of our hearing him may not be construed into a precedent.

Now, for the purpose of understanding the points that have been raised, it is necessary that the proceedings in appeal, and the dates when they occurred, should be properly noted.

The judgment of the Court below was given against the plaintiff on the 16th of August 1883. On the 5th of September (which was twenty days after the judgment), the plaintiff's attorney applied to the officer of the Court to file his appeal. He was told that it could not be filed without a copy of the decree (*see* s. 541 of the Civil Procedure Code), but as the decree itself had not been then signed by the Judge, the appellant could not have obtained a copy even if he had asked for it.

On the 6th, however, the following day, the decree was [637] signed; and on the 8th a notice to that effect was given to the plaintiff's attorney. On the 12th the plaintiff's attorney bespoke a copy of the decree, and he obtained it on the next day, the 13th.

On the 15th he applied again to file his appeal, but the officer refused to admit it, on the ground that it was not in time.

No step was then taken by the appellant to get the appeal admitted until the 6th of December, when an application was made to Mr. Justice PIGOT, upon affidavit, for the admission of the appeal; and the appeal was admitted.

On the 13th of December the defendant obtained a rule, upon affidavits, calling upon the plaintiff to show cause why the appeal should not be taken off the file.

On the 7th of January cause was shown against the rule, and it was discharged upon the ground that the Appeal Court was sitting, but without prejudice to any application to the Appeal Court to take the appeal off the file.

No application was made for that purpose, and on Friday, the 22nd of February, the appeal came on for hearing before this Bench. This happened to be the last day on which my brother CUNNINGHAM and myself were to sit together, as on the following Monday I was to sit with Mr Justice WILSON. We had, therefore, given notice that no long case would be taken on the Friday, and when this appeal was called on about 1 o'clock on Friday, Mr *Pugh*, who was one of the appellant's counsel, said that, as it was a long case, and he thought it would not have been taken, he was not prepared to argue it.

The Advocate-General, who appeared for the respondent, said that, in his opinion, it would be a short case, for that he had a preliminary objection on the ground of limitation, which he thought would dispose of it.

Under these circumstances, we determined to hear it. But as Mr. *Pugh* said he was not then prepared to argue the point of limitation, we postponed the hearing until after the mid-day adjournment, in order that he might have time to prepare himself.

Upon our return to the Court at a quarter to three, Mr. *Pugh* was not present, nor was Mr. *Phillips*, but Mr. *Amir Ali*, [638] who was the third counsel in the case, appeared and objected that no notice had been given to the appellant that the respondent was going to rely upon the point of limitation, and that no application had been made to rescind Mr Justice PIGOT's order admitting the appeal.

We explained that the point of limitation arose upon the appeal itself, quite apart from any order admitting the appeal, and that, under s 4 of the Limitation Act, we were not at liberty to hear the appeal, unless the appellant could satisfy us that he had filed it in proper time, or that, under s 5, he had sufficient cause for not presenting it within the prescribed period.

But we told Mr. *Amir Ali* that, in order to satisfy us upon that point, he was at liberty to use all the affidavits which were used before Mr Justice PIGOT, either on the 6th or the 13th of December. Accordingly, upon those affidavits, the point of limitation was fully argued by Mr. *Amir Ali* on the one side, and the Advocate-General on the other, and in the result, we dismissed the appeal upon the ground that it was barred.

Mr. *Phillips* has now contended on the application for review that he and his friends were taken by surprise, and ought not to have been called upon to go into the case. But the question whether the case should be taken was entirely a matter for the discretion of the Court, and as we had reason to believe, from what was stated by the Advocate-General, that the case would not be a long one, we thought it right to call it on.

The appeal had been in the paper for upwards of six weeks. There were three counsel engaged in it, and, of course, they ought to have been aware that the point of limitation was not only open to the respondent, but that it was one which the Court, whether it were taken by the respondent or not, was bound by law to entertain.

Upon the proceedings it appeared that the appeal had not been filed within twenty days from the date of the judgment, so that, *prima facie*, it was barred;

and the fact that it had been admitted by order of the Judge did not dispose of the point of limitation. The officer of the Court is not allowed to file any appeals which appear to be out of time, except by order of the Court, but the Court, if anything like a *prima facie* case for the admission is made [659] out by the appellant, is of course quite right to admit it, in order that the point of limitation may be argued at the hearing. Unless the appeal is admitted, the appellant of course is precluded from raising the point.

But the order for admission has no greater effect than that. We are constantly in the habit, on the Appellate Side, of making these orders *ex parte*; but it also constantly happens that when the point is argued at the hearing, we hold the appeal to be barred.

The counsel, therefore, for the appellant ought to have been fully prepared to argue the point in this case. Mr *Amir Ali* had all the affidavits before him for that purpose, and it was not suggested that he had any material facts to add to those which were disclosed in his affidavits.

We think, therefore, that there is no ground for Mr. *Phillips* first contention, that the case ought not to have been heard, or that he and his friends were taken by surprise.

But then, secondly, Mr *Phillips* contended that the appeal was not barred; and the point of limitation was not properly argued or understood at the hearing.

It was in this respect we considered that Mr *Phillips* had no right to address us. We have always held in this Court that a review is not admissible merely for the purpose of having a point argued again upon the same materials by some other counsel. If that were permitted there would be no finality in any judgment. But we permitted it, as we have already said, on this occasion, from an anxiety, that upon a point of so much importance and of such general application no argument should be excluded.

Mr *Phillips* contended, as I understood him, that where the decree, as in this case, was not drawn up and signed until after twenty days had expired from the delivery of the judgment, the twenty days ought to count from the time when the decree was made. But this is directly contrary to the express language of the law.

By the 151st article of the schedule to the Limitation Act the twenty days are to be reckoned from the date of the decree, and by the 20th section of the Civil Procedure Code, the decree is to bear [660] date the day on which the judgment is pronounced, so that the appeal must clearly be filed within twenty days from the day on which the judgment is pronounced.

But then it was said (and this is really the only arguable point) that, although the appeal was not brought to the office to be filed until ten days after the proper time, the additional ten days were requisite for enabling the appellant to get a copy of the decree.

If this had been so, the appellant would no doubt have brought himself within s. 12, but the facts were against him.

* [Art 151.—

Description of appeal	Period of limitation.	Time from which period begins to run.
From a decree or order of any of the High Courts of Judicature at Fort William, Madras and Bombay in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order]

The appeal, as we have seen, was first brought to the office on the 5th of September, and on the 20th day after the judgment was pronounced. It could not be received then, because the appellant had no copy of the decree; and no copy of the decree could then be had, because the decree itself was not signed.

I quite agree, therefore, that upon the facts disclosed on the affidavits, the appellant was entitled to as many additional days after the 5th of September as were requisite to enable him to get a copy of the decree.

But the decree was signed on the 6th of September, and it is sworn—and I see no reason to doubt the fact—that a copy of the decree was sent to the appellant's attorney on the 8th, whether he received that notice or not, the decree was ready, and it was his business to go to the office and get the copy. It clearly was not the duty of the office or of the respondent to give him any notice. He was bound himself to ascertain at the office when the decree was ready, and to bespeak a copy.

Instead of doing this, he allowed five days to expire before he applied for a copy. He applied for it on the 12th, and obtained it on the 13th, and even then he did not apply to file his appeal until the 15th.

There are then at least five or six days unaccounted for, which were clearly not requisite for obtaining a copy of the decree. He might easily, if he had used due diligence, have filed his appeal on the 9th or 10th; and he does not apply to file it till the 15th.

[661] We held here not long ago on the Appellate Side of the Court, after consulting some of the other Judges, that where an appellant was too late by a single day—and for that day's delay there was no sufficient excuse—the appeal was barred. Section 4 of the Limitation Act leaves us no discretion in this respect, and unless the appellant can satisfy the Court *that he had sufficient cause* for not presenting the appeal in proper time, we have no right to hear it.

● I quite think that, where an appellant has any real difficulty in obtaining a copy of the decree, and uses due diligence to obtain it, every reasonable allowance should be made in his favour, and I confess I think there are strong reasons in favour of altering the law of limitation, so as to make the twenty days allowed for an appeal count from the signing of the decree, and not from the day when the judgment is pronounced.

As the law now stands, all we can do is to be liberal in allowing the appellant (under s. 12) a requisite time for obtaining a copy of the decree, and this I should in all cases be quite prepared to do.

But here, there is no pretence for saying that the delay which occurred in obtaining a copy of the decree was not due to the plaintiff himself. In addition to the information which the affidavits disclose, and which shows that the appellant might have obtained a copy of the decree five or six days earlier, if he had only used due diligence, we have obtained from the office the following facts, which make it clear the delay in getting the decree itself settled and signed was also due to the appellant.

The draft decree was prepared in the office on the 18th of August. It was sent to both parties for approval on the 21st. The defendant approved it on the 28th, but the plaintiff has never returned it (either approved or otherwise) up to the present time.

In consequence of the plaintiff's not returning it, the usual notice was issued to him to come and settle it on the 28th of August. He did not appear in pursuance of that notice, and consequently it was settled and passed in his absence on the 30th of August. It was given out to be engrossed on the 31st. It [662] was engrossed and examined on the 4th of September, and it was signed by the Judge on the 6th of September.

But for the plaintiff's own delay, therefore, the decree would have been prepared and signed much earlier, and a copy might have been obtained by him in ample time to file his appeal within the twenty days

But apart from these reasons, which in my opinion are conclusive, there is also another point which I consider fatal to the plaintiff's case

If an appeal is not preferred in due time, the officer of the Court, as I have already said, has no right to receive it without an order from a Judge, and the appellant must come as early as he can to the Court to make his application. This has always been the rule on the Appellate Side of the Court, and I do not see why it should not also be the rule in appeals from the Original Side. The provisions of the Limitation Act apply equally to both sides of the Court.

The 15th of September last was immediately before the vacation. But there was not the least reason why the appellant should not have applied to the Vacation Judge, and at any rate he should have applied immediately upon the Court re-opening in November

Instead of this he waits for nearly three months, and does not make his application till the 6th of December, and he gives no excuse for this delay, except that his counsel, Mr *Phillips*, was not at Calcutta, which, of course, is no excuse at all

The facts of the case appear to me to disclose very serious negligence on the part of the plaintiff's attorney, and if there was any good ground for the appeal on the merits, the attorney would certainly seem answerable to the plaintiff for the consequences of that negligence

I am clearly of opinion that the appellant is barred, and that there is no ground whatever for a review

Application dismissed

Attorney for the Plaintiff Baboo *N. L. Bose*

Attorney for the Defendant Messrs *Sanderson & Co*

NOTES

[The time between the signing of the decree and the passing of the judgment ought to be excluded —13 Cal, 101, 12 All, 461— 10 A W N, 119]

The time for obtaining copies is excluded only from the time when application for copy is put in —12 All, 461, 11 B R (1905) Civ Pro, 24, 25 Bom, 586

It is the duty of the Court to take notice of limitation at however late a stage the point may be raised —10 Cal 652, 16 All 399, 34 Cal 941 —11 C W N, 959 6 C. L. J., 237, 14 Bom, 591]

[663] PRIVY COUNCIL

The 6th and 7th December, 1883.

PRESENT

LORD FITZGERALD, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Sadakat Hossein

versus

Mahomed Yusuf

On appeal from the High Court at Fort William in Bengal.]

Mahomedan law—Legitimation of offspring by acknowledgment.

The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist

Mahomed Azmat Ali Khan v Lalk Begum (L R , 91 A , 8 , I.L.R , 8 Cal., 422) referred to.

Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question

APPEAL from a decree of the High Court (3rd June 1880), reversing a decree of the Subordinate Judge of the Sarun district.

This was an appeal in one of two suits, in both of which there were decrees made by the High Court against the appellant. He was the son of Kalb Ali, a Shia Mahomedan of the Sarun district, deceased, who left, besides this son, Sadakat Hossein, two daughters also, named Khairun Nissa and Saskimun Nissa, the latter of whom was the mother of, and died before Amir Hossein, to whose share the present litigation related. Amir Hossein, the appellant's sister's son, died in 1866, leaving him surviving a grandmother, Bibi Sadra, his aunt Khairun Nissa, and his uncle, this appellant. He left no other issue than a son, Mahomed Selim, born of a woman who had been in an inferior station in his household. Whether Mahomed Selim had been legitimated by his father's treatment of him was the question on this appeal.

Bibi Sadra died in 1869, and her estate devolved on this appellant, who also succeeded to the share of his sister, Khairun Nissa, she dying childless a few months after the grandmother. The appellant thus became entitled, unless the rights of Mahomed Selim as a legitimate son should prevail, to the whole share which had belonged to Amir Hossein, as well as to the shares of his mother and sister. Mahomed Selim, on attaining his majority [664] in 1877, applied for "dakhil kharij" of the revenue-paying estates which his father had possessed. This was opposed by the appellant.

On the 17th July 1877 Mahomed Selim executed a deed of sale transferring to Mahomed Yusuf five villages, part of the estate which he claimed to have inherited from Amir Hossein, and at the end of the same year Mahomed Yusuf brought a suit to recover them, that being the suit in which the present appeal was preferred. For all the rest of the villages belonging to Amir Hossein's estate, Mahomed Selim himself had already instituted a suit against Sadakat Hossein. Both suits raised the same question, except that, besides the legitimacy of Mahomed Selim, the right of the plaintiff to sue in Mahomed Yusuf's suit was questioned. This objection was allowed by the Subordinate Judge, though afterwards in appeal held untenable. The Subordinate Judge, giving judgment in Mahomed Selim's suit, on the question of his right to inherit, decided in his favour. The Judge found that there had been a marriage between the plaintiff's mother and Amir Hossein that the plaintiff was the begotten son of the latter, and had been treated by him as his legitimate son.

On appeal a Divisional Bench of the High Court (GARTH, C.J., and MITTER, J.), after examining the evidence, stated grounds for holding that Mahomed Selim had been legitimated by treatment, and concluded thus:

"For these reasons we are of opinion that the plaintiff is the son begotten of Amir Hossein's body, and that during Amir Hossein's lifetime he was always treated as his legitimate son. It has been held by the Privy Council, that from such a uniform course of treatment, an acknowledgment of legitimacy, under the Mahomedan law may fairly be inferred, and having regard to the circumstances set forth above, such inference in this case seems to us to be just and proper. (See *Ashrufood Dowlah Ahmed Hossein v. Hyder Hossein Khan*, 11 Moo I.A., 94)

"The Plaintiff, therefore, though born out of wedlock, was legitimated by this acknowledgment, and is entitled to succeed to the property left by Amir Hossein as his legitimate son.

[665] " In this view of the case, it is not necessary to decide whether Mussumat Domni had been, as alleged by the defendant, married to Jummun or not.

" The appeal will be dismissed with costs."

The amount, or value, of the subject-matter in each of the suits being less than Rs. 10,000, while, taken together the amounts in both exceeded it, upon a petition by Sadakat Hossein for leave to appeal to Her Majesty in Council, and for a certificate that the case fulfilled the requirements of s. 596 of Act X of 1877, the order of the High Court admitting the appeal was preceded by a judgment (PONTIFEX, J), in which it was pointed out that a question of law might be said to have arisen. The point was thus stated in the judgment (28th January 1884) —

" Now, in Selim's suit, the first Court held that Amir Hossein was married to Domni, and that Selim was his legitimate son. The High Court on appeal held that the marriage was not proved, but that Selim was the son of Amir Hossein by Domni, and had been acknowledged by Amir Hossein, and was therefore entitled to his property. It appears, however, to have been alleged by the appellant that Domni, with whom Amir Hossein had been living, was in fact the wife of somebody else, and thus incapable of being the wife of Amir Hossein. That question does not appear to have been gone into by this Court. This Court considered that the finding that Domni had a son by Amir Hossein, who was treated by Amir Hossein as a son, was sufficient to give that son a title. But referring to the case of *Khajah Hidayut Oollah v. Roy Jan Khanum* (3 Moo. I. A , p 295), it appears that a substantial and at least arguable question of law may exist. At page 318 there is a quotation from Macnaghten's book, which tends to show that if the woman was married to some other person, then her son could not be legitimated because she was incapable of being the wife of Amir Hossein. That question refers to the Sunni law, and the parties here are Shialis. But this view of the law seems also to apply to Shiahs as appears by a passage in Baillie's Digest of the Imamia Law, page 289. The decision of the High Court in Selim's case, of course, also governed the other case of Mahomed Yusuf. I, therefore, think that there is [666] a substantial question of law involved in these cases, and I admit the appeals. But as it is not expedient that both appeals should proceed together before the Privy Council, I think the appeal forwarded should be that one in which Mahomed Yusuf is a respondent, as in that all questions in dispute may be decided. The whole record, however, should be translated and transmitted to the Privy Council, and the other appeal should stand over until further orders "

Mr. J. F. Leith, Q C , and Mr. R V. Doyme appeared for the Appellant

It was submitted that the title of Mahomed Selim to succeed to his father's estate, as his legitimate son, failed, because the evidence showed that there had been a marriage, before his birth, between his mother Domni and one Jummun, which was subsisting at the time of her connection with Amir Hossein. It was not competent to the latter to give to the offspring of an adulterous connection the status of a legitimate son. He had not, however, on the evidence, shown any real intention to do so

With reference to that part of the judgment of the High Court in which that Court declined to deal with the question whether or not there had been a marriage between the mother, Domni, and Amir Hossein, the father, it was argued that as legitimation of a son by evidence of treatment, or acknowledgment, took its origin in the presumptions of the Mahomedan law in regard to

marriage, there could be no finding of legitimation, where the marriage of the mother was not presumed. Legitimation was effected by, and through, presumption of marriage.

Reference was made to Baillie's Digest of Mahomedan Law, Haneefia, book V, "Of Parentage", chapters I and II of "Acknowledgment", 2nd edition, 1875, pp. 406, 407, *et seq*, the Hedaya, volume III, p. 549, cited in the above. Macnaghten's Principles of Mahomedan Law, chapter VII, paragraph 33, Macnaghten's Precedents, chapter VI, case XLVI, also to *Mirza Qaim Ali Beg v. Mussumat Hingun* (3 S. D. A., Sel. Rep., 152, 154), *Khajah Hidayat Oollah v. Roy Jan Khanum* (3 Moo I A., 295), *Ashrafud Dowlah Ahmed Hossein v. Hyder Hossein Khan* (11 Moo I A., 94), *Mahammed Azmat Ali Khan v. Lalh Begum* (L. R. 9 I A., 8, I L. R., 8 Cal., 422)

[667] The respondent did not appear

Their Lordships' Judgment was delivered by

Lord Fitzgerald.—In this case some questions of importance have been raised, and their Lordships regret that they have not had the assistance of counsel appearing for the respondent. Their Lordships are, therefore, impressed with the propriety of not going beyond questions which are absolutely necessary for the purpose of their decision.

The real issue in this case, and the only issue upon which their Lordships feel it necessary to decide, is whether Selim,—who was beyond question the actual son of Amir Hossein by a woman known as Domni,—had been so recognized by Amir Hossein as to give him the status of a son capable of inheriting. The suit relates to the property of Amir Hossein. He died in the year 1866, and if Selim is in the position of having the rights of a son in reference to heirship, the plaintiff in the case, who claims as the assignee of his interest, is entitled to succeed. A question of importance was raised by the counsel for the appellant. He contended that Selim could not be treated as having acquired the status of a son capable of inheriting, because he alleged that the intercourse between Amir Hossein and Domni was an adulterous intercourse, as she had been previously married to a person then and still living, and that, consequently, whether her connection with Amir Hossein was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that, according to Mahomedan law, the issue of that adulterous intercourse could not inherit as heir or acquire the status of a son by recognition. It, therefore, becomes necessary to consider, in the first instance, whether the alleged marriage of Domni to a man named Jummun has been established by satisfactory proof. Jummun appears to have been a person of somewhat the same degree in life as Domni, whose father's name was also Jummun. This marriage, if it took place at all, would have occurred shortly before or somewhat about the same period as the alleged marriage between Amir Hossein and Domni. The alleged marriage of Jummun with Domni is said to have been somewhere about 1852 or 1853, and the alleged marriage of Domni with [668] Amir Hossein must have taken place about the same period. Amir Hossein died in 1866, leaving Selim, his son, then about eight or nine years of age, which would have made him born in 1857 or 1858. Another child had been born of the intercourse between Amir Hossein and Domni about four years before; so that the marriage between Amir Hossein and Domni, if it ever took place, is referred to about the same period as the alleged marriage between Jummun and Domni.

Now the account given by Jummun is certainly one of an incredible character. The statement is that he became acquainted with Domni when he

went to live in this particular village. [His Lordship then examined the evidence as to the alleged marriage between Jummun and Domni and concluded as follows :—]

Their Lordships have then come to the conclusion that the parties fail to establish this marriage between Jummun and Domni. That relieves them from offering any opinion upon the very important question of law which was raised by the counsel for the appellant, namely, whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment. The absence of reliable proof, such as their Lordships could act upon, of the marriage of Domni and Jummun, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Mahomed Azmat Ali Khan v Mussumat Lalli Begum* (L R, 9 I. A., 8, I. L. R., 8 Cal, 422), which is as follows — ‘ Their Lordships are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the bar, viz, that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case.’ Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the Primary Court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence afterwards, concur in opinion that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from [669] which an inference is fairly to be deduced that the father intended to recognize him and give him the status of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the status of Selim as son has been sufficiently established by recognition so as to enable him to claim as heir. Other questions have been raised in the case, but, in accordance with what has been stated as their Lordships’ view, they think they ought not in a case of this kind to go beyond what is necessary for the decision.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, and to affirm the decision of the Court below.

There will, of course, be no costs in this case.

Appeal dismissed.

Solicitors for the Appellant Messrs *Watkins and Lattey*.

NOTES

[MAHOMEDAN LAW —ACKNOWLEDGMENT AND LEGITIMACY—

The mere acknowledgment of *paternity* is insufficient, it should be of sonship —(1866) 11 M I A, 94, (1893) 21 Cal, 666 (670), for an acknowledgment to be valid, the paternity must be uncertain either as regards the fact or time of marriage with reference to the child’s birth and there should have been no impediment to a valid marriage —10 All., 289 on appeal from 8 All, 234

Thus, acknowledgment has no effect where the facts of parentage are known, (1881) 10 All., 289 (330), (1866) 11 M I A 94 subsequent marriage *disproving* previous marriage); (1900) 27 Cal. 801, 9 C.W.N. 352 (offspring of illegitimate intercourse), (1895) 23 Cal., 130 (void marriage, (1903) 26 All., 108 (mother having been married to another) 5 W. R, 4, 26 W. R. 26 (slavery of the mother is no bar as regards the status of the son), 21 Cal. 666 9 C.W.N 352 (difference in religion, *quære*).]

[10 Cal. 669]

APPELLATE CIVIL

The 12th May, 1884

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Juggut Chunder Dutt.... Plaintiff

versus

Rada Nath Dhur. . . . Defendant.

*Partnership—Suit for an account—Introduction of new member into firm—
Contract Act IX of 1872, s 253, cl 6 and s 265—Jurisdiction.*

The effect of cl 6 of s 253 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partners as to cause an immediate dissolution of the partnership

If no assent is given by the other partners to the assignment, the assignee is upon dissolution at liberty to sue for an account and for distribution, not as a partner, but as assignee of the right of his assignor in the partnership property

Section 265 of the Contract Act commented on

THE plaintiff in this case stated that, in the year 1284, Rada Nath Dhur, the defendant No. 1, and one Gopal Chunder Dhur opened a shop agreeing to share profit and loss equally between them, this business being managed by Mohesh Chunder [670] Bose, Nobin Chunder Doss and Nobo Kumar Nath (defendants 2, 3 and 4), as gohmastas

That on the 12th March 1880 Gopal Chunder Dhur sold his share in the business to the plaintiff and Modhu Sudun Roy under a registered deed of sale, that, subsequently to this sale, the defendants 2, 3 and 4 colluded with Rada Nath Dhur (defendant No. 1) and collected and appropriated moneys owing to the firm, that he, the plaintiff, on the 10th Aghian 1287 (25th November 1879) purchased the share of Modhu Sudun Roy, that he demanded from the defendants the papers and books of the firm and asked for an account, but on their at first promising to comply and then failing in their promise, he filed the present suit against them on the 28th November 1880, asking for an account.

Defendant No. 1 contended that all that the plaintiff purchased in 1880 was, the articles in store and the debts due to the concern, and that the assignment was made secretly and without his consent, and further contended that the business had been closed since 1286 (April 1880), and that nothing was due to the plaintiff.

The other defendants contended that, being gohmastas only, they were not liable to be sued.

The Munsif found that the plaintiff had obtained possession of Gopal Chunder Dhur's share in the business, and that there was evidence to show that the defendants had at one time agreed to account, but that the business had

* Appeal from Appellate Decree No. 2334 of 1882 against the order of Colonel T. Lamb, Deputy Commissioner of Nowgong, dated the 28th of August 1882, reversing the decree of Gunabhai Ram Borua, Munsif of that district, dated the 21st of September 1881.

closed in 1286; that the plaintiff was entitled to an account from the defendants, and after going into the accounts he made a decree in favour of the plaintiff for Rs. 442-15-12.

The defendants appealed to the Deputy Commissioner, contending that a new partner could not be introduced into the business without the consent of the other partner, under s. 253, cl. 6 of the Contract Act.

The Deputy Commissioner, after stating that it appeared that Gopal Chunder Dhur had introduced the plaintiff into the business without the consent of Rada Nath, and that the plaintiff had not asked for a dissolution of the partnership by his plaint, but had sued for an account, held that the sale to the plaintiff in [671] 1880 was invalid, as it introduced a new partner into the business without the consent of the other partners, and he, therefore, reversed the decision of the Munsif.

The plaintiff appealed to the High Court.

Baboo *Bhooban Mohan Dass* for the appellant contended that the plaintiff was entitled to sue for an account, and that one partner was at liberty to sell his share without the consent of the other partners, and that it having been found by the Munsif that the defendants had recognized the sale by allowing the plaintiff to take possession and by promising to render him an account, s. 253 of the Contract Act should not have been applied when these facts had not been displaced.

Baboo *Huri Mohun Chuckerbuti* for the respondents cross objected, that under s. 265 of the Contract Act the District Judge alone had jurisdiction to try the case.

Judgment of the High Court was delivered by

Garth, C. J. (BEVERLEY, J., *concurring*).—The plaintiff's case is that the defendant No. 1 and a person named Gopal Chunder Dhur opened a shop and carried on business in co-partnership for about three years. Gopal Chunder Dhur then sold his share to the plaintiff, and the plaintiff says that after this purchase he continued to carry on the business with the defendant No. 1, but that the defendant No. 1, in collusion with the other defendants, who are his gohmastas, have been receiving moneys due to the firm, and keeping back papers and accounts in fraud of him, the plaintiff. He, therefore, brings this suit against them for production of the papers and for an account.

Two of the defendants say they have nothing to do with the partnership, and that they are merely employed as gohmastas. But the defendant No. 1 says that the business has been closed since the end of the Bengalee year* 1286, and that nothing is due to the plaintiff.

The Munsif found, as a fact, that the business was closed at the end of the year 1286, but he considered that the plaintiff was entitled to the investigation which he claimed, and after appointing an ameen and examining the accounts, he made a decree in the plaintiff's favour for Rs. 442-15-12.

[672] The Deputy Commissioner took a different view. He considered that the purchase by the plaintiff from Gopal Chunder Dhur of the share in the partnership was invalid, and that (apparently, for that reason) the plaintiff had no right to sue the defendant for an account.

It has now been contended before us that the view taken by the Deputy Commissioner was wrong, and that the judgment of the Munsif ought to be restored.

We think it very doubtful, however, whether, upon the plaintiff's own showing, and upon the facts found by the Munsif, the plaintiff is entitled to a decree.

It is not actually stated in the plaint, although it may certainly be inferred, that the business of the partnership had been carried on up to the time when the suit was brought in November 1880.

The defendant No. 1 says that this was not so, and that the business came to a close at the end of the Bengalee year 1286, which would be about the 11th of April 1880, or about a month after the plaintiff bought his share in the concern; and the defendant No. 1 also says, though the fact is not distinctly found by either Court, that the sale of the share to the plaintiff *was made secretly, and without his consent*.

Now, the Deputy Commissioner is so far right in his view of the law that no partner has a right to transfer his share in the partnership to a stranger without the consent of the other partners. (See cl. 6 of s. 253 of the Contract Act.)

But the Deputy Commissioner does not quite understand the true meaning of this rule. Its effect is, not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partner or partners, as to cause an immediate dissolution of the partnership.

In other words, one partner cannot by assigning his share make any one else a partner in his stead with his co-partners, and therefore upon his assigning his share the partnership ceases to exist, unless the other partners consent to accept the purchaser as a partner in the place of the latter.

If they do so consent, the partnership may continue to be carried on as before. If they do not consent, the plaintiff would, [673] upon the dissolution, have a right to sue, not as a partner, but as an assignee of the rights of his assignor in the partnership property, for an account of that property, and for such a distribution share as belonged to his assignor.

Now, in this case, it does not appear to have been distinctly found by either of the lower Courts whether the defendant No. 1 consented to receive the plaintiff as a partner in the concern or not. The defendant No. 1 says that the transfer was made *secretly and without his consent*, and, although he says that the business continued to be carried on for about a month after the transfer was made, it does not appear whether the plaintiff was considered to have any share in it.

It will be found that this point has a very material bearing upon the question whether, in point of law, the plaintiff has any right to bring this suit.

If he never became a partner with the defendant No. 1, he might, as I have just now explained, have a right, *not as a partner, but as an assignee of Gopal Chunder Dhur's share*, to sue for an account against the defendant No. 1, and the judgment of the Munsif may then be substantially right; although it is difficult to see how the plaintiff would have any right of suit against the defendants Nos. 2, 3 and 4 if they were only *gohmastas*.

If, on the other hand, the plaintiff, after the transfer to him, became a partner with the defendant No. 1 for ever so short a time, and that partnership came to an end on or about the 11th of April 1880, then we think this suit would come within section 265 of the Contract Act, and could only be brought in the Court of the District Judge.

This principle seems now to be pretty clearly established by several decisions in this Court. It has led to a good deal of inconvenience and injustice that suits of this description should only be brought in the Court of the District Judge; but so long as that section continues to be the law, the Court has no power to prevent the mischief.

It was certainly a matter of doubt at one time, both in this Court and elsewhere, whether the provisions of s. 265 were not intended to provide additional remedy otherwise than by a [674] regular suit in cases where a partnership had determined. But the Civil Procedure Code has provided no other proceeding except a regular suit, under which accounts may be taken under such circumstances, and it has accordingly been held in several subsequent cases in this Court that a regular suit is the only remedy, and that such a suit can only be brought in the Court of the District Judge. See *Prosad Dass Mullick v Russick Lall Mullick* (I. L. R., 7 Cal., 157), *Ramayya v. Chandra Sekara Rau* (I L R., 5 Mad., 256), *Harrison v Delhi and London Bank* (I. L. R., 4 All., 437), *Sorabji Fardunji v Dulabhbhai Hargovandas* (I. L. R., 5 Bom., 65), *Ladubhai Premchand v Revichand Venuchand* (I. L. R., 6 Bom., 143), *Ram Chunder Shaha v Manick Chunder Banikya* (I L R., 7 Cal., 428). We think therefore that, as the Deputy Commissioner has misconceived the effect of the plaintiff's purchase, and as neither Court has tried what appears to be a very important question in the case, namely, whether the plaintiff ever really became a partner in the concern with the defendant No 1, the case ought to go back to the Munsif's Court for re-trial, and if in the result it should turn out that the suit can only be brought in the Court of the District Judge, as being a suit by an accepted partner after determination of the partnership, the plaint should be given back to the plaintiff to be there presented. The plaintiff, we presume, will not be prejudiced, so far as limitation is concerned, because he would have brought this suit *bona fide* in a Court which has no jurisdiction to entertain it.

Case remanded.

NOTES.

• [The Indian Contract Act, 1872, sec. 265, was amended in 1886 by Act IV of 1886, sec. 1, which omits the old explanation of the term "Court"]

As regards the assignee's rights, see the Notes of Messrs Pollock & Mulla to sec. 253 of the *Indian Contract Act*, 1872. (1913) III Edn., p. 658.]

[675] APPELLATE CIVIL.

The 17th April, 1884.

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Ashanullah :Plaintiff

versus

Kali Kinkur Kur and others...Defendants.

Partition—Joint property consisting of several houses—Principle of partition—Commission of partition—Act XIV of 1882, s. 396.

Where in a suit for partition possession was sought of a definite share of a property consisting of a number of houses. *Held*, that the principle in such cases is, that if a property can

* Appeal from Appellate Decree No. 1928 of 1882, against the decree of Baboo Uma Churn Kastogiri, Subordinate Judge of Tipperah, dated 22nd June 1882, modifying the decree of Baboo Protap Chander Mozoomdar, Officiating First Munsif of Moradnagore, dated 18th of July 1881.

be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made, but where partition cannot be made without destroying the intrinsic value of the property, then a money compensation should be given.

IN this suit the property, of which partition was claimed, was said to consist of ten houses. The houses were originally in the joint possession of three brothers, the defendants. The shares of two of these brothers, being a 10-anna 13 gunda 1 cowri 1 krant portion of the whole property, were purchased by the plaintiff at an execution sale. The principal defendant, the brother who still retained his share, contended, that partition of *ymali* dwelling-houses could not be legally made. The Munsif found that one of the ten houses was not then in existence, and ordered that nine of the houses should be partitioned, and directed that a valuation of the nine houses should be made, and a two-third share thereof be made over to the plaintiff who should be at liberty to remove them, but as regards the tenth house no order was made, the Munsif stating that as to this house he left the plaintiff to seek such remedy as he might be advised. The Subordinate Judge modified the decree, and ordered that the houses should be valued by an expert in execution of the decree and two-thirds of the value with interest be given to the plaintiff.

The plaintiff appealed to the High Court

[676] Baboo Chunder Madhub Ghose, for the Appellant, contended that the decree of the lower Court limiting the plaintiff's claim to a two-third share in the value of houses was bad in law

Baboo Boikanto Nath Doss for the Respondents

The Judgment of the Court (McDONELL and FIELD, JJ) was delivered by

Field, J.—The plaintiff in this case purchased two-thirds of a property consisting of ten houses. One of these houses has since fallen down, or otherwise been destroyed, and the present dispute concerns nine houses only. The plaintiff sued to have a partition, and he said that he intended to break down and remove those houses, of which he would obtain possession by this partition.

The Munsif gave him a decree for six-houses out of the nine, holding that this was the arithmetically proportionate share of the property. An appeal was then preferred to the Subordinate Judge, and the Subordinate Judge, evidently influenced by the idea that the case was a hard one, directed that the houses should be valued, and that two-thirds of the value, together with legal interest, should be given to the plaintiff

* The plaintiff now contends that the Subordinate Judge had no right to give him the price of the houses instead of the houses themselves, and we think that upon this bare contention the plaintiff is entitled to succeed. The principle in these cases of partition is that if a property can be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to the plaintiff by partition

In the present case the defendant did not object before the Subordinate Judge that the nine houses could not be partitioned without destroying the value of the property. He did not object that no three houses could be given to him which would bear a fairly proportionate value to the whole of the property. We think, therefore, that the decree of the Subordinate Judge is erroneous and must be set aside.

We have, however, to point out that the Munsif committed [677] an error in directing six houses out of the nine to be given to the plaintiff without

specifying which six houses should be given. In other words, he should have proceeded under the provisions of s. 396 of the Code of Civil Procedure, and we direct that having determined what portion of the property ought to be given to the plaintiff as representing the two-thirds which he obtained by purchase, the Munsif do proceed to embody in his final decree the result of the Commissioner's investigation and report

We do not think that this is a case in which we ought to give costs.

Case remanded.

NOTES.

[PARTITION—

As regards the general principles underlying the actual allotment of shares, *see also* (1905) 7 Bom., L.R., 482 (485), as regards giving money compensation in lieu of shares, *see* (1907) P. W. R., 52.]

[10 Cal. 677]

APPELLATE CIVIL

The 21st April, 1884

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Anundo Rai and others..... Defendants

versus

Kali Prosad Singh and another. Plaintiffs.*

*Ghatwali tenures of Kharukpore—Transferability of Ghatwali tenures—
Mitakshara law inapplicable to ghatwali tenure—Family custom
inapplicable to ghatwali tenure.*

A ghatwali tenure in Kharukpore is transferable if the zemindar assents and accepts the transfer.

Such assent and acceptance may be presumed from the fact of the zemindar having made no objections to a transfer for a period of over twelve years, and when such a fact has been found a Court ought to recognize such a transfer.

In a suit brought to recover possession of a ghatwali tenure situated in Kharukpore which had been brought to sale in execution of a decree against the previous ghatwali and purchased by the defendants, the plaintiffs sought to rely on the Mitakshara law and certain family custom for the purpose of establishing their right. The lower Court applying such law and custom found that the tenure was transferable, and that it was joint ancestral property and gave the plaintiffs a decree for two-thirds of the property and the defendants a decree for the remaining one-third, holding that to be the extent of the previous ghatwali interest which had been purchased by the defendants.

[678] *Held*, on appeal, that the decision of the lower Court was erroneous. That in dealing with a ghatwali tenure the Court must have regard to the nature of the tenure itself and to the rules of law laid down in regard to such tenures and not to any particular school of law or the customs of any particular family, and that a ghatwali being created for a specific purpose, has its own particular incidents and cannot be subject to any system of law affecting only a particular class or family.

* Appeal from Original Decree No. 114 of 1882, against the decree of Hafiz Abdool Kurreem, Khan Bahadoor, Second Subordinate Judge of Bhagulpore, dated the 18th of February 1882.

IN this case the plaintiffs sought to recover possession of a ghatwali mehal named Kharna, appertaining to the mehals of Kharukpore in the district of Bhagulpore.

The plaintiffs alleged that the family of plaintiff No 1 was governed by the Mitakshara law, and by a special family custom that the eldest son became the malik of the estate, the other members of the family being entitled to maintenance. That, in accordance with such custom, Tekait Meghraj Singh, the father of plaintiff No. 1, held possession of the ghatwali mehal in question till the 13th July 1868, on which date he was nominally, though not actually, ousted by the ancestors of the defendants who purchased the mehal at a sale in execution of a decree obtained against him on the 18th July 1862. The plaintiffs further alleged that the purchasers, although they got the writ for possession, issued and gave a receipt in the usual way purporting to have obtained possession on the 19th Bysack 1276 Fuslee (15th April 1869), in reality did not take actual possession till the month of Assin 1287 Fuslee (September and October 1879), that Tekait Meghraj Singh died in Bhador 1278 Fuslee (August and September 1871), and that after his death the plaintiff No 1, in conformity with the family usage, acquired the right to take exclusive possession of the mehal now claimed.

The plaintiffs also alleged that there was no legal necessity for the debt incurred by Meghraj Singh in respect of which the mehal was brought to sale, and that it was incurred without the consent of plaintiff No 1. The alienation to the predecessors of the defendants was bad and invalid as against plaintiff No. 1, and that by their purchase at the execution sale they got only the right and share of Meghraj Singh in the mehal.

Previous to the suit being brought, plaintiff No 1 sold a 10-anna share in the mehal to plaintiff No 2, and the suit was [679] accordingly brought, by them both, and they contended that the defendants acquired no right to possession of the mehal as against them by virtue of their predecessors' purchase at the sale in execution of the decree against Meghraj Singh. The defendants opposed the plaintiffs' claim on the following amongst other grounds, viz. —

That they and their predecessors had held possession of the mehal since the date of the auction purchase, and that the suit being one for the purpose of setting aside that sale, it was barred as having been brought more than one year after the date of the sale, and that even if it were held that it was not barred on that account, it was still barred by the fact that they had held possession for more than twelve years. That although the mehal Kharna was formerly a ghatwali tenure, that tenure was abolished previous to the date of the sale. That according to the practice of the ghatwali tenures situated in the mehal of Kharukpore, the holder had a full proprietary right, and could sell or transfer the tenure, and that the son acquired no right of partnership with his father during the father's lifetime. They also denied that plaintiff No 1 alone was entitled to succeed by inheritance and pleaded that other similar ghatwali mehals belonging to Meghraj Singh had been sold in execution of decrees against him, and that plaintiff No 1 had remained silent and made no claim with respect to them, and that in respect of the mehal in suit he had been perfectly well aware of the proceeding in the suit in which the sale took place, and had not made any objection thereto.

The lower Court held that the suit was not barred by limitation, and that the ghatwali tenure had not been abolished as pleaded by the defendant, that the practice alleged by the plaintiffs, that the eldest son succeeded the father as ghatwal, was proved, and that the tenure in suit was not divisible, but was transferable. The Court also found that the mehal was joint ancestral property

subject to the Mitakshara law, and gave the plaintiff a decree for two-thirds of the mehal, and the defendants the remaining one-third, holding that to be the extent of Meghraj Singh's interest in the tenure

During the course of a very lengthy judgment, in which the [680] Court went very fully into the evidence and the authorities on the subject, the following cases were referred to *Deendyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198, L. R., 4. I. A., 247); *Rajah Lelanund Singh Bahadoor v. The Government of Bengal* (6 Moore's I. A., 101) *Rajah Lelanund Singh v. The Government* (S. D. A., 1860, 219), *Munrunjun Singh v. Rajah Lelanund Singh* (3 W. R., 84), *Rajah Lelanund Singh Bahadoor v. Thakoor Munrunjun Singh* (13 B. L. R., 124), *Lelanund Singh Bahadoor v. Thakoor Munrunjun Singh* (1 L. R., 3 Cal., 251), *Hari Lal Singh v. Jorawar Singh* (6 Sel. Rep., 169), *Thakoor Kopalnath Sahi Deo v. The Government* (22 W. R., 17), *Rajah Ram Narain Singh v. Pertum Singh* (20 W. R., 189, 11 B. L. R., 397), *Chintamun Singh v. Noulukho Konwari* (I. L. R., 1 Cal., 153), *Doorga Pershad Singh v. Doorga Konwari* (I. L. R., 4 Cal., 190, L. R., 5 I. A., 190), *Maharani Hiranath Koar v. Baboo Ram Narain Singh* (9 B. L. R., 274), *Rajah Lelanund Singh v. Doorgabutty* (W. R., 1864, 249), *Lalla Gooman Singh v. Grant* (11 W. R., 292), *Grant v. Bangshi Deo* (15 W. R., 38, 6 B. L. R., 652), *Jogeswar Sirkar v. Nimai Karnakar* [1 B. L. R. (short notes 7)].

The defendants being dissatisfied with that decision now appealed to the High Court and the plaintiff preferred a cross-appeal

Mr. Pugh and Baboo Rash Behari Ghose and Moonshi Mahomed Yusoof for the Appellants

The Advocate-General (Mr. Paul), Mr. Evans and Baboo Nil Madhub Sen for the Respondents.

The **Judgment** of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

Tottenham, J.—This is an appeal from a decree of the Subordinate Judge of Bhagulpore made in a suit brought by the plaintiffs-respondents to recover possession of a ghatwali mehal named Kharna from the defendants-appellants who, or their predecessors, purchased it in 1868 at a sale held in execution of a decree against [681] the then ghatwal, Tekait Meghraj Singh, father of the plaintiff No. 1

The plaintiffs' case was that from the nature of the tenure in question and under the principles of the Mitakshara law governing the Tekait's family, the alienation was invalid, and that plaintiff No. 1 as eldest son of Meghraj Singh was entitled to hold the estate on the death of his father. Plaintiff No. 2 joined in the suit as purchaser from plaintiff No. 1 of five-eighths of the latter's interest

The case is in many respects a peculiar one, and the decision of the lower Court partakes also of that character. Both sides have objected to it by way of appeal and cross-appeal

In a case of this kind it might have been expected that the plaintiffs would have relied simply on the inalienable character of a ghatwali tenure, the purpose for which it was created necessitating its being protected from seizure and sale for debt, as well as its impartibility.

But the plaint shows that the plaintiffs rely chiefly on the Mitakshara law modified by a family custom that the eldest son alone succeeds to possession. It is alleged that the late holder, though by family usage sole possessor, was precluded by the Mitakshara law from encumbering or alienating the tenure,

except for family necessity, without the consent of his son, the plaintiff, who was adult at the time the debt was incurred which formed the basis of the decree under which the sale took place.

The plaintiffs, therefore, evidently rely chiefly on the Mitakshara law, but further appeal to the nature of the tenure as rendering the sale invalid.

The peculiarity of the defence is that while it denies that plaintiff No. 1 acquired any right in the property under the Mitakshara law by his birth, and contends that the father was sole proprietor fully competent to deal with it, still it raises the plea of limitation on the ground that the right to sue accrued on the date of sale, whereas the suit was not instituted until more than twelve years afterwards.

And to get over the difficulty in regard to the seizure and sale of a ghatwali tenure, the defence alleges that the ghatwali tenure [682] was long ago abolished, and so the property became Meghraj Singh's absolutely.

The somewhat mixed character of the pleadings may be accounted for thus. Plaintiffs must have felt some diffidence in trusting simply or chiefly to the nature of the ghatwali tenure as being indivisible and inalienable, for upon their own showing one of them had sold, and the other had bought, five-eighths of it just before the plaint was filed, and they were doubtless fully aware that in fact numerous similar ghatwalis of Kharukpore, to which class the one in question belongs, had actually been sold. It was convenient, therefore, to put forward the Mitakshara law which does allow alienations for necessity, and moreover the chief inducement to bring the suit was probably the success of other suitors in recent years in recovering property sold for their fathers' debts by the application of the Mitakshara law. It was necessary, however, to fall back upon the nature of the tenure as a ghatwali in order to allow the plaintiffs to count the period of limitation from the time of Meghraj Singh's death, rather than from the date of sale, in the event of plaintiffs being unable to establish their allegation that plaintiff No. 1 was dispossessed only in 1287==(1879).

The defendants would naturally wish to eliminate the Mitakshara law, except in so far as it might help their plea of limitation, and to contend that plaintiff No. 1 had no interest whatever in his father's lifetime, and could not object to any alienation effected during that period.

The lower Court evidently took infinite pains with the case, and recorded an extremely long and elaborate judgment. It found that the ghatwali had not been abolished yet that it was transferable also that it was a joint ancestral property subject to the Mitakshara law, modified only by the custom which operated in this case to make the period of limitation run from the death of Meghraj Singh, and not from the date of sale or of the adverse possession of the defendants, and finally that it was indivisible, and upon these findings it proceeded to give the plaintiffs two-thirds of the property, and the defendants one-third, which the Subordinate Judge held was the extent of Meghraj Singh's interest in the ghatwali tenure.

It appears to us that both parties are justified in objecting to-[683] the manner in which the case has been decided, for it seems clear either that the plaintiffs should have recovered the whole tenure, or that the suit should have been dismissed altogether. The tenure being undoubtedly a ghatwali, the lower Court we think made a mistake in attempting to apply to the case the rules of the Mitakshara law.

For we concur with the learned counsel for the appellants in his contention that in dealing with a ghatwali the Court must have regard to the nature

of the tenure itself, and to the rules of law laid down in regard to such tenures, and not to any particular school of law or to the customs of particular families. The incidents of a ghatwali tenure are the same whether the ghatwal be a Hindu or a Mussulman or a follower of any other system of religion, and the same ghatwali might be held successively by persons governed as to other property by totally different rules of law. A ghatwali is created for a specific purpose, has its own particular incidents, and cannot be subject to any system of law affecting only a particular class or family.

We think, therefore, that the lower Court was misled in its recourse to authorities bearing upon the effect of the Mitakshara law on ancestral joint property whether partible or impartible, and as to the obligation of sons to pay the debts of their fathers, and the authorities cited on these points seem, therefore, to us to afford no assistance in disposing of this case.

The real and only material questions for us to decide are—*first*, whether the sale of this ghatwali in execution of a decree against the ghatwal was invalid and liable to be set aside by reason of the tenure being in its nature inalienable, and, *secondly*, if the alienation was bad, are the present plaintiffs entitled to recover the property? The second question also involves one of limitation.

As to the first question there is doubtless authority for holding that ghatwali lands are not alienable either at the pleasure of the ghatwal for the time being, or for the payment of his debts at the pleasure of his creditors. For the nature of the tenure and the reason of its existence render it necessary that the holder of the office of ghatwal be secured in his enjoyment of the tenure.

* [684] The principal case cited to us by the learned *Advocate-General* for the plaintiffs-respondents is that of *Rajah Nihmoni Singh v. Bakranath Singh* (L. R., 9 I A, 104). But in that case the particular point decided by the Judicial Committee, Privy Council, was that ghatwali lands could not be seized in execution of a decree for the debts of a former ghatwal as assets by descent in the hands of his successor. Then Lordships, however, expressed an opinion that the same considerations on which the ghatwali should be held to be indivisible would make it inalienable. That case related to a jagir in West Burdwan to which Police services were attached, and it was considered to be analogous to one of the Beerbhoom ghatwalis governed by Regulation XXIX of 1814. Another case was cited to us in which a Division Bench of this Court held in a Second Appeal No. 2451 of 1880 that a Shikni ghatwali could not be seized in execution of a decree for debt. That too was a Beerbhoom ghatwali, and the objection was taken by the Shikni ghatwal before any decree was obtained.

The ghatwali in the present case is one of the Kharukpore ghatwalis, and as regards them the Judicial Committee noted, without expressing dissent, that transfers have taken place and have been recognized if made with the assent of the zamindar, while without that consent the Court has not recognized them. Precedents for these propositions are to be found in two cases mentioned by the lower Court.—*Liyah Lelamund Singh v. Doorgabutty* (W. R., 1864, 249) and *Lalla Gooman Singh v. Grant* (11 W R, 292).

These decisions have not been overruled, but the Judicial Committee point out this distinction between the ghatwalis of Beerbhoom and of Kharukpore, that the former are appointed by Government and the latter by the zamindar.

As to the Beerbhoom ghatwals, Regulation XXIX of 1814 expressly provides that they and their descendants in perpetuity shall be maintained in possession of the lands so long as they pay their revenue, and fulfil the other obligations of their tenure.

It has been argued that the Kharukpore ghatwals are on the same footing as those of Beerbhoom, but this does not appear [683] to be the case, for besides there being no statutory provision in their favour, it appears from a description given of their status in the judgment of the Privy Council in the case of *Raja Lelamund Singh Bahadur v The Government of Bengal* (6 Moore's I A., 101) that the zamindar retained in his hands the power of appointing and dismissing the ghatwals in case of their not performing the duties. This seems to negative a right to hold from generation to generation on payment of the rent reserved. Be that as it may, we think that we must hold, upon the authority of the cases and upon the evidence of many such transfers having been effected and unquestioned, as well as in consideration of the long silence of the present plaintiff No. 1, and the silence too of his father while he lived, that a Kharukpore ghatwali is transferable, if the zamindar assents and accepts the transferee, and in the present case we think the lower Court was justified in holding that the zamindar by making no objection within twelve years of the sale acquiesced in it, and that the transfer was, therefore, one which the Court ought to recognize, and looking to the fact that the purposes for which the Kharukpore ghatwalis were created no longer exist, we should greatly regret being compelled to come to a contrary conclusion. We accordingly decide the first question in favour of the defendants-appellants, and hold that the sale was not invalid by reason of the inalienability of the ghatwali tenure.

And upon the second point, too, we think the plaintiffs must fail.

For only as ghatwals duly appointed by the zamindar could they establish any claim to possession of the tenure, and they nowhere allege that they have been appointed ghatwals. Their case was that plaintiffs had a vested interest by his birth in the ghatwali, but this we have shown to be untenable.

The result is that we decree the appeal of the defendants, and dismiss the plaintiffs' suit with costs of both Courts.

Appeal allowed

NOTES.

[This case was affirmed by the Privy Council in (1887) 15 Cal., 471 P.C.]

This case was referred to in 9 Bom., 198 (226) in connection with *raian* tenures, and in 34 Cal., 753-5 C. L. J., 583-12 C. W. N., 193, in connection with *dupan* tenures.]

[686] APPELLATE CIVIL.

The 24th April, 1884.

PRESENT :

MR JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

Nobin Chunder Chowdhry and another..... Defendants

versus

Dokhobala Das.Plaintiff :

Joint family — Partition — Presumption as to purchase in name of wife.

In a suit for partition of joint family property, it was found that certain property stood partly in the name of the wife of the original proprietor, and partly in that of a daughter-in-law. *Held*, that a wife, a member of a joint family, is, as regards property held in her name, in the same position as her husband with respect to property acquired in his name, and subject to the same presumption in favour of the joint family. *Chunder Nath Mostro v. Kristo Komul Singh* (15 W R 357) followed, *Chowdhram v. Tanna Kant Lahuri Chowdhry* (11 C L R 41) distinguished.

THE plaintiff on the allegation that she was a member of a joint family brought this suit for partition against the other members of the joint family. The defendants stated, *inter alia*, that certain plots of land enumerated in the schedule to the plaint were the self-acquired properties of Raimoni, the wife of the common ancestor, and Jadumoni, his daughter-in-law, and held by them under three separate *kobalas* or conveyances. The Court of First Instance gave a decree to the plaintiff, and with respect to the properties in the names of the ladies made this observation

“There is no independent proof as to the source from which the purchase money of the land included in the three *kobalas* came, whether or no it came from the *stridhana*, or from whom the *stridhana* was acquired. On account of these deficiencies in the evidence and want of reliable proof, the presumption would be against the ladies.” On appeal, the District Judge entirely concurred in the view of the lower Court.

The defendant appealed to the High Court

Baboo *Rash Behari Ghose* (with him Baboo *Golap Chunder Sircar*) for the Appellants contended that the presumption of Hindu law that property purchased in the name of one member is joint family property of all the members did not apply to the purchases by Raimoni and Jadumoni, and that the onus was on the plaintiff of proving that the purchases in question were *benami* acquisitions with family funds.

Babu *Mohesh Chunder Chowdhry* and Baboo *Srish Chunder Chowdhry* for the Respondent.

The **Judgment** of the High Court (WILSON and TOTTENHAM, JJ.) was delivered by

Wilson, J. (TOTTENHAM, J., *concurring*).—The only question argued before us is this, whether property acquired in the name of a Hindu lady, a member of a joint family, is presumably joint family property or not. The

* Appeal from Appellate Decree, No 765 of 1883, against the decree of S. H. C. Taylor, Esq., Judge of Beerbhoom, dated 30th December 1882, affirming the decree of Babu Minu Lal Chatterjee, Subordinate Judge of that district, dated the 17th April 1882.

property in this case is found standing in the names of two ladies, members of a joint Hindu family and widows of deceased members of that family. An express decision on the point given in 1871 is that of *Chunder Nath Montro v. Kristo Komul Singh* (15 W R., 357). The judgment was delivered by one of the greatest masters of Hindu law who has ever administered justice in this country. And we are not aware that that view has ever been questioned until now. It is said that a recent decision of a Division Bench of this Court is in conflict with this ruling. But it does not appear to us to be so. The case referred to is *Chowdrain v. Tarini Kant Lahiri Chowdhry* (11 C. L. R., 41, 8 Cal., 545).

There the question considered was whether as between a husband or a purchaser at a sale in execution against the husband and the wife, there is any presumption that property standing in the name of the wife is held by her *benami* for her husband. That is an entirely different question from that raised in this case, whether a wife, a member of a joint family, is, as regards property held in her name, in the same position as her husband with respect to property acquired in his name, and subject to the same presumption in favour of the joint family.

The appeal is dismissed with costs.

Appeal dismissed

[688] APPELLATE CIVIL

The 4th March, 1884

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD

Raj Coomarr Lall and others.... .. Plaintiffs

versus

Bissessur Dyal and others..... .. Defendants.

*Hindu Law—Mitakshara—Adoption—Kayasthas—Sudras—Admissions
against interest—Evidence.*

As a general principle Kayasthas are Hindus of the Sudra class and may, as such, adopt their sisters' son.

THIS was a suit by the plaintiffs, who were the descendants of one Pahar Singh, against Nowrungi Lal, their father, Amani, their paternal uncle, and one Bissessur Dyal, for possession, among other things, of mouzah Jalwandohi by right of inheritance under the Mitakshara law. Pahar Singh had several sons and grandsons, of whom the parties in the suit were the last surviving descendants. Amani was born blind, and made a defendant *pro forma*, Bissessur Dyal was the sister's son of Chandan, one of the grandsons of Pahar Singh, and was adopted by the latter by a deed of the 18th June 1856. Sometime

* Appeal from Original Decree No. 139 of 1881. Appeal preferred on the 5th of January 1879, in the Court of the Judge of Shahabad, against the decree of First Munsif of Buxar, dated 30th November 1878, and heard by the Subordinate Judge of Shahabad, called up to this Court by an order, dated the 14th of June 1881.

after the adoption, Nowrungi Lal and Amani brought a suit against Chandan and Bissessur Dyal to set aside the deed of adoption, but on the 30th April 1866 filed a petition of compromise in Court, whereby they contented themselves with a small portion and gave up the rest of the ancestral property. On the 5th January 1871 Bissessur Dyal recorded his name as the owner of the property in the place of his adoptive father, and on the 26th November 1877 presented an application in the Revenue Office in pursuance of the Land Registration Act, whereupon the plaintiffs filed their objection to the registration of Bissessur's name in respect of, among other properties, Jalwandohi; but their objection was disallowed on the 8th April 1878. The plaintiffs then brought this suit on the 29th April asking for possession of 13 annas in Jalwandohi, that the compromise of the 30th April 1866 should be set aside, and that the deed of adoption might be cancelled.

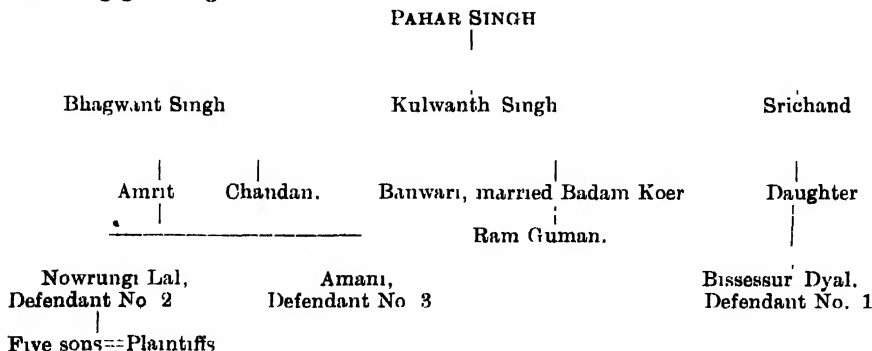
[689] Nowrungi Lal, the father of the plaintiffs, died before the suit came on for hearing in the Munsif's Court. The defendant Bissessur contended that his adoption was good, and that he had been in possession of mouzah Jalwandohi, which was self-acquired property ever since his adoption. The Munsif dismissed the case on the ground of limitation. He, moreover, held that the family was not joint, that Jalwandohi was self-acquired property, and intimated that there was nothing illegal in Chandan's adopting his sister's son. The plaintiffs appealed to the Subordinate Judge who reversed the Munsif's decision, and held the adoption void, on the ground that Chandan being a Kayastha belonged to one of the superior classes. The defendant Bissessur appealed to the High Court, and at the hearing, the Court (GARTH, C. J., and McDONELL, J.) directed a further inquiry as to whether the plaintiffs' family belonged to either of the three higher castes, and after a formal order of remand transferred the appeal to the file of the High Court. The points argued at the hearing after such transfer to the High Court were—(1) whether Jalwandohi was acquired out of joint funds, (2) whether the adoption was valid.

Babu *Guru Das Bannerjee*, Babu *Pran Nath Pundit*, and Babu *Taruck Nath Palit* for the Appellants

Babu *Golap Sarkar*, Mr *R. E Twidale* and Babu *Ram Sukha Ghose* for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ) was delivered by

Field, J—The position of the family in this case will appear from the following genealogical tree. —



Pahar Singh had three sons-- Bhagwant Singh, Kulwanth Singh **[690]** and Srichand. Of these three Srichand died without issue. Bhagwant Singh had

a son, Amrit. Amrit had two sons, Nowrungi Lal and Amani. Nowrungi is defendant No. 2, Amani is defendant No. 3, and is said to have been born blind and therefore incapable of inheriting. Nowrungi had five sons, who are the five plaintiffs in the present case. Kulwanth Singh had two sons, Chandan, who died in Bhadro 1276, and Banwari, who died leaving a widow, Badam Koer, since dead. Kulwanth Singh had also a daughter, and this daughter's son Bissessur Dyal is defendant No 1

The present suit arises out of certain proceedings under the Land Registration Act of 1876. The plaint, after setting out the members of the family, proceeds to allege that Chandan Lal, without the knowledge of the other members of the family, had concocted a deed of adoption, that under this deed Bissessur Dyal was adopted, and that this adoption, being that of a sister's son, was invalid. It then recites that a certain suit was brought by Nowrungi Lal and Amani as co-plaintiffs, and was terminated by a compromise on the 30th April 1866. The plaint then refers to another suit, the date of which is not given, as instituted by Nowrungi and Bissessur Dyal in collusion. It then refers to the registration proceedings and the cause of action is dated from the 26th November 1877 when the defendant No 1 intervened in those proceedings. The plaintiffs allege that they, being the five sons of Nowrungi, and members of a joint family governed by the Mitakshara law, cannot be affected by any of the alleged collusive proceedings of their father, Nowrungi, of Chandan Lal or Bissessur Dyal. They ask that possession may be given to them of 13 annas 4 pie out of the 16 annas of mehal Jalwandohi, pargana Chawsa, and some other property specified in the plaint, that the fraudulent compromise of the 30th April 1866 may be set aside, and that the deed of adoption, dated 18th June 1856, may be cancelled.

The Munsif, who first tried the case, dismissed it. He held that the suit was barred by limitation, that part of the property claimed, viz, Jalwandohi, was self-acquired, that the family was not joint, and without exactly deciding the question, he intimated his opinion that the deed of adoption was good, and that the plaintiffs were not in a position to contest the validity of this adoption.

[691] The case then went on appeal before the Subordinate Judge, who reversed the Munsif's decision, holding, amongst other things, that the adoption of Bissessur by Chandan, being that of a sister's son, was invalid, as the plaintiffs being Kayasthas must be deemed to rank amongst the three higher Hindu castes. A second appeal was preferred to the High Court, and on the 14th June 1881 it was heard by the learned Chief Justice and Mr. Justice McDONELL, who is now a member of this Bench. The portion of their judgment with which we are concerned is as follows: "We think, therefore, that it is necessary, in order to come to a proper decision of the case, to direct a further enquiry as to whether the plaintiffs' family, who are, as we understand, admitted to be Kayasthas, do belong to either of the three higher castes, and as we think that it may be a matter of some difficulty to bring before the Court in the Mofussil such evidence and information as will enable it to decide that question satisfactorily, we think that our best course will be to remand the case to the lower Court, as a matter of form, and then to bring it up to this Court and try it as a regular suit." The case is now, therefore, before us as an appeal from an original decree.

On the 18th June 1883 an application was made to this Court, the purport of which was threefold.—*first*, that as the value of the suit was very small, the case might be heard upon the evidence taken in the vernacular, or that it might be translated by the Court without the parties being charged the expenses of such translation; *secondly*, that the appellants might be allowed to

put in certain documents as exhibits, and *thirdly*, that the appellants might be examined as witnesses orally, or upon commission.

Upon this application it was directed, *first*, that the documents might be put in as exhibits subject to any objection which might be made at the hearing, *secondly*, that the appellants might be examined in Court; and *thirdly*, that the case might be heard on the evidence taken in the vernacular.

The hearing of the appeal has now occupied our attention for three days. No application was made to us to examine any of the parties in Court, and in reply to our question, it was intimated to us that the pleaders, who had charge of the case, did not propose to put any of the parties into the witness-box. A considerable amount of new evidence has been taken, copies of translations of ex-[692]tracts from certain learned works have been put in, and we have been referred to a large mass of authorities. Three questions were at first stated by the appellants' vakil for argument, but as Mr. *Twidale* intimated to us, on behalf of the defendants, that they had decided to abandon the objection of limitation, there remain two points only to be dealt with, namely *first*, whether Jalwandohi was acquired out of joint funds, and, *secondly*, whether the adoption is invalid. We think that the finding of the Munsif upon the first of these points ought to be confirmed.

There is evidence that Jalwandohi was not family property of Pahar Singh, but was acquired by Ram Guman Singh, an important portion of this evidence consists of an admission contained in a plaint in a former suit. In the second paragraph of that plaint, which was filed by Nowrungi and Amani, there is an admission that mouzah Jalwandohi was purchased by Ram Guman Singh, son of Banwari, with his exclusive funds in the name of Ban Pershad, one of the relatives. It is contended by the learned pleader for the appellants that this admission by Nowrungi cannot bind the plaintiffs, inasmuch as they, being members of a Mitakshara family, do not derive title from their father; are not privies in title with him; and therefore cannot be bound by any admission made by him. Without deciding whether this is a good objection or not (see, however, the remarks of the Privy Council in L R, 7 I A, 191) we think that there is another principle upon which this admission must be held to be relevant evidence, and that is the principle that it was an admission against the interest of the person making it. When Nowrungi and Amani admitted that mouzah Jalwandohi was purchased by Ram Guman Singh with his exclusive funds, they made an admission against their own interest, because the effect of that admission was that they could make no claim to a share of that property. If Amani were born blind and were therefore incapable of inheriting, the admission would not be against interest so far as he was concerned, but it was clearly against the interest of Nowrungi, the father of the plaintiffs, and as he is dead, the statement containing the admission is good evidence. An admission against interest is relevant not only against privies by title, but also against strangers, and we think that taking this admission along with the oral evidence, we must [693] decide that mouzah Jalwandohi was purchased with separate funds and is not part of the joint family property.

We then come to the question of adoption. The plaintiffs contend that the adoption was invalid on two grounds. *first*, because the adoptive father being a Kayastha and in their view entitled to rank amongst the three superior classes, could not adopt a sister's son; *secondly*, because Bissessur Dyal was adopted by two persons, viz., Chandan and Badam Koer, and this double adoption was wholly invalid. We shall consider these two grounds of objection separately: *first*, as to the allegation that Chandan being a Kayastha and entitled to rank

amongst the three superior classes, could not adopt a sister's son, we have to consider two points : *first*, whether, according to the Hindu law, it is competent to a member of the three superior classes to adopt a sister's son, and, *secondly*, whether a Kayastha is entitled to rank amongst the three superior classes. As to the first point, we think that there can be no doubt, and we take it to be settled law that a member of any of the three superior classes—*Brahmins*, *Kshetrias* and *Vaisyas*—cannot, according to Hindu law, adopt a sister's son. Abundant authority for this proposition will be found in the following works : Mayne's Hindu Law, paragraph 180 ; Strange's Hindu Law, edition of 1830, vol. I, p. 83, Norton's leading cases on Hindu Law, vol. I, pages 69 and 70 and the authorities there quoted, Baboo Shyama Churn Sirkar's *Vyavastha Darpana*, page 549, and the following pages of the third edition, and two cases to be found in I. L. R., 3 Bom., 73 and 298.

As to the second question, whether Kayasthas are entitled to rank amongst the three superior classes, a vast mass of authorities has been quoted to us during the hearing of this appeal. Considerable research and ingenuity of argument have been displayed in discovering these authorities and placing them before us. The following, amongst other authorities, were referred to. Padma, Purana, Yajnavalkya, Mr Mandlik's work on Hindu Law, Mitakshara, Viramirodaya, Wilson's Glossary, Ward on Hindu Law, Steele on Castes, Vivada Chintamani, Sherring on Caste, Mr. Sarradhicare's work on Hindu Law, being the Tagore Law Lectures of 1880, some census reports, and reports of local officers contained therein, Elliot's Races of British India, the Gazetteers of N.-W. Provinces and Oudh, Professor Jolly's Institutes of Narada, Max Muller's Sacred Books of the East, and the Dattaka Mimansa. Many of the arguments addressed to us rested upon the somewhat doubtful legends of Hindu mythology, and although no doubt very ingenious, were not, however, based upon modern facts, proved or undisputed, or characterized by that conclusive force, which are necessary in order to have weight with a Court of Justice in this practical age. We think that the whole question has been fairly summed up in the following passage of Babu Shyama Churn Sirkar's *Vyavastha Darpana*—"There is, therefore, a preponderance of authority to evince that the *Kayasthas*, whether of Bengal or of any other country, were *Kshetrias*. But since several centuries passed, the *Kayasthas* (at least those of Bengal) have been degenerated and degraded to *Sudradom*, not only by using after their proper names the surname '*Dasa*' peculiar to the Sudras, and giving up their own, which is '*Barma*,' but principally by omitting to perform the regenerating ceremony '*upanayana*' hallowed by the Gayatri."

It has been contended that however valuable Babu Shyama Churn's opinion may be as regards Bengal proper, there is a difference as regards Behar, and the Kayasthas of Behar. It had been established by evidence to our satisfaction that there was a difference in respect of the questions essential to this enquiry, and that the Kayasthas of Behar, as a class, had generally performed those ceremonies which might be supposed to have the effect of retaining them in the ranks of the three upper classes. We might accept this evidence and might come to a different conclusion from that to which we feel constrained upon the authorities and the evidence. I shall, therefore, consider the evidence which has been placed before us to show that the Kayasthas of Behar are an exception to the general principle contained in the opinion which I have just extracted from the work of Shyama Churn Sirkar. First, there is a *Vyavastha* by 96 pundits of Benares. Two of these pundits were examined as witnesses in the case and we are of opinion that the value which can be attached to the *Vyavastha* must be measured exactly by the value which can be given to the oral

testimony of these two witnesses. The Vyavastha is a recent one and there is no provision of law which allows a Court of Justice [693] to accept as evidence a written opinion delivered by persons still alive who have not been called to the witness-box. Then, as regards the testimony of the two pundits who were examined (and this is perhaps the most valuable part of the oral testimony), we have to observe that these gentlemen do not speak with direct reference to Behar, and however valuable their opinion may be, if precise upon the point, with reference to the Kayasthas of the Upper Provinces, or of Benares, we think they cannot be accepted as an authority upon the subject as regards the *Kaests* of Behar.

The next piece of evidence consists of the decisions of the local Courts. Two cases only have been quoted. We think that these judicial instances are too few in number to establish an usage or custom such as is contended for. Were it otherwise, we think that in a matter of this sort very little weight can be given to the decision of the Subordinate Civil Courts.

Then we have a considerable quantity of oral evidence. This evidence, with the exception of one or two witnesses, consists of the testimony of persons who are themselves *Kaests* and whose interest in the subject-matter of this proceeding is therefore considerable. Under the circumstances, we think that this evidence must be accepted with very considerable caution. But when we come to examine this evidence, we think that it does not, to any very material extent, advance the case of the plaintiffs. The examination of the witnesses was directed principally to show that, in four particulars, Kayasthas of Behar observed religious or other rules which would have the effect of giving them a title to rank amongst the three superior classes. These four particulars are—*first*, wearing the sacred thread, *secondly*, ability to perform the *homa*, *thirdly*, the rule as to the period of impurity and, *fourthly*, the rule as to the incompetence of illegitimate sons to succeed. The practice as regards adoption has also been made the subject of argument, but as this is the very point in dispute and as the instances supposed to have been established by evidence are exceedingly few, we set but little value upon this portion of the evidence. We have considered the evidence with respect to the four particulars just mentioned, and the impression which it creates on our minds is that no such uniformity has been established as amounts to legal proof of the custom or usage contended for. [696] Some of the witnesses state, as a fact, that the sacred thread was not usually worn. As regards the period of impurity observed, there is a remarkable diversity in the practice of different persons. Taking the whole evidence together, we think that it fails to establish that the Kayasthas of Behar, as a class, have observed the four rules relied upon so uniformly and so regularly that they are entitled to say that upon the basis of these observances they must rank among the three superior classes. It must be borne in mind that what has been sought to be proved in this case is not an usage in a particular family, but the custom of a class, that is, the whole class of Behar Kayasthas and regarding this custom as the point to be proved, we think that the evidence fails to establish it.

The conclusion then to which we are led upon the authorities and upon the evidence which has been submitted to us is this, that the plaintiffs have not shown that the Kayasthas of Behar rank amongst the three superior classes, and that, therefore, the adoption of a sister's son by Chandan was invalid.

But it is alleged that the adoption is invalid upon another ground, viz., that Bissessur Dyal was adopted by two persons—Chandan and Badam Koer. The original deed of adoption is not before us and no attempt has been made

to give us secondary evidence of its contents. It is said that there was a copy in another record which was referred to by the Court below, but no steps have been taken to bring that copy or that record up to this Court. Reliance has been placed upon an admission made by Bissessur Dyal in a petition filed in Court by him. We think, however, that the statement there contained cannot be interpreted as an admission that he was doubly adopted, that is, adopted by the two persons Chandan and Badam Koer. There is no pretext that Badam Koer, the widow of Banwari, had any authority from her husband to adopt a son, and we think that we cannot say that Badam Koer should (upon the statement in the petition just referred to) be taken to have adopted Bissessur not to her husband but to herself, as was pressed upon us by the appellant's vakil. If Bissessur Dyal had been adopted by Chandan and at the same time by Badam Koer on behalf of her husband Banwari, there can be no doubt that upon the authorities both adoptions [697] would be invalid. But if, on the other hand, Bissessur Dyal were adopted by Chandan, and Badam Koer, being a member of that branch of the family, that is, the branch descended from Kulwanth Singh, had merely assented to such adoption, we cannot say that the fact of Badam Koer's joining in the adoption with this object would in any respect invalidate it as an adoption by Chandan. The deed of adoption is not before us, no positive evidence has been given to show that Bissessur Dyal was adopted by two persons simultaneously. The statement in the petition cannot, in our opinion, be interpreted as an admission of such a double adoption. We cannot therefore say that Bissessur's adoption by Chandan is invalid upon this ground. The result is that the decree of the Munsif dismissing the plaintiffs' suit must be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

NOTES.

[As regards the inapplicability of the rule to Sudras see also 1 Mad, 62, 9 Mad, 44* at 53. As regards the question whether *Kayasthas* are to be deemed Sudras in Hindu law, see J. C. Ghose's Hindu Law (1906), II edn., p. 848, 12 All, 328 (334).]

[10 Cal 697]

APPELLATE CIVIL

The 7th May, 1884

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS

Gopi Nath Chobey..... One of the defendants

versus

Bhugwat Pershad and another... . Plaintiffs

Suit for Malikana—Benamidar—Res judicata—Adverse possession—Court of Jurisdiction competent to try such subsequent suit—Act XIV of 1882, s. 13—Act XV of 1877, sch II, arts. 120, 131, 144.

So long as the benami system is recognized in this country, it is to be presumed, in the absence of any evidence to the contrary, that a suit instituted by a benamidar has been

* Appeal from Appellate Decree No 805 of 1883, against the decree of H Beveridge, Esq., Judge of Patna, dated 30th of December 1882, reversing the decree of Moulvi Nurul Hosain, Khan Bahadur, First Subordinate Judge of that district, dated the 19th of December 1881.

instituted with the full authority of the beneficial owner, and any decision made in such suit will be as much binding upon the real owner as if the suit had been brought by the real owner himself. *Meheroomssa Bibee v. Hur Churn Bose* (10 W. R., 220), *Kallee Prosunno Bose v. Dmo Nath Bose Mullick* (19 W. R., 434), and *Sita Nath Shah v. Nobin Chunder Roy* (5 C. L. R., 102) discussed.

In a suit for malikana the issue between the parties substantially raises the question of the proprietary right to the estate in respect of which the malikana is claimed, and when the question of the proprietary right has been decided in a previous suit between the same parties, a subsequent suit for malikana will be barred as *res judicata*.

[698] In s. 13 of Act XIV of 1882 the words "in a Court of jurisdiction competent to try such subsequent suit" refer to the jurisdiction of the Court at the time the first suit is brought. Thus when the first suit is within the jurisdiction of a Munsif, and the subsequent suit, by reason of an increase in value of the property, is beyond his jurisdiction, such subsequent suit would nevertheless be barred, inasmuch as if the subsequent suit had been brought at the time when the first suit was brought, the Munsif would have been competent to try it.

Previous to 1825 dearah X accreted to mouzah Y, and some time before 1860 the malik of Y executed two conveyances in favour of A and B, respectively. In 1860 A sued B in the Munsif's Court for possession of a share in X which B claimed under his conveyance. In that suit A succeeded on the ground that B's conveyance did not cover the share claimed by him in X, but merely covered the share in the mouzah itself, whereas by his conveyance A had acquired the right to the share in X which he claimed. In 1866 the Collector refused to recognize B's right to malikana payable in respect of the share in X, which had been the subject of the suit in 1860, or to register his name in respect thereof, but acknowledged A's right thereto, relying on the decision of the Civil Court in the suit between A and B. Subsequently B's representatives, C and D, in 1876, sought to have their names registered in respect of the same malikana, but they were opposed by E, who alleged that A had been acting throughout as his benamidar. The Collector referred the case under s. 55 of Act VII of 1876 to the Civil Court, and the application of C and D was eventually disallowed. C and D thereupon, on the 5th November 1880, instituted the present suit against E, in the Court of the Subordinate Judge, for a declaration of their right to the malikana, and for a reversal of the order refusing to allow their names to be registered in respect thereof.

Held, that inasmuch as the allegation made by E, in the proceedings held in 1876 on the application by C and D before the Collector, and afterwards upon the reference before the Civil Court, that A had been acting in the matter merely as his benamidar, was uncontradicted by C and D in their plaint in the present suit, there was sufficient evidence upon which to hold that that fact was true.

Held, also, that the suit was barred as *res judicata* on the ground that the right to malikana was substantially the same question as the proprietary right to the share in the dearah, and that this issue had been tried and decided in the suit in 1860 in favour of A, who must be taken to be E, that the fact that the previous suit had been brought in a Munsif's Court, whereas the present suit was brought before a Subordinate Judge, did not affect the question, inasmuch as the property was the same, and it was not shown that the present suit, if brought in 1860, would not [699] have been within the jurisdiction of the Munsif, nor was it alleged that the suit in 1860 was beyond his jurisdiction.

Held, further, that the suit was barred by limitation, being governed either by Arts. 120, 131*, or 144 of the Limitation Act (Act XV of 1877), because—

* [Art 131 —

Description of suit.	Period of limitation	Time from which period begins to run.
To establish a periodically recurring right.	Twelve years ..	When the plaintiff is first refused the enjoyment of the right.]

(1) there being no allegation of dispossession, if it were contended that the suit was one for possession of an interest in immoveable property, art 144* would apply,

(2) if it were contended that the suit was for the purpose of establishing a periodically recurring right, pure and simple, art. 131 would apply, and the period must be reckoned from 1866, when the plaintiff was first refused the enjoyment of the right,

(3) if, however, it were said to be a suit to establish a periodically recurring right, and something in addition, inasmuch as the right carried with it a right to the property itself, if the parties consented to take a settlement when the time for concluding the next temporary or permanent settlement came, art 120 must be held to apply

But that, in any event, inasmuch as in the year 1866 the Collector refused to recognize B's right to the malikana and adverse possession, so far as possession could be taken of such an interest in immoveable property, was then taken by A, or in other words by E, because it must be taken that the Collector since that date had been holding for A, whose right he had then recognized, after refusing to recognize the right claimed by B, the present suit having been instituted in 1880 was equally barred whichever of the above articles was held to apply. *Rao Karan Singh v Raja Bakur Ali Khan* (L R, 9 I A., 99) referred to and distinguished

THE plaintiffs brought this suit to obtain a declaration of their right to 6 annas 17 d. 18 c of the malikana money of dearah Afzulpur which had formed in front of what they alleged to be their estate, and to have their names registered in the Collector's office in respect thereof in place of the defendants.

They alleged that mouzah Syedpur Mosleh consisted of several kulums or estates, and that there were 154 bighas 8 cottas of land belonging in common to the kulums of Syedpur Mosleh and dearah Afzulpur. They stated that they were the purchasers of that kulum of Syedpur Mosleh of which the touzi number was 319, and the sudder jama Rs 423-13-4, and that out of the joint land 65 bighas 10 cottas 12 dbans belonged to Syedpur Mosleh, that one Behari Mahton was the proprietor of Syedpur Mosleh, having purchased it from one Tafuzzul Hosain, and that they were the auction purchasers of the right, title and interest of Behari Mahton, [700] that as dearah Afzulpur had formed in front of Syedpur Mosleh contiguous to the joint land, they, as proprietors of the main land, had a right to the settlement thereof in proportion to their shares in the joint land; and that as the settlement of the shares had been concluded with a third party, they were entitled to get the amount sued for out of the malikana fixed.

That they had presented an application to the Collector to have their names registered, but on the defendant filing an objection to their right to the malikana money. the Collector referred the case under s 55 of Act VII of 1876 to the Judge, who in turn referred it to the Additional Subordinate Judge. The latter official on the 10th October 1879 disallowed the plaintiffs' application, and accordingly the Collector directed the registration of the names in accordance with the findings of the Additional Subordinate Judge.

* [Art. 144.—

Description of suit	Period of limitation	Time from which period begins to run
For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff

The plaintiffs therefore brought this suit with the object above stated.

In answer thereto the defendants contended that, inasmuch as the right to the share in the dearah in respect of which the malikana money now claimed was payable, was the subject of a suit between Behari Mahton and one Sheik Rowshun Ali who, the defendants alleged, was their benamidar, and as the decision of the Court in that suit was in favour of Rowshun Ali, the present suit was barred as *res judicata*. They also set up a title by twelve years' adverse possession, and contended that the suit was barred by limitation, and further alleged that the dearah formed a separate mehal, and did not appertain to mouzah Syedpur Mosleh at all.

It appeared from the evidence in the case that previous to 1860 in all settlements made by the Collector in respect of dearah Afzulpur, the proprietors of Syedpur Mosleh were treated as the maliks, that some time previous to that year the owner of the share now in dispute of both Syedpur Mosleh and the dearah executed two conveyances in favour of Behari Lal and Rowshun Ali, Behari Lal's being of the earlier date, that in 1860 Rowshun Ali sued Behari Lal (the suit referred to by the defendant) for possession of the share in the dearah, and for the reversal of an order of the revenue authorities settling it with Behari Lal, and in that suit he was successful, the Court holding that Behari Lal's [701] conveyance only included the share in mouzah Syed Mosleh, and did not affect the dearah, and that Rowshun Ali by his conveyance had acquired the title claimed by him to the dearah.

In the year 1866 the question of the right to receive malikana came before the revenue authorities, and the Collector, relying upon the decision in the suit between the parties, refused to recognize Behari Lal's claim, but allowed that of Rowshun Ali.

'In the present suit, upon the above facts, the first Court found that there was nothing on the record to show that Rowshun Ali was benamidar for the defendants, and that the suit was not barred as being *res judicata*, but inasmuch as it considered the plaintiffs had failed to establish their proprietary right in the dearah, it dismissed the suit. In that Court the plea of limitation was not considered as being necessary for the determination of the suit on the facts found.

The lower Appellate Court found that the dearah was an increment to Syedpur Mosleh, and that the proprietors of the latter had a right to the malikana money.

On the question of *res judicata*, that Court held that the suit was not barred, for it considered that, although Rowshun Ali must be taken to have been only benamidar for the defendant, still in the previous suit there was no question as to a right to malikana money, and there was no evidence as to what was the title set up by Rowshun Ali, and further, that the decree in that suit was by a Munsif, and the present suit being beyond a Munsif's jurisdiction, the plea of *res judicata* could not be supported under Act XIV of 1882.

Upon the question of limitation, the Court held that, inasmuch as the Government acknowledged that the malikana money was due, and was prepared to pay it to whoever should prove his right to it in the Civil Court, and as there was no evidence of anyone having drawn it adversely to the plaintiffs for twelve years, coupled with the facts that the right to it was not raised in the previous suit, and that it was an annually recurring charge and might be sued for within twelve years of its becoming due—*Hurmuzi Begum v. Hurdaynarain* (I. L. R. 5 Cal., 921)—the suit was not barred.

The Court accordingly reversed the decree of the Court of First Instance, and gave the plaintiffs a decree as prayed for with costs.

[702] The defendants accordingly now specially appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Digumbur Chatterjee* for the Appellant.

Mr. *C. Gregory*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Durga Dass Dutt* for the Respondents

The **Judgment** of the High Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—The plaintiffs (respondents before us) brought this suit for establishing their right to certain malikana money in respect of a 6 annas 17d. 18c. share of dearah Afzulpur bearing touzi No 71. The previous history of this litigation is as follows. There was a permanently-settled estate, which is recorded in the rent-roll of the Collectorate as No 319, consisting of a mouzah named Syedpur Mosleh. It is admitted in this case that dearah Afzulpur lies in front of Syedpur Mosleh. The dearah accreted some time before 1825. Before 1860 in all the settlements which the Collector concluded in respect of the dearah in question, the maliks or proprietors of the permanently-settled estate No 319 were treated as the maliks of dearah Afzulpur. Some time before 1860, the owner of the 6 annas 17d. 18c. share, viz., the share in dispute in this case, of both Syedpur Mosleh and dearah Afzulpur, executed two conveyances, one in favour of Rowshun Ali and the other in favour of one Behari Lal. Behari Lal's conveyance was of prior date. In 1860 Rowshun Ali sued Behari Lal for possession of 5 annas of the dearah in suit and for reversal of the order of the revenue authorities settling it with Behari Lal. The Court on that occasion came to the conclusion that Behari Lal had purchased only Syedpur Mosleh, and that under his conveyance he had acquired no right to dearah Afzulpur. On the other hand, the Court held that under the conveyance executed in favour of Rowshun Ali, he (Rowshun Ali) had acquired a title in the aforesaid dearah. That suit was accordingly decided in favour of Rowshun Ali. In the year 1866, on the occasion of another temporary settlement, the question as to the right to receive malikana again came before the [703] Collector, and the Collector, relying upon the Civil Court's decision in the suit of 1860, refused to recognize Behari Lal's right to malikana, allowing Rowshun Ali's right to the share of the malikana. It is not shown on this record that Behari Lal or Rowshun Ali has, since the date of the Collector's *rohokari* settling this malikana question, drawn the malikana in question. Behari Lal's right and interest in the property which he acquired under his conveyance were brought to sale in execution of a decree, and the plaintiffs (respondents) before us purchased them. After the new Registration Act came into operation, the plaintiffs, on the strength of their purchase, presented an application for the registration of their names in respect of a 6 annas 17d. 18c. share of the malikana money in question. They were opposed by the defendant Gopi Nath Chobey. The Collector referred the case, under s. 55, Act VII of 1876, to the Civil Court, and on the 18th October 1879 disallowed the plaintiffs' application. Thereupon the present suit was brought on the 5th November 1880.

It is alleged by the defendant Gopi Nath Chobey that Rowshun Ali was his *benamidar* only. The defendant Gopi Nath Chobey, who is the appellant before us, amongst other pleas, relied upon the decision in the suit of 1860 being *res judicata*, and also upon the plea of limitation. He contended that, under the circumstances of this case, the plaintiffs' claim was barred by limita-

tion. On the merits his case was that the conveyance to Behari Lal did not transfer any right to dearah Afzulpur.

The Subordinate Judge dismissed the plaintiff's suit. The District Judge, on appeal by the plaintiff, has reversed that decision.

The District Judge has decided all three questions in favour of the plaintiff. He holds that under his purchase, Behari Lal acquired a right to dearah Afzulpur, which was only an accretion to mouzah Syedpur Mosleh. He has overruled the pleas of *res judicata* and limitation. Upon all these three points this second appeal has been argued, but it is sufficient for us to notice only the pleas of *res judicata* and limitation, and we are of opinion that upon both these pleas this appeal should succeed, first, as regards *res judicata*. The District Judge has found as a fact, with reference to which finding there is an objection on the other side, that Rowshun Ali was the benamidar of the appellant Gopi Nath Chobey. Notwithstanding that finding he is of opinion that the present claim is not barred by *res judicata* first, because there was no question about malikana in the suit of 1860, secondly, because it is not shown that the suit of 1860 was litigated by the parties upon the same title, and, thirdly, because the Munsif who tried that suit was not competent to try the present suit. The learned vakil for the respondents has urged that the District Judge is in error in assuming without evidence that Rowshun Ali is the benamidar of Gopi Nath Chobey. He has further contended that even supposing that Rowshun Ali was the benamidar of Gopi Nath, the suit of 1860 would not preclude the plaintiffs from contesting the same matter in a subsequent suit with the real owner—Gopi Nath Chobey. We shall notice these two objections, taken before us by the learned vakil for the respondents, first. As regards the first objection, it appears to us that the cases cited in support of it do not at all bear him out. With the exception of the decision in *Meheroonissa Bibee v. Hur Churn Bose* (10 W. R., 220) none of the other cases really touch this point. As regards the decision in that case, the observation relied upon appears to us to be a mere *obiter dictum*. There the question was whether the benamidar alone was entitled to maintain the suit without bringing upon the record the beneficial owner. In the course of the decision upon this point one of the learned Judges who decided that case made some observations which no doubt support the contention of the learned vakil for the respondents. The other two cases are not in point. The decision in *Kallee Prosunno Bose v. Dinonath Bose Mullick* (19 W. R., 434) really turns upon the ground that all the parties interested in the suit were not plaintiffs or parties to it. There a party, not on the record, viz., one Kedar Nath Bose, stated in his deposition that the property in dispute in that case had been purchased in the benami name of his cousin, the plaintiff on the record, and he further stated that under that purchase he and his cousin, the plaintiff on the record, were jointly entitled to the property. Upon that state of things the learned Judges decided the case [705] upon the ground that all the persons entitled to the property were not joined as plaintiffs.

The other decision, viz., in the case of *Sita Nath Shah v. Nobin Chunder Roy* (5 C. L. R., 102) was on the question whether a benamidar alone, without joining the beneficial owner, is entitled to maintain a suit. Therefore none of the cases cited by the learned vakil for the respondents really can be relied upon as authorities upon the point now before us. But apart from authorities, it appears to us that so long as the benami system is to be recognized in this country, the proper rule, in our opinion, is that, in the absence of any evidence to the contrary, it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if

the suit had been brought by the real owner himself. That being so, we do not think that this objection is valid. The next objection that was taken was that there was no evidence upon which the learned Judge could find that Rowshun Ali was really the benamidar for Gopi Nath Chobey. It appears to us that in the proceedings before the Civil Court under s. 55, Act VII of 1876, it was taken for granted by the Judge who decided that case that Rowshun Ali was the benamidar for Gopi Nath. The Subordinate Judge who tried that case, as found by the District Judge in this case, treated the defendant (appellant) Gopi Nath Chobey as the real owner of the share which had been purchased in the name of Rowshun Ali. In the plaint it is not stated by the plaintiffs that the Subordinate Judge was not right in treating Gopi Nath, the defendant, as the benamidar of Rowshun Ali, and whether the recital in the decision of the Subordinate Judge in the proceeding under s. 55, Act VII of 1876, is any evidence upon this point or not, it is clear to us that the said recital, coupled with the fact that it is not contradicted by the plaintiffs in the plaint, is some evidence of the fact that Rowshun Ali is the benamidar for Gopi Nath. Therefore we think that this objection also must fail.

We now come to the grounds upon which the District Judge has overruled the plea of *res judicata*. The first ground taken [706] by the District Judge is that the former suit was for possession of the dearah itself, and that no question of malikana was in issue. It seems to us that this ground is untenable. Substantially the same question is at issue in both these suits, *viz.*, the proprietary right to the dearah in dispute. In the suit of 1860, if Behari Lal had succeeded in establishing his proprietary right to the dearah, the suit of Rowshun Ali would have been dismissed, so also in this case, if the plaintiffs can establish as against Gopi Nath Chobey, the appellant, their proprietary right to the dearah, the plaintiffs would be entitled to a decree. The substantial question is therefore identical, *viz.*, who is the proprietor of mouzah Afzulpur. The second ground upon which the District Judge has overruled the plea of *res judicata* is equally untenable. We have the decree passed in 1860 in which it was decided in favour of Rowshun Ali (and it may be taken, now that Rowshun Ali is only another name for Gopi Nath, the appellant before us), that Gopi Nath under his purchase from the common vendor of both himself and Behari Lal, had acquired a title to the dearah in dispute and that Behari Lal had no title to it. It is not shown that that title, which was established in the suit of 1860 in favour of Rowshun Ali or Gopi Nath, the appellant before us, has been extinguished. Under these circumstances, it is reasonable to presume that Gopi Nath is in this suit relying upon the same title upon which Rowshun Ali on his behalf obtained a decree in the suit of 1860. Unless the plaintiffs can show that that title has been extinguished and that Gopi Nath is really relying upon a different title, it is reasonable to presume that Gopi Nath is litigating the same question in this suit under the same title. As regards the third ground, no doubt the District Judge's view is to a great extent supported by the language of s. 13 of Act XIV of 1882. The first paragraph of the section, which alone is material, is as follows — "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised." Now the District Judge says that, as the Munsif who tried the former suit would [707] not be competent to try the present suit which is "*the subsequent suit*," therefore the provisions of s. 13 do not apply. We are of opinion that this construction of s. 13 is not correct. It is well known that in this country the value of landed

property is increasing every day. A suit regarding a particular property may be, so far as regards the pecuniary value of it, properly cognizable by a Munsif to-day, and ten years hence a suit for that property, having regard to its pecuniary value then, might not be cognizable by the Munsif. But it would be unreasonable to hold, in a suit which might be brought ten years hence, that a decision between the same parties to-day passed by a Munsif having full jurisdiction would not be *res judicata* ten years hence. The reasonable construction of the words "in a Court of jurisdiction competent to try such subsequent suit" seems to us to be that it must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive under s. 13, although on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property. In this case, in the suit of 1860, there was no objection taken that the Munsif had no jurisdiction to entertain it, and therefore the parties being the same, it may be taken as conclusively decided by that suit as between them that the Munsif in that suit had jurisdiction to entertain it. The present suit relates to the same property, it is true that it has been brought in the Subordinate Judge's Court, and no objection has been taken to the value put upon the claim, still if the first suit was cognizable by the Munsif, the second suit, which embraces the same property, must be held to have been cognizable by the Munsif also if brought in 1860. Putting this construction upon s. 13 it seems to us that the decision in the suit of 1860 comes within the purview of it. Upon all these grounds, we are therefore of opinion that the plea of *res judicata* taken by the defendant (appellant) should prevail.

* As regards the other plea, *viz*, that of limitation, it appears to us that one of the following articles, *viz*, 131, 144, or 120 must [708] apply to the present suit. If it can be held that this is a suit for possession of immoveable property or any interest therein, then in that case it is quite clear that article 144 must apply. Article 142 is not applicable, because that article contemplates a suit for possession of immoveable property when the plaintiff, while in possession, has been dispossessed. There is no allegation of dispossession in this suit, therefore if it is a suit for possession of an interest in immoveable property, article 144 applies. Again, if it be said that it is not a suit for possession of an interest in land, then either article 131 or 120 is applicable. Article No 131 is to this effect "For a suit to establish a periodically recurring right twelve years from the time when the plaintiff is first refused the enjoyment of the right." In this case the plaintiffs are seeking to establish, no doubt, a periodically recurring right, *viz*, a right to receive *malikana* annually, but there is also a further claim involved in the suit, because that right carries with it a right to the property itself, if the

* [Art. 142 —

Description of suit	Period of limitation	Time from which period begins to run.
For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years.	The date of the dispossession or discontinuance.]

parties consent to take a settlement when the time for concluding the next temporary or permanent settlement comes. Therefore it cannot be said that it is purely a suit to establish a periodically recurring right. But if the present suit do not fall within article 144 or article 131 it must then fall under article 120. If article 144 applies, we have to determine whether in this case the possession of the defendant did not become adverse to the plaintiff for more than twelve years. In the year 1866, when the Collector refused to recognize the right of Behari Lal and recognized the right of Rowshun Ali, adverse possession, so far as possession could be taken of an interest in immoveable property like the one in dispute in this case, was taken by Rowshun Ali. Upon this point the learned vakil for the respondents strongly relied upon a decision in the case of *Rao Karran Singh v. Raja Bakar Ali Khan* (L R., 9 I A, 99). It was held in that suit that upon the facts found in the lower Court, article 145 of the second schedule of Act IX of 1871, which corresponds with article 144 of the present Limitation Act, was applicable, and their Lordships of the Judicial Committee further held that, with reference to the facts found in the case, adverse possession against the plaintiff had not been taken for more than twelve years. These [709] facts were as follows —One Badam Singh was entitled to the property in dispute in that case and upon his death his widow took possession. Karan Singh, who was the appellant before their Lordships, brought a suit to turn the widow out of possession, upon the ground that Badam Singh had made him his heir-at-law. That suit was defended by the widow, and after her death the grandchildren of Badam Singh, Kharag and Rudar Singh, were made parties to the suit. The claim of Karan Singh, the appellant before the Privy Council, was dismissed. Then Karan Singh brought another suit against Kharag and Rudar Singh for possession of the same property, on the ground that they, Kharag and Rudar Singh, who were the sons of a daughter, were not, according to the custom of the family, entitled to inherit the estate. While that suit was pending, the Collector, in order to secure the Government revenue, attached the property and retained possession from 1861 till October 1863, when, in accordance with the decision of the Civil Court, the possession of the property in dispute, together with the surplus profits of the estate lying in deposit in the Collectorate, were made over to Karan Singh.

Then the suit out of which arose the appeal under consideration, was brought within twelve years from October 1863, but not within twelve years from 1861 when the Collector took possession. Under these circumstances, their Lordships of the Judicial Committee held that the Collector's possession from 1861 to October 1863 was not adverse to the plaintiff in that suit. Their Lordships observed

"It was the duty of the Collector, whilst in possession under the attachment, to collect the rents from the ryots, and having paid the Government revenue and the expenses of collection, to pay over the surplus to the real owner. If the defendant was the real owner, the surplus belonged to him, but if, on the other hand, the infants were the right owners, then the surplus belonged to them." In this case it cannot be said that the Collector, supposing that the malikana money from the year 1866 is lying in deposit in his office, was holding it for the real owner, whoever he may be. In this case the Collector, under the power vested in him by the Settlement Regulations, had to decide at the time of the settlement as to the person who was entitled to the [710] malikana, and under this power vested in him by the Regulations, he decided that question in favour of Rowshun Ali and against Behari Lal. Therefore, it is clear that after that decision he was holding for the person whose right he had recognized, he having the right to decide that question under the Settlement Regulations.

Therefore, in this case, it must be held that from the year 1866 adverse possession, so far as adverse possession can be held of a right of this description, has been held by Gopi Nath Chobey, the appellant before us. If art. 131 is applicable, the claim would be equally barred, because the plaintiffs are bound to bring their suit within twelve years from the time when they were first refused the enjoyment of the right. It is quite clear that at least in the year 1866 they were first refused the enjoyment of that right, and therefore the plaintiffs were bound to bring their suit within twelve years from that date. For similar reasons, if art. 120 be applicable, the suit should have been brought within six years from the date of refusal. We are, therefore, of opinion that the suit must be dismissed, both upon the grounds of limitation and *res judicata*, under s 13 of the Civil Procedure Code.

We reverse the decision of the lower Appellate Court and dismiss the plaintiffs' suit with costs in all the Courts.

Appeal allowed.

NOTES.

[I BENAMIDAR IS REPRESENTATIVE OF THE REAL OWNER IN SUITS -

The presumption being that the benamidar acts with the consent and authority of the real owner, he has been held to represent and act for the real owner, so as to make the decision binding on the real owner — 10 Cal , 697 ; 30 All , 30 (1907) A W N 272 4 A L J , 689 , 2 I C 990 , 4 C W N 283 15 Mad , 267 ; 18 All 69 , 30 Mad , 245 , 22 Bom , 672 ; 12 C L J , 357 , 19 C L J , 193 ; 20 Cal , 418 , 13 C P L R , 31 , 21 All , 380 See also 11 C W N , 215 as regards set off

As regards the maintainability of a suit for land by the benamidar, see 25 Cal 874 , 12 C. L. J , 357 , 8 M L T , 154

II. RES JUDICATA—COMPETENCY OF THE TWO COURTS DETERMINED WITH REFERENCE TO THE TIME OF SUIT—

See 10 Cal 697 , 11 Cal , 153 , 15 Mad , 494 , 2 C W N , 297 , 10 C P L R , 89 (90) , 2 O. C. , 261 (267) , 36 P R . 1902 22 P L R , 1902 , 9 C W N , 656 (661) , the subsequent alteration in the value of the subject matter by, say, such causes as accrual of interest may affect the question of competency — 29 Mad , 65 (67)

III. ESTOPPEL BY SUBMISSION TO JURISDICTION -

See *Hukm Chand on Res judicata* (1894) pp 416—420 or see. 175]

[10 Cal 710]

APPELLATE CIVIL

The 1st May, 1884

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR JUSTICE BEVERLEY

Chunder Kant Roy . . . (Defendant) Appellant

versus

Krishna Sunder Roy . . . (Plaintiff) Respondent

*Specific Performance—Oral Agreement—Sale to third person in
contravention of Agreement—Notice—Act XIV of 1882, ss. 261-262*

Where a *bona fide* contract, whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under his purchase.

*Appeal from Appellate Decree No. 2733 of 1882, against the decree of G. G. Dey, Esq., Officiating District Judge of Mymensingh, dated the 23rd of September 1882, affirming the decree of Baboo Debendra Nath Roy, Officiating Second Munsif of Netrokona, dated 11th of August 1881

[711] THIS was a suit for specific performance of an oral agreement to sell certain property.

The plaintiff alleged that one Brojo Sundari Dasi, defendant No. 1, orally agreed to sell to him certain property for Rs. 112, and that he had paid her Rs. 28 as earnest money in connection with this contract. That he had tendered to defendant No. 1 the whole of the purchase money, and had asked for a conveyance of the property, but she had refused to sell to him, and had since sold this very property to defendant No. 3 (who was aware of the agreement entered into between plaintiff and defendant No. 1) under a registered deed of sale. Brojo Sundari Dasi, her husband, and the vendee of the property, were all made defendants. The defendant No. 1 denied having entered into any agreement with the plaintiff for the sale of the property. Defendant No. 3 contended that he was a *bona fide* purchaser for value, and also denied the agreement between the plaintiff and defendant No. 1. The Munsif found that the agreement had been entered into and the earnest money paid, and that defendant No. 3 had notice of the agreement between defendant No. 1 and the plaintiff, he, therefore, set aside the sale to defendant No. 3, and ordered the defendant No. 1 to execute a *kobala* in favour of the plaintiff, and in default that the decree should be taken to be the *kobala*. Defendant No. 3 appealed to the District Judge, who upheld the decision of the Munsif, dismissing the appeal with costs.

Defendant No. 3 appealed to the High Court.

Baboo *Hari Mohun Chakravarti* for the Appellant.

Baboo *Girish Chunder Chowdhry* for the Respondent.

Judgment of the High Court was delivered by

Garth, C. J. (BEVERLEY, J., *concurring*) —We think there is no ground for this appeal.

It is contended, that as this case does not come within s. 48 of the Registration Act (III of 1877), the Court has no right to enforce the agreement of the 20th of February 1881 as against the defendant. It is said that, although the agreement was prior to the purchase by the defendant, still as the agreement was not accompanied by possession, the title under the defendant's registered deed ought to prevail.

[712] But this argument entirely ignores the doctrine of notice. It is clear law, both in England and in this country, that where a *bona fide* contract, whether oral or written, is made for the sale of property, and another party afterwards buys the property with notice of the contract, the title of the party claiming under the contract prevails against the subsequent purchaser, although his purchase may have been registered, and although he has obtained possession under his purchase.

This has been decided by MITTER and MACLEAN, JJ., in the case of *Nema Churn Dhalal v. Kukul Bag* (I L. R., 6 Cal., 535. 7 C. L. R., 487) to which the provisions of s. 27 of the Specific Relief Act I of 1877 did not apply.

But the present case comes clearly within the purview of sub-section (b) of s. 27 of that Act.

That section enacts—"Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

(a) either party to the contract, or

(b) any other persons claiming under either party to a contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith, and without notice of the original contract

This shows, that where a party *has notice of a prior contract for sale*, he cannot, by any purchase that he may subsequently make, override it.

We think, therefore, that the decision of the Court below is right, with the exception of the latter portion of the decretal order, which directs, that "if on the receipt of the above sum of Rs 84 from the plaintiff, the defendant No. 1 do not execute the said kobala, this decree shall, to all intents and purposes, be deemed a kobala to the plaintiff for the property in dispute."

The lower Courts had no right to make an order of this kind.

We, therefore, set aside that portion of the decree, and direct that in the event of the defendant No. 1 failing or refusing to comply with the decree, the Court shall proceed to exercise the powers which are given by ss. 261 and 262 of the Code of Civil Procedure for the purpose of carrying out the conveyance.

The appeal is dismissed with costs

Appeal dismissed

NOTES

[See also 10 Cal , 250 , 17 M I J., 319 , (1889) P R . 143 , 22 Bom . 46 (49) , 4 L B R., 26 (27)]

[713] APPEAL FROM ORIGINAL CIVIL.

The 23rd May, 1884

PRESENT

SIR RICHARD GARTH, KT , CHIEF JUSTICE, AND MR. JUSTICE WILSON.

The Oriental Bank Corporation and another.....Plaintiffs

versus

Gobinloll Seal and others. . Defendants

Suit by creditor on behalf of all other creditors—Administration suit—Legal personal representative—Refusal to sue—Receiver, Suit by

Persons interested in the estate of a testator, not being the legal personal representatives of the testator, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate.

Such a suit may be supported where the relations between the legal personal representative and the debtor to the estate present a substantial impediment to the prosecution by the legal personal representative of a suit against the debtor to recover the assets of the testator, and where there is a strong probability of the loss of such assets unless such a suit be allowed.

But where there is an administration suit already pending the proper course to pursue is to obtain an order in the administration suit, directing either a suit to be brought in the name of the legal personal representative, or appointing a Receiver to sue ; and in this country the Courts might have the power to direct such Receiver to sue in his own name.

THIS was an appeal from a judgment of Mr Justice PIGOT, dated the 14th September 1883.

The suit was instituted by the Oriental Bank Corporation and the Delhi and London Bank on behalf of themselves and all other unsatisfied creditors of the late Heraloll Seal, against Gobinloll and Kannyloll Seal (as trustees of a certain indenture of settlement dated 21st February 1848, and as beneficiaries under the deed), Koosummoney Dossee, as widow, heiress and administratrix of the said Heraloll Seal, Biddomoney Dossee, the widow, heiress and administratrix of Russickloll Seal, the only son of Heraloll Seal, certain other persons as representatives of the beneficiaries under the deed of settlement, and J. C Macgregor as Receiver of the property comprised in the said deed of settlement, for the construction of the settlement of 21st February 1848, and for ascertainment of the rights of the parties thereunder, for a declaration that Heraloll Seal, deceased, was entitled [714] to an equal fifth part of the said property comprised in the said settlement, and for an account of what was due to the plaintiffs and the other unsatisfied creditors of the deceased, and for partition, etc.

The plaintiffs were the largest creditors of one Heraloll Seal, who died intestate in March 1876. administration to the estate of Heraloll was in May 1876 granted to his son Russickloll, and in the same month a creditor's suit, numbered 295 of 1876, was brought in the High Court by one Rose against Russickloll for the administration of Heraloll's estate. In June 1876 a decree for administration was made in such suit, and the usual accounts and enquiries directed. On the 25th February 1878 Russickloll died, and letters of administration *de bonis non* of the estate of the said Heraloll were granted to his widow Koosummoney, and the suit was revived against her and the widow of Russickloll—Biddomoney. And on the 12th August 1878 by a decree on further directions, a report, which had been previously made, finding, amongst other things, that the present plaintiffs were creditors of the estate of Heraloll, was confirmed. The properties comprised in this decree were, however, wholly insufficient to cover the plaintiffs' debt, a considerable portion of which remained unsatisfied.

It appeared that in 1848 Muttyloll Seal, the father of Heraloll, had executed a deed of settlement, by which he conveyed certain properties to trustees upon trust for the benefit of his family and that Muttyloll died in 1854.

The plaintiffs then brought this present suit (the administration suit No. 295 of 1876 being at that time, and at the hearing of the present appeal, still pending) to have it declared that the trusts of the deed of 1848 were void in law, that one-fifth part of the property affected by those trusts passed to Heraloll as one of the heirs of Muttyloll, and that such share formed a part of Heraloll's assets applicable to the payment of his debts, and after asking for partition, and certain other relief unnecessary for the purpose of this report, prayed that their suit might be taken as supplemental to suit No. 295 of 1876, without asking to reopen the decree in that suit.

They further stated that Behayloll Seal, who was interested in [715] contending that the trusts of the deed were valid, was a fit and proper person to be sued in and defend the suit on behalf of the other *cestui que trust*. Also that being the largest creditors (the debts due to them amounting to more than the debts of all the other creditors to the estate put together), it was fit and proper that they should sue in their own names on behalf of the other creditors, and as additional reasons stated that the defendant Koosummoney refused to take any proceedings, or to take part in any proceedings, with a view to impeach any of the provisions of the deed of settlement, alleging as her reason that under the terms of the deed of settlement any member of the family taking proceedings in a Court of Justice in any matter affecting the trusts thereof, would

forfeit all right, benefit, and interest thereunder, that Koosummoney was also interested as a beneficiary under the settlement, and that the relation between her and the defendants Gobinloll and Kannyeloll Seal (who were both trustees and beneficiaries under the deed) were such as to create a substantial impediment to the prosecution by Koosummoney of the rights of the creditors of Heraloll's estate against the trustees of the settlement. Also that it was impossible that they could obtain the relief they now prayed for in suit No. 259 of 1876, and that, unless proceedings were allowed to be taken by creditors, the share of the said Heraloll comprised in the indenture (which formed the only available assets belonging to his estate, save the small and totally insufficient amount brought in under the suit 295 of 1876) could not be made available for payment of the unsatisfied claims of the plaintiffs and the other creditors.

It appeared from the pleadings, and from an order of NORRIS, J., in the administration suit, that the conduct of the administration suit of 1876, before mentioned, was in the hands of one Ram Das Coondoo (a tradesman who had dealings with the Seal family), and whose debt amounted in all to about Rs. 2,000, and that Ram Das Coondoo had in March 1883 applied in the administration suit and obtained a rule *nisi* for the appointment of a Receiver, with a view to bringing a suit for the same objects as the present suit. The plaintiffs in the present case opposed, contending that they were the largest creditors, that rule, however, stood over until the 23rd [716] April 1883, and in the meantime the plaintiffs obtained a rule calling upon Ram Das Coondoo and the present defendants to show cause why the plaintiffs should not bring this present suit in its present form. This rule was made absolute as against Ram Das Coondoo, but not as against the present defendants, the order expressly declaring that the present defendants were not bound by its tenor. This order was made on a petition entitled in the administration suit, and "*in the matter of a suit intended to be brought,*" etc, the order itself, so far as is material, being as follows:—"It is ordered under the provisions of s 12 of the Charter that the said Oriental Bank Corporation, and the Delhi and London Bank, Ltd, be at liberty to institute a suit in this Court," etc., etc

The defendant Gobinloll in his written statement contended that the plaintiffs had no right or title to bring the suit in its present form; that the deed was valid, that no special circumstances had been shown entitling the plaintiffs as creditors to bring the suit.

The female defendants stated that, having regard to the provisions of the deed, that "any member of the family taking proceedings in Court in any matter affecting the trusts of the deed should forfeit all interest thereunder," they were unable to impeach the deed, and they submitted that the trusts thereof were valid.

Beharyloll contended that the trusts of the deed were valid, but denied that he was a fit person to represent the *cestui que trust*, many of whom were adverse to him in interest, and who contended that the said trust was not valid.

Mr. Phillips, Mr. Allen, and Mr. Stokoe for the Plaintiffs.

Mr. Hill, Mr. Trevelyan, and Mr. O'Kinealy for Gobinloll Seal.

The Advocate-General (Mr. Paul), Mr. Evans, Mr. Bonnerjee, for Kannyeloll Seal.

Mr. Paulst, Mr. Gasper, and Mr. Sale, for Beharyloll Seal.

Mr. T. A. Apear for Surrut Coomaree Dassee.

PIGOT, J. [after stating the facts of the case, continued].—I must first determine the question of the frame of the suit, and I regret to say that I shall

be obliged to confine what I have to say [717] to that subject. The first objection raised by the defendants to the suit is, that this being a suit brought by creditors against persons, debtors to, or alleged to have in their possession property belonging to, the estate, it was not competent to the plaintiffs to maintain the suit, on the ground that the principle of the cases referred to at pages 2026, 2027 of Williams on Executors, where all the cases are mentioned, does not apply, and the plaintiffs are consequently not entitled to maintain the suit.

The general rule and the exception to it within which the plaintiffs contend that the present case comes are thus stated in Williams "Again the established rule has been that in ordinary cases persons who have possessed themselves of the property of the deceased or debtors to the estate generally, cannot be made parties to a bill against the executor. For regularly there can be no suit against the debtor but by the executor who has the right both in law and in equity. If he even releases, and is solvent, neither a creditor nor a residuary legatee can bring any bill against that debtor. There must be collusion or insolvency or some special case. The Court will interfere if there is such special case as collusion or insolvency, and thus the bill may be brought against both the debtor and the executors. And the general principle on which a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor unless collusion, insolvency or some special case be shown, has been held to apply equally to the case of a creditor overpaid by the executor. That is, if there is no collusion or special case, if the executor is not insolvent, he stands the middleman, responsible for the property misapplied by paying a man as a creditor who was not a creditor, as in the other case for the property outstanding in a debtor."

It is contended by the defendants that the circumstances of the case do not bring it within the scope of that exception from the general rule which is set forth in the passage I have just read. The plaintiffs relied on the case read in his opening by Mr. Phillips of *Yeatman v Yeatman* (1 R., 7 Ch D., 210).

Vice-Chancellor HALL in his judgment examines and summarises the previous decisions on this subject. It appears to me that the passage from *Travis and Mithe* cited by him at page 214, his [718] own summary at page 216, and the passage from the judgment of Vice-Chancellor CHATTERTON in *Hilliard v. Eiffe* (L R., 7 H L., 39), and the observations of BLACKBURN, M.R., in 6 Irish Equity Cases, *Phillips v Phillips*, sufficiently mark the boundaries of the doctrine in question for my guidance in this case. Vice-Chancellor TURNER in *Travis v Mithe* (9 Hare, 141) says upon an examination of the authorities "I believe it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases I think may be considered to go to this extent, that such a bill may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners." Now Vice-Chancellor CHATTERTON, in the case of *Hilliard v. Eiffe*, to which I have referred, and which is referred to in the passage I have read, says: "The rule originally was as laid down by Lord REDESDALE in his treatise and in the earlier cases, that there must be either collusion with, or insolvency of, the personal representative pleaded and proved to entitle a creditor or legatee to sue for recovery of assets. This rule was first relaxed in cases where the personal representative of a deceased partner was sued with a surviving partner, as in *Bowsher v Watkins* (1 R. & M., 277), for reasons unnecessary now to be considered. It was further relaxed when there was

proved to have been an express refusal of the personal representative to sue, and the more readily when the assets in question were only recoverable in equity. It was said in some of the cases where this was done that such refusal might be deemed evidence of collusion within the original rule. But I think that this is too narrow a ground on which to rest the decision, as there are many cases where such a refusal could not have been ascribed to collusion. In *Lancaster v. Evors* (4 Beav., 158) Lord LANGDALE held that a refusal by the executors to recover certain assets was in itself sufficient to take the case out of the rule, and he also seemed to be of opinion that the rule only applied to a proceeding against a debtor to the estate, and did not extend to a proceeding to realize a specific fund in Court for the augmentation of the assets."

Then he refers to *Consett v. Bell* (1 Y. & C. C. C., 569), to which I need not refer, and says "The rule now appears to be subject to the exceptions of cases of collusion, of insolvency of the personal representatives, of refusal by them to sue whether collusively or *bona fide* or of the existence of what has been rather vaguely termed 'special' circumstances. The last exception seems to comprehend and to be confined to cases in which, from the nature of the assets or the position of the personal representatives, it would be either impossible, or at least seriously inconvenient, for the representatives to take proceedings," and Vice-Chancellor HALL in *Yeatman v. Yeatman* (L. R., 7 Ch. D., 210) thus closes his judgment "Notwithstanding the view that I have taken of this case with reference to the right to sue, my impression rather is that it would be a correct holding to say, that if the circumstances of any given case are such that upon an enquiry directed as to whether any and what proceedings should be taken, the Court, upon the materials before it, would come to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, there it would be a proper case to allow a party to sue in his own name."

In the case of *Phillips v. Phillips* [6 Ir. Eq. R., 509, (512)] the Master of the Rolls says "It is, however, contended that, although there be neither collusion or insolvency, the present is a special case, such as Lord ELDON may be supposed to have had in view in using those words in *Alsager v. Rowley* (6 Ves., 748), that the defence is evidence of unfair and fraudulent dealing on the part of the administrator. I confess I should have great difficulty in holding that this Court could assume a jurisdiction that does not belong to it, that is, to oblige a debtor by a suit here to pay a debt which he does not owe to the plaintiff, and for which he may not be liable in equity, unless facts were both alleged and proved by the plaintiff to warrant such an assumption. I find no case in which this jurisdiction has been exercised without making a special case for it by the bill and proving that case if the defendants controvert it." The defendants say that no case is made of such special circumstances of conduct on the part of the representatives, or of such relation between the representatives and the property sought to be recovered, as to warrant the application of the exceptional rule.

The first question is whether on the cases this contention is well founded, and at the hearing I confess it did not appear to me that the defendants made out such a case upon that point, or that it was as well sustained as upon consideration it appears to me now.

The circumstances stated by the plaintiffs are these --

That there is a clause in the deed, the precise words of which I need not recapitulate, providing that no person taking any benefit under that deed shall

attempt to impeach its provisions on pain of forfeiture of his interest which clause is referred to in the defendants' written statement in the following manner.—

"These defendants are advised and believe that, having regard to the provision in the said deed that any member of the family taking any proceedings in any Court of Justice, in any matter affecting the said trust, should forfeit all the rights, benefits and interests bestowed on them by the said indenture, they cannot take part in impeaching any of the provisions of the said deed without endangering their said rights and interests, and that they ought not to be made parties to this suit, but ought to be dismissed therefrom."

It was contended by the learned Counsel for the defendant, Kanneloll Seal, that the clause referred to was an illegal provision, and contrary to the policy of the law, and that the law would not give effect to it in any way, and that I am not entitled for that reason to accept the existence of it as explaining or justifying such a reluctance on the part of the administratrix of Heraloll Seal, who takes a beneficial interest under the deed, as would be a serious obstacle to the prosecution of a suit by her, on behalf of his estate, to set aside the provisions of the trust deed so far as they affect it.

But I do not agree with this argument. I should not be prepared, perhaps, to hold the provision in question to be contrary to law. The matter has not been gone into, and I am not called on to decide the question. But supposing it to be held that such [721] a provision is void, I should not be disposed for that reason to refuse to notice the existence of such a provision as operating to create a substantial impediment to the discharge of her duty by the representative, if I thought it really had such an effect.

I think it might be that the existence of such a restraining motive as that, might well be considered sufficient to justify the application of the exceptional rule invoked by the plaintiffs in this case. Whether or not there is a "substantial impediment" to sue, again, Vice-Chancellor TURNER'S expression, depends upon the circumstances of each case, and in some cases I think the existence of such an apprehension, as Koosummoney states herself to be under, might naturally be such an impediment.

Is there such here?

That question is connected with the next branch of the argument. The defendants argue that there being an administration suit in existence the rule in question is wholly inapplicable, and it is said that no case can be cited in which it was sought to apply this rule in Courts of Equity after a decree for administration of the estate of the debtor. This argument of the defendants bears on the question whether the unwillingness of the personal representative to sue does practically constitute an obstacle to the recovery of the debt in question. It may well be that the reason why no case is cited but one is, that where there is an administration suit, and a creditor or legatee can have recourse to the Court to apply for an order that the representatives shall bring a suit, that bar to the recovery of his rights, which is the foundation of the exception to the general rule, does not exist, that he is not hampered in such a way as to constitute a ground for entitling him to sue instead of the representative. Can it be said in this case that, there being an administration suit in existence, and the representative being subject to the Court which could direct a suit to be filed in her name to recover the property, the circumstances are such as to show that unless the plaintiffs are allowed to bring this suit the claim on behalf of Heraloll's estate cannot be made good by suit?

I must answer that question in the negative, and although if no administration suit were pending I perhaps might hold the clause of forfeiture and the

unwillingness of the administratrix [722] to be a substantial impediment. I cannot say that in this case the institution of the suit by creditors is justified by such circumstances as alone could entitle them to sue. Next, can the suit be brought, there being an administration suit pending?

I was unaware, until this matter came on, that any order in it had been made, and it was not until the argument had proceeded nearly to a conclusion that it was brought to my notice that other orders had been made bearing upon the institution of this suit.

If I had been aware of these orders, I should have declined to hear this suit. It is not convenient, and hardly seemly, that one Judge should be bound to deal with the effect of orders passed in another Division Court. I can only say that I shall certainly take care that no case comes before me in future which has been so affected by the order of another Judge.

It is said that even if there were any difficulty on the part of a creditor suing in his own name within the rule of *Alsager v. Rowley* (6 Ves., 748), the plaintiffs here represent the estate under an order of Court giving them liberty to bring this suit, an order made in the administration suit in which the Court has full seizure, an order which authorizes them, as it does, to institute a suit, and as was suggested makes them receiver for the purpose of bringing it, and it was said that as the suit was in truth brought for the benefit of the estate by an order of Court, and as all parties interested are before the Court, and by the decree all parties would be bound, why should the Court hesitate to allow the suit to proceed?

Unfortunately there is, as I must hold, insuperable difficulty to acceding to that argument.

No doubt the case of *Haile v. Sidebottom* (37 L. J. Ch., 503) is not precisely similar, and the legal liability sought to be enforced was initiated by the executor of the estate which was being administered, but in dealing with that suit Lord ROMILLY, a Judge of great experience, summarized the position and remedies of parties to an administration suit under circumstances which arise here. He says at page 504: "If there is no bill existing in the Court at all, a creditor may file a bill on behalf of himself and all other creditors against an executor or a legal personal representative [723] for the administration of a deceased person's estate, that is every day's practice. Also if he makes out a case of collusion between the legal personal representative and the debtor of a testator, he may make the debtor of the testator a party to that suit, but these are exceptional cases. Excepting those cases, a creditor cannot file a bill to get in the assets of a testator or an intestate. It is the business of the legal personal representative to do that, and bills are instituted every day for that purpose. If the legal personal representative, without collusion, is not active and vigorous in getting in the estate of the testator or is culpably negligent, then the Court does not allow the debtors to be made parties, but appoints a receiver, who, by the authority of the Court, gets in all the assets. But when once there is a decree in an administration suit, proceedings must be taken in that suit, and there must not be another suit for the same purpose."

And later on: "If the matter be a peculiar one, and the assets cannot be got in without a suit being instituted in the name of the legal personal representative and the legal personal representative refuses to institute any such proceedings, then the plaintiff in the suit might apply to the Judge in Chambers for leave to file a bill in the name of the legal personal representative

* indemnifying him against the costs." That was what, as it appears, the creditor in the administration suit who has the carriage of that suit, Ramdoss Coondoo, did apply to be allowed to do.

On the 1st March Mr *Bonnerjee* on his behalf moved for a rule nisi for the appointment of a receiver, and the rule having been obtained, appears to have been opposed on behalf of the present plaintiffs, who stated that they were large creditors. The hearing of that rule then stood over until the 23rd April, a rule was, however, granted in the interval calling upon Ramdoss Coondoo and the present defendants to show cause why the plaintiffs should not bring this suit in its present form. This rule was opposed by Counsel on his behalf, and was made absolute against him, but not as against the present defendants, who have come in now to object to the form of the suit.

The question has now been raised, and I am bound to answer it--whether the suit is well brought?

If the order entitling the plaintiff to bring the suit had been [724] made in this suit, I should have been bound by it, but it was not made in the suit. It is expressed to be made in the administration suit, and "in the matter of a suit intended to be brought" (meaning the present suit), but the learned Judge who made the order expressly declared that he did not intend by it to bind the present defendants.

Under such circumstances, can I hold that the plaintiffs, who are not entitled to sue in their own capacity, are entitled to maintain the suit because they practically represent the estate, acting in any known capacity by virtue of which they are entitled to represent it. I am bound to hold that I do not think they are.

No doubt there is one case in which such a suit as this has been instituted in this Court, *Greender Chunder Ghose v Mackintosh* (I. L. R., 4 Orl., 897), but the point was not raised. A creditor sought to get in the estate, suing on his own behalf and after an administration decree. But the point was not raised.

The point has, however, been raised here, and I must decide it. Is it a merely technical objection? I do not think it is. What is the difference between this suit and a suit brought in the name of the representatives? It was very justly suggested by Messrs *Phillips* and *Stokoe*, that regard to form of proceedings is a matter to which original courts of first instance would be more bound than appeal courts. The remark was made in consequence of a suggestion that they should look more to substance than to procedure, but there is a limit to this.

The objection is not a merely technical one.

Though no doubt the intention was that a suit should be brought, which should benefit the creditors of the estate, the order contemplated a suit not on behalf of the estate by the plaintiffs, but on behalf of themselves and the creditors of the estate only.

The order of the 19th March 1883 says "It is ordered under the provisions of s. 12 of the Charter that the said Oriental Bank Corporation and the Delhi and London Bank, Limited, be at liberty to institute a suit in this Court," etc.

The order is that the plaintiffs be at liberty, not that they do, but that they are at liberty, to institute a suit. I think it would be reading the proceedings with all elastic freedom, which I have [725] no right to do, to go so far

as to construe this as an order appointing the Banks receivers for the purpose of bringing this suit. The remarks of TURNER, L. J., in *Harrison v Richards* [L. R. 1 Ch App, 473 (475)] referred to by Mr. *Phillips* cannot, I think, be treated as being more than figurative, for the purpose of pointing the objection to the order then under discussion

He says "The order under appeal, whatever be its form, is in substance an order for a receiver, for it takes the administration of a part of the estate out of the hands of the executor and entrusts it to some one else. Now, a receiver is not appointed against an executor unless some case of misconduct is proved. Is there any such case made out here? It is alleged against him that he applied for time to put in a voluntary answer, but it seems to me that it would have been very convenient for a voluntary answer to have been put in, since the Court would then have had materials before it enabling it to give special directions as to the dealings with Mr French which have become the subject of subsequent inquiry. The proceedings to be taken must be carried on in the name of the executor, and I find that all the information which lays a ground for those proceedings has been obtained from him or his solicitor. If the proceedings are taken out of their hands, it is not likely that the executor will voluntarily communicate with the other solicitor for the purpose of giving all the information material to the carrying on of the proceedings. In the absence of misconduct on the part of the executor, I do not think it desirable to place the business in the hands of a person with whom he is not likely to communicate freely"

I don't think that this case can be used as an authority for treating the order of the 19th March 1883 as placing the plaintiffs in the position of receivers

Upon these grounds, I come to the conclusion that in this Court I am not at liberty to allow this suit as framed, and I must dismiss it with costs.

* I have considered whether I should exempt the plaintiffs from costs by reason of the order made, but I do not think I should do [726] so. The plaintiffs have only themselves to blame for not framing the suit in the regular form. They actually opposed, and opposed with success, an application by Ramdoss Coondoo for authority to prosecute the claim set up in this suit in a regular way. It is to be regretted that they did not frame their suit in the mode in which he was advised to frame his

I must dismiss the suit with costs, but the added defendants will bear their own costs.

The plaintiffs appealed

Mr *Kennedy*, Mr *Pugh*, Mr *Phillips* and Mr *Bonnerjee* for the Appellants.

Mr. *Kennedy*.—The Court below has decided that the pending of the administration suit excludes any other suit. The earlier reported cases show that a Court of Equity would not entertain a suit without equities; and the only forum in which such a suit could be brought was the Court of Common Law. Collusion would give a direct cause of action, and we allege collusion, and a Court of Equity would have jurisdiction. In the case of *Yeatman v. Yeatman* (L. R., 7 Ch. D., 210) the plaintiffs, who were legatees, were permitted to sue; the case shows that under special circumstances the Court may say that a person who has no direct right against a defendant may be plaintiff. Under the Hindu law we should have a right to go against the person in possession, and even if the English cases are against us, the arrangement of the different suits could be settled by the process of staying all but one.

In the case of *Sharland v. Mildon* (5 Hare, 469) the plaintiff appears to have made no case of collusion, the executor was the proper person to get in the

assets, but there the plaintiff, who was a small creditor, was held to be entitled to get in the assets. It shows that although an administration suit is pending, a suit analogous to ours may be brought

In *Greender Chunder Ghose v. Mackintosh* (I. L. R., 4 Cal., 897), which was a suit after a decree for administration, against a debtor, to the estate seeking to have certain property made liable and asking for administration, shows that such suits lie. The point now raised, however, does not seem to have been raised at all in that case.

[727] In *Earle v. Sidebottom* (37 L. J. Ch., 503) an administration suit had been brought, and the plaintiff filed a supplemental bill to obtain the payment of certain sums into Court which had been ordered and had not been done. The defendant, the executor, had leave to sell certain property, and the order directed that the money should be paid into Court in the original suit, the defendant sold to his brother, and the whole of the money was not paid into Court, it was held the suit would not lie, but there it would not have been necessary for the executor to bring the suit; and the plaintiff filed his supplemental suit. Our suit is not a second suit to get in the assets

We obtained an order to sue, and the case of *Harrison v. Richards* (L. R., 1 Ch. App., 473) shows that the order to sue in an administration suit is in effect an order for a receiver.

[WILSON, J.—How can your clients be receivers, for if they recovered the property it would go into the hands of the administrators to administer, and would not go into your hands at all]

Under s. 51 of the Civil Procedure Code there would be great difficulty in the receiver bringing the suit. There must be an express authority from the plaintiff to the person who signs the plaint, and that we could not get. In *Phillips v. Phillips* (6 Ir. Eq., 509) there was no collusion, and it was shown that the executor was not in default; but the Court stated that, if the charge sought to be made good had been proved to be due, and the executor shown to be remiss in calling it in, the Court might direct proceedings to be taken by means of a receiver. There is a difference between the Hindu and English laws in the matter. In England the entire property vests in the executor, in India the executor is only a manager—*Srimati Jaykali Devi v. Shubnath Chatterjee* (2 B. L. R., 1 O. C., Col. Dig., bk. I, Ch. II, s. 220).

Mr. Hill, Mr. Trevelyan and Mr. Sale for the Defendant Gobinloll

Mr. O'Kinealy for the Defendant Beharyloll.

Mr. Hill, for Gobinloll.—The general rule is that an executor or administrator can alone sue to recover assets. Therefore in [728] ordinary cases a debtor to the estate cannot be made a party to a suit against an executor

Collusion, or the insolvency of executor, or some other special circumstance, must be made out by a creditor who sues. In the early cases, proof of collusion was held to be essential—*Newland v. Champion* (1 Ves. Sen., 105). In that case the Lord CHANCELLOR distinguished the case of suits by a creditor against an executor of a deceased, and surviving partner, from other cases. A surviving partner would be a party because he would have an interest in contesting the debt, and a right to be heard in taking the account. *Storey's Equity Pleadings*, s. 167, *Thorpe v. Jackson* [2 Y. & C. Exch., 553, (563)], *Bowsker v. Watkin* (1 R. & M., 277) is also an instance of such a suit, but as to this last case see *Davies v. Davies* (2 Keen, 534). *Gedde v. Traill* (1 R. & M., 281, note) is an authority as to collusion. *Travis v. Milne* (9 Hare, 141, 150) shows that collusion is not the only ground and that there must be

special circumstances, some substantial impediment to the suit being brought by the executor. The rule which now obtains dates from about 1800, viz., as to collusion, insolvency or some special case. See *Alsager v. Rowley* (6 Ves., 748), *Hilliard v. Eiffe* (L. R., 7 H. L., 39, 44). As to what have been held "special circumstances," at one time the refusal of the executor to get in funds was sufficient, *Wilson v. Moore* (1 M. & K., 126, 337), *Lancaster v. Evors* (4 Beav., 158), illustration of special circumstances is afforded by *Consett v. Bell* (1 Y. & C. Ch., 569), also in *Stanton v. The Carron Co.* (18 Beav., 146, 159), *Sanders v. Druce* (3 Drew, 140, 156). The case of *Yeatman v. Yeatman* (L. R., 7 Ch. D., 210) merely amounts to saying that when it is a case for proceedings to be taken by a creditor, a creditor applying for leave to sue will be allowed to sue in his own name. In our case plaintiff alleges neither collusion nor insolvency nor inability to sue. The proper course for the plaintiff to have pursued is that indicated in *Sharpe v. San Paulo Ry. Co.* (L. R., 8 Ch. App., 597) The objection is not a technical one, the question of costs is sufficient ground for adherence to the general rule

[729] Mr. *O'Knealy* for Behariloll contended that the proper person to sue was the representative, and the cause should not be taken from her except on proof of misconduct, *Samuel v. Samuel* (L. R., 12 Ch. D., 152). *Dowd v. Hawtin* (L. R., 19 Ch. D., 61) shows that a receiver never is appointed in a case like this. *Phillips v. Phillips* (6 Ir. Eq., 509), and *Utterson v. Mair* (2 Ves., 95) were also cited

Judgments of the Court were delivered by GARTH, C. J., and WILSON, J.

Wilson, J.—The case disclosed by the pleadings is this The plaintiffs were creditors of one Heraloll Seal who died intestate in March 1876 They sue on behalf of themselves and all other creditors Administration of the estate of Heraloll was in May 1876 granted to his only son Russickloll. In the same month a creditor's suit was brought in this Court for the administration of Heraloll's estate. In June 1876 a decree for administration was made and the usual accounts and enquiries ordered A report was subsequently made by which it was found that the plaintiffs were creditors of the estate for the debt now relied upon. On the 25th February 1878 Russickloll having died, administration of the unadministered estate of Heraloll was granted to his widow, the defendant Koosummoney, and the suit was revived against her and Russickloll's widow, the defendant Biddomoney On the 12th August 1878 by a decree on further directions this report was confirmed and the usual directions given That suit is still pending.

In 1848 Muttyloll Seal, the father of Heraloll and of four other sons, executed a deed by which he conveyed certain property to trustees upon trusts for the benefit of his family Muttyloll Seal died in 1854, intestate so far as the property involved in this suit is concerned. The defendant Gobinoll Seal and Kannyeloll Seal are the present trustees under the deed of 1848.

The plaintiffs contend that the trusts of the deed of 1848 are void in law; that one-fifth part of the property supposed to be affected by those trusts passed to Heraloll as one of the heirs of Muttyloll, and that that share forms part of Heraloll's assets applicable to the payment of his debts

[730] They say in their plaint.—

Paragraph 26—"The defendant Koosummoney Dossee has refused and still refuses to take any proceedings or to take part in any proceedings with a view to impeaching any of the provisions of the said indenture, alleging, amongst other things, that under the terms of the said indenture any member

of the family taking any proceedings in any Court of Justice in any matter affecting the said trusts would forfeit all rights, benefits, and interests thereunder."

Paragraph 27.—"The defendant Koosummoney Dossee is also interested as one of the beneficiaries under the said indenture, and the relation between the defendant Koosummoney Dossee and the defendants Gobinloll Seal and Kannyeloll Seal, the trustees of the said indenture, who are also beneficiaries under the said indenture, is such as to create a very substantial impediment to the prosecution by the defendant Koosummoney Dossee of the rights of the creditors of the said Heraloll Seal, deceased, against the defendants Gobinloll Seal and Kannyeloll Seal in relation to the property comprised in the said indenture."

The plaintiffs ask, in substance, for a declaration in accordance with the contention above stated, that the share of Heraloll may be duly administered, and that this suit may be taken as supplemental to the existing administration suit.

They have made defendants in the suit the trustees of the impeached deed; Koosummoney, the administratrix of Heraloll, Biddomoney, the widow and heiress of Russickloll, who was himself the sole heir of Heera Lall, certain persons as representatives of the beneficiaries under the trust deed, and Mr. Macgregor, in whose hands the property is as receiver in another suit, which need not be further referred to.

The female defendants in a joint written statement take the same ground which the plaintiff in the passage already cited from the plaint alleged Koosummoney to have taken. The trustee defendants, as trustees of the deed, resist the plaintiff's claim to have the property dealt with as assets of Heraloll on a variety of grounds.

From what has been said I think the following propositions follow --

[731] (1) That the case is one in which proceedings ought to be taken to test the validity of the plaintiff's contention as to the trusts.

(2) That the administratrix has refused, and still refuses to take any such proceedings.

(3) That the trustee defendants dispute the right of the creditors in their character of trustees and for the benefit of the beneficiaries of whom the administratrix is one, and that the administratrix concurs in this action of theirs and refuses to proceed against them, because she prefers her personal interest under the trust deed to her duty as administratrix. It appears also, if that be material, that the heiress-at-law takes the same view and from the same motive. This, I think, amounts in law to collusion between these parties.

(4) There is already an administration suit pending, covering the whole of Heraloll's assets, whatever they may be.

The question we have to decide is whether on these facts the present suit is maintainable.

The general rule of law is that the executor or other representative of the deceased is the proper person to realize the assets of his estate, and that no other person can sue for them in any Court, and this rule rests upon obvious

principle. The proper person to sue for a debt is the creditor. The proper person to sue to recover property is the person who has a title to it, not one who has none.

But an exception to the general rule has been admitted in certain instances. Many cases were cited to us beginning with *Alsager v. Rowley* (6 Ves., 748) and ending with *Yeatman v. Yeatman* (L. R., 7 Ch. D., 210) in which, on grounds of collusion, insolvency, or other special circumstances, a creditor of an estate has been allowed to join a debtor to the estate as defendant in a suit against the executor. I do not think it necessary to examine those cases in detail. The principle on which they rest is stated by TURNER V.C., in *Travis v. Milne* (9 Hare, 141, 149). "Upon an examination of the authorities I believe it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases, I think, may fairly be considered to go [732] to this extent, that such a bill may be supported in all cases in which the relation between the executors and the surviving partners" (the case then before the Court was one of a deceased partner's estate), "presents a substantial impediment to the prosecution by the executors of the rights of the parties interested in estate against the surviving partners." In *Stainton v. The Carron Company* (18 Beav., 146) ROMILLY, M. R., stated the rule "I think it unnecessary to go in detail through all the cases to be found on this subject. I think that they may be summed up thus: that the persons interested in the estate of the testator, not being the legal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate," and both these statements of the rule are cited with approval by HALL, V.C. in *Yeatman v. Yeatman*. In the present case, had there been no administration suit pending, there would have been, in the collusion of the administratrix and the trustees, a substantial impediment to her suing them, and a strong probability of the loss of assets, unless a suit like the present were admitted, and, in my judgment, the authorities show that it would have lain.

But the administration suit is pending, in which the Court has control of the administration of all the assets of Heraloll. In that suit an order might be made directing proceedings to be taken, in proper form and by proper parties, to recover the assets in question, and the conduct of such proceedings might be given as seemed best to the Court. Nor is any reason shown why such an order should not be applied for. The applications that were made, and the order of the Court, I shall notice later. Two courses would be open to the Court in that suit: *first*, to allow a suit to be brought in the name of the administratrix, *secondly*, to appoint a receiver to sue. It is pointed out in *Dowd v. Hawtin* (L. R., 19 Ch. D., 61) that the latter course would be in accordance with the older practice of the Court of Chancery, but that in recent times the former course is always adopted. But I do not understand the Court there to have held that there is power to give a receiver the conduct of a suit, if necessary; at any rate, in [733] this country under the Procedure Code, I think there clearly is such a power. Having regard to the requirements of s. 51 of the Procedure Code as to plaintiffs, the nature of the objection raised by the administratrix, and the great practical difficulty of enforcing any order against a *purdahnashin* woman in this country, I think the Court might well hesitate before directing proceedings in her name. But under s. 503 of the Code, I think it clear that the Court might authorise a receiver to sue in his own name.

Under these circumstances, I do not see, on principle, how it can be said that there is any substantial impediment to the bringing of a suit in a regular manner, or any danger to assets such as to necessitate the reception of the present exceptional suit.

I think, too, the weight of authority is in favour of this view. In one sense there is no direct authority upon the point. That is to say, there is no case in which such a suit has been held to lie, while an administration suit was pending, nor is there any case in which a suit has been rejected expressly on that ground. *Sharland v. Mildon* (5 Haro, 469) was cited for the plaintiffs. But that case is not in point. The defendant there held liable was not a mere debtor to the estate, but an executor *de son tort* accountable as such to those interested in the estate. In *Stainton v. The Carron Company* (18 Beav, 146) already referred to, an administration suit was pending, and a decree had been made, and the Master of the Rolls does not expressly dismiss the second suit on that ground, but lays down the rule in the terms already cited. He did, however, according to the *Law Journal* report, point out in his judgment that, if the plaintiffs had any remedy, it was in the administration suit, 23 L. J., Ch. 299. *Greender Chunder Ghose v. Mackintosh* (1 L. R., 4 Cal., 897) was a case similar to the present, and it proceeded to decree both in the Court of First Instance and on appeal. But the point was not raised. It was indeed argued that the Judges before whom the case came must be taken to have approved of the frame of the suit, because they did not object on the ground now in question. But I do not see that it was in any way the duty of the Court to take such a point when the parties did not choose to raise it.

[734] On the other hand, in *Earle v. Sidebottom* (37 L. J. Ch., 503) in the passage cited in the judgment of PIGOT, J., ROMILLY, M. R., examined the question, and stated his view of the law thus: "If there is no bill existing in the Court at all, a creditor may file a bill on behalf of himself and all other creditors against an executor or a legal personal representative for the administration of a deceased person's estate. That is every day's practice. Also, if he makes out a case of collusion between the legal personal representative and the debtor of a testator, he may make the debtor of the testator a party to that suit. But these are exceptional cases. Excepting those cases, a creditor cannot file a bill to get in the assets of a testator or intestate. It is the business of the legal personal representative to do that, and suits are instituted every day for that purpose. If the legal personal representative, without collusion, is not active and vigorous in getting in the estate of the testator, or is culpably negligent, then the Court does not allow the debtors to be made parties, but appoints a receiver, who by the authority of the Court gets in all the assets. But when once there is a decree in an administration suit, proceedings must be taken in that suit, and there must not be another suit for the same purpose, and if the matter be a peculiar one and the assets cannot be got in without a suit being instituted in the name of the legal personal representative, and the legal personal representative refuses to institute any such proceedings, then the plaintiff in the suit might apply to the Judge in Chambers for leave to file a bill in the name of the legal personal representative indemnifying him against the costs." And in *Dowd v. Hawtin*, already referred to, the Court of Appeal states what the ordinary practice of the Chancery Division is, namely, by proceedings in the administration suit.

I therefore agree with the view of the learned Judge who heard this case, that under such circumstances as those disclosed the present suit will not lie.

It remains however to consider the applications which were made in the administration suit and the order made thereon. It appears from the proceedings

brought before us, that the conduct [733] of that suit is in the hands of one Ramdoss Coondoo, that he applied for and obtained in that suit an order *nisi* for the appointment of a receiver, with a view to bringing a suit for the same objects as the present. The present plaintiffs obtained an order *nisi* giving them leave to bring this suit. The nature of the latter order is plain enough. It gives leave under clause 12 of the Letters Patent to sue, though part of the property may not be within the jurisdiction. It gives leave to join causes of action under s 44, rule (a) of the Procedure Code. It gives leave to sue on behalf of all the creditors, and to sue the defendant Behariloll Seal on behalf of all the beneficiaries under s. 30 of the same Code.

The learned Judge before whom the matter came appears to have considered (and as far as I can judge, for good reason), that the now plaintiffs were fitter persons than Ramdoss Coondoo to have the control of the litigation. He dismissed Ramdoss Coondoo's application, and made the plaintiffs' order absolute. The learned Judge, as I understand him, limits his order in such a way as to show that it is an order only as between the parties in the administration suit and not one affecting the defendants in this suit.

The plaintiffs sought to use this order in two ways, *First*, it was said that such a suit may lie with the leave of the Court, if it could not without. I do not see how this can be. So far as the order is one under clause 12 of the Letters Patent it affects only local jurisdiction. So far as it is under s. 44 of the Code it goes only to the joinder of claims. So far as it is under s. 30 it goes only to the joinder of parties. It makes it unnecessary to join all the creditors as plaintiffs, and places the present plaintiffs in the same position they would have been in under English law without any order. From no point of view can the order, in my opinion, give a right of suit not existing without it.

Secondly, it was contended, on the strength of an expression of TURNER, L. J., in *Harrison v Richards* (L. R., 1 Ch. App., 473) that the effect of the order might be to constitute the plaintiffs receivers, for the purpose of bringing this suit. I think it is impossible to construe the order in any such sense.

[736] I agree, therefore, in the view taken of the case by the Court below, and I think the appeal should be dismissed.

I arrive at this conclusion with regret, because it is always unfortunate that costs of litigation should be wasted by reason of the dismissal of a suit on a ground which leaves the merits of the controversy untouched. And so far as appears, I do not suppose the defendants would be worse off, if such a suit could proceed, than in one regularly brought. In this sense the objection, to which I feel bound to give effect, is technical, but in no other sense. It rests upon clear principles, a departure from which would, I think it not in this case, in other cases lead to multiplicity of suits, increase of expense and confusion. We cannot hold this suit to lie without laying down a new rule, and establishing a precedent of general application. The objection is one which the defendants have a perfect right to raise, and the defendant Gobinloll raised it at the earliest moment by his written statement. The plaintiffs have carried on their suit through two Courts with full knowledge of the difficulty which lay in their way.

On the subject of costs I have had an opportunity of reading what the Chief Justice has written and I concur in his view.

Garth, C. J.—As my brother WILSON agrees in this case with the Court below, that we ought in this country to be guided by the rule, which appears to be observed by Courts of Equity in England, I shall defer to their judgment, although I confess I do so with reluctance, because I see no sufficient reason for introducing such a rule here.

It is expedient, no doubt, that some recognised procedure should be followed, as regards the persons who should have the conduct of a supplemental suit of this kind, and it is obviously right that, in the absence of good reason to the contrary, the legal representative of the party, whose estate is being administered, should sue to realise assets of that estate for the benefit of the creditors

And it may also be right, that where there is any valid objection to the legal representative suing, the conduct of such a suit [737] whoever may be the nominal party to it, should generally be in the hands of the plaintiff in the administration suit

But where, as in this case, there is ample reason why the legal representative should not sue, and where there is also good reason as I consider for not allowing the person who instituted the administration suit, to have anything to do with the supplemental suit, I confess I should have thought that the selection of a proper person to bring this suit on behalf of the estate might well have been entrusted to the Judge in the administration suit, without its being absolutely necessary to appoint a receiver

The learned Judge had all the facts and the parties before him, and I should have thought that he was probably the best tribunal to decide, whether it was necessary or expedient, having regard to the circumstances of the case, that a receiver should be appointed

It seems clear from the English authorities, that where there is no administration suit pending, a suit of this kind may be brought by one creditor on behalf of himself and the other creditors, and, therefore, *there would seem to be no objection in substance to such a suit being brought, when there is an administration suit pending*. The argument in favour of the rule, which my learned brothers are disposed to adopt, seems to be, that where a receiver *can be appointed*, to bring such a suit, it is always right that he *should be appointed*. But the rule is only one of procedure, as it seems to me, and one which we are at liberty to adopt or not in this country, as we think proper, and although in many and perhaps in most cases it may be the best course to appoint a receiver, I think there are some cases, in which such a course may be neither necessary nor expedient; and I am strongly of opinion that, although we should always pay the utmost respect to the wisdom and authority of our English Courts, we are by no means bound to adopt all the rules of procedure and practice, which the Equity Courts in England may have established

In this case, as far as I can see, there was no necessity for a receiver, nor is there any substantial reason why this suit should not have been properly tried upon its merits in its present form, without putting the parties to the frightful expense and delay of fresh proceedings

[738] No receiver, I presume, unless he were himself an interested party, would act gratuitously, and in this case, it appears, there are no means of paying a receiver. There are literally no assets, as I understand, out of which a receiver could be remunerated, unless the object of this suit were attained, and the trust funds realized for the benefit of the creditors

The consequence is, that the receiver, when appointed, must be paid either by the creditors generally, or by the plaintiffs, who are by far the largest creditors, and in either case the appointment of a receiver would be an expense to them, without being, as far as I can see, any benefit to anybody,

because the plaintiffs have such a deep interest in the success of the suit, that there can be no reasonable doubt of their doing their best to win it, and as this suit is supplemental to the administration suit, any assets which may be realized in this suit would of course have to be administered in the administration suit. And, again, if a receiver were appointed, he would only sue, I presume, upon being indemnified by the plaintiffs, either with or without the aid of the other creditors

It is obvious, therefore, that when this suit is dismissed, and the Judge in charge of the administration suit is asked to appoint a receiver, it may be a question well worthy of consideration, whether the plaintiffs themselves should not be appointed receivers, inasmuch as they will virtually have to bear the expense of bringing the fresh suit. I entirely agree with Mr. Justice NORRIS, that it would have been highly improper under the circumstances to allow Ramdoss Coondoo to have the conduct of this suit in any way. A tradesman, who has had dealings with the Seal family whose debt is only a small one (some Rs 2,000), *who is actually offered payment of that debt, and refuses to take the money, in the hope of being entrusted with the bringing this suit against the Seal family*, is certainly not the sort of person whom any Court would select to have the conduct of such a suit. He must either have a craving after costs, which, to say the least of it, is not a good trait in a receiver, or he must have some other reason, perhaps even less creditable, for wishing the conduct of the suit to be placed in his hands

It, therefore, as far as I can see, comes to this, that when a [739] receiver is appointed, the persons after all really interested in the suit, and paying the expense of it, and winning the risk of it, will be the plaintiffs, and the real defendants will be in no better position as against the receiver, whoever he may be, than they are now against the plaintiffs. In either case, I presume, they would be entitled to security for costs, if they choose to ask for it, and in either case, they are secure, as far as I can see from being sued over again for the same cause of action

Indeed, I do not know that the defendants will have effected any other result by the objection which they have taken, than to put themselves and the other parties to the suit to a good deal of unnecessary expense.

Under these circumstances, although, as I said before, I defer to the opinion of my two learned brothers upon this, which seems to me a mere question of procedure, I do not think it right to give the respondents any costs, for two reasons—

(1) In the first place, I consider their objection to have been a technical one, advanced for no *bonâ fide* object, but merely for the purpose of putting the plaintiffs to expense and trouble, by obliging them to bring their suit in a different form, and

(2) (Which is to my mind the more cogent reason), because hitherto there has been no authority in this country, deciding that a suit in this form cannot be brought, whereas, on the other hand, there is a direct authority that such a suit can be brought, inasmuch as the case of *Greender Chunder Ghose v. Mackintosh* (I L. R. 4 Cal., 897) is a precedent for such a suit in this very Court. And it must not be forgotten that the Judge in the administration suit, who, as I consider, ought to have the selection of the plaintiffs in a suit of this kind, had sanctioned the suit in this form.

For these reasons, I think that, whatever view the learned Judge may have taken as to the form of the suit, no costs ought to have been allowed to the defendants in the Court below, and I certainly do not feel justified in allowing them any costs in this Court

The appeal will, therefore, be dismissed without costs

Appeal dismissed.

NOTES.

[I RIGHT OF RECEIVER TO SUE IN HIS OWN NAME—

See also (1907) 34 Cal , 305 5 C. L. J., 270 , (1898) 25 Cal , 642 (646)

II. CREDITOR'S RIGHT OF SUIT AGAINST DEBTOR TO ESTATE—

See also (1905) 3 L. B. R. 192 (193)]

[740] PRIVY COUNCIL

The 5th February, 1884

PRESENT

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER,

SIR R. COUCH AND SIR A. HOBHOUSE.

Narotam Dass . Plaintiff

versus

Sheo Pargash Singh . Defendant

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Act XXIV of 1870 (The Oudh Taluqdars' Relief Act, 1870)—Hypothecation of lands under management

A taluqdar, the management of whose taluq at the time was vested in an officer appointed under s. 3 of Act XXIV of 1870, made an instrument purporting to hypothecate the taluq to secure payment of money borrowed by him

Held that, as the document contained no personal contract to pay out of personal estate, or any estate other than the taluq, it was unnecessary to consider whether a taluqdar, whilst his taluq is under management in pursuance of the provisions of the above Act, is competent to make a personal contract this being only an hypothecation of the property falling within s. 4, cl. 3 of the Act, and invalid within its meaning

APPEAL from a decree of the Judicial Commissioner of Oudh (13th October 1881), whereby a decree of the Judge of the Fyzabad District (19th April 1881) was confirmed.

On the 18th July 1873 the respondent, a taluqdar of Oudh, the management of whose taluq was then vested in an officer appointed by the Chief Commissioner, under the provisions of s. 3 of Act XXIV of 1870 (The Oudh Taluqdars' Relief Act, 1870), executed in favour of the appellant (a shraf at

Fyzabad), the instrument of which the clauses are set forth in their Lordships' judgment. Before the institution of this suit against him, for principal and interest due to the 15th July 1873, which with subsequent interest was made up to the sum of Rs. 10,981, the respondent had been restored to the possession of his taluq, under s. 12; but had made no payment.

The defence, besides denying the receipt of the money, alleged that the claim was invalid, inasmuch as the bond on which it was based had been executed while the defendant's estate was under the operation of Act XXIV of 1870, and an issue was fixed on this point.

[741] In the Court of First Instance the suit was dismissed with costs on the ground that the instrument on which the claim was based was a mortgage, and invalid under s. 4. The Judicial Commissioner dismissed the appeal for the same reason

On this appeal—

Mr. J. T. Woodroffe, for the Appellant, argued that the instrument of 18th July 1863, though invalid for the purpose of charging the taluq, was evidence of a contract to pay the debt for which the taluqdar was personally liable. By reason of his estate being brought under the operation of Act XXIV of 1870, he had been rendered unable to charge the taluq, but not incompetent to contract. The instrument bore the construction that it contained a promise to pay, distinct from the hypothecation, and the transaction itself was to be so regarded. A document rendered inoperative for a particular and limited purpose might be used as evidence of a different matter; for instance, as occurred under the registration laws. A document required by law to be registered, in so far as it affected land, was admissible, even if unregistered, in evidence for any purpose with regard to which its registration was not compulsory—*Lachmipat Singh Dugar v. Munza Khairat Ali* [4 B.L.R., (F.B.) 18]. So a document, purporting to charge land, might be invalid for that purpose, under s. 4 of Act XXIV of 1870, but receivable for another purpose, viz., as evidence of a debt.

He referred also to the sections in "The Scinde Encumbered Estates Act," XIV of 1876, corresponding to ss. 3, 4, 8 and 12 in Act XXIV of 1870.

Mr. R. V. Doyne and Mr. H. Conell for the Respondent were not called upon.

Their Lordships' Judgment was delivered by

Sir B. Peacock.—The issue raised in this case is, can the bond be held to be a valid document and binding upon the defendant when it was executed during the time the estate was under the operation of the Taluqdars' Relief Act, 1870 (Act XXIV of 1870)? It is not necessary to consider whether a taluqdar, whilst his taluq is under management in pursuance of that Act, is competent to make a personal contract, inasmuch as it does not arise in the [742] present case. The question depends upon the construction of the document which is set out on the record, and which their Lordships consider to be a mortgage of the estate and nothing else. It contains no personal contract by the defendant to pay out of his personal estate, but it is a mere contract to pay out of the hypothecated estate.

The contract commences by stating that he has borrowed the sum of Rs. 4,100 at a certain rate of interest. Then it goes on: "I have by this instrument hypothecated the whole of my property in taluq Chandipur Birhar, situate in Fyzabad." There he describes it as an hypothecation. "As the aforesaid taluq of Chandipur Birhar is under management under the Encumbered Estates Act, and I have already filed in the

office of the Superintendent a schedule of my debts specifying the names of my creditors, I do hereby promise and give it in writing that I shall without any plea repay the principal with interest within the term of two years." But the contract does not stop there. It goes on. "The mode of payment will be, that after paying up the scheduled debts, I shall first of all pay up the debt covered by this bond, including interest"—that is to say, that he will pay this bond after he has paid the scheduled debts. "I shall thereafter appropriate the profits of the estate and attend to the liquidation of other debts. I shall not take the profits of the estate without paying up the present debt with interest, if I do take the profits, it will be for the payment of this debt. I shall, until this debt is repaid, abstain from contracting other debts from the bank or anywhere else" Up to this period it is evidently a mere hypothecation of the estate as a security for the money. Then he says lower down "When my estate is released from management under the Encumbered Estates Act, I will immediately first of all pay the debt due to the said banker, and will pay the other creditors afterwards" That is merely an intention on the part of the borrower that this debt shall be a prior charge upon the estate after payment of the scheduled debts "In both cases, that is, while the estate is under management and after it is released, the repayment of this debt will be the subject of my first consideration In the event of any breach of contract taking place on my part, the said banker is at liberty to institute [743] a suit within the time fixed in this bond and recover the money I will not transfer or mortgage to any one the hypothecated property till the principal and interest of this debt is paid up, if I do so it will be illegal." Then he goes on: "These few lines have therefore been written as an unconditional bond hypothecating my property, so that it may serve as a document and be of use when required. P. S.—I have taken this Rs. 4,100 over and above the Rs. 3,200 borrowed by me, by hypothecation of the property, by the mortgage deed attested on 17th March 1873."

Looking at the whole of this deed, their Lordships cannot place any other interpretation upon it than that it was a mere hypothecation of the taluq which was then under management.

Then with regard to s. 4, cl. 3, which says, "that, so long as such management continues, the taluqdar and his heir shall be incompetent to mortgage, charge, lease, or alienate their immoveable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom," it appears to their Lordships that this deed, being a mere hypothecation of the property, falls clearly within the clause, and consequently that it was invalid. Both the Courts have held that the deed was invalid within the meaning of the Act; and their Lordships think that those decisions are right. They will, therefore, humbly advise Her Majesty to affirm the decision of the Court, and the appellant must pay the costs of this appeal.

Solicitors for the Appellant: Messrs. *Watkins and Lattey*

Solicitors for the Respondent: Messrs. *Barrow and Rogers*.

NOTES.

[MORTGAGE—PERSONAL LIABILITY TO PAY—

This is a question of construction of each deed. In 16 Cal., 540, personal liability was not upheld, in 28 Cal., 645, it was, see the remarks of Dr. *Rash Behari Ghosh* in his *Mortgages* (1911) Vol., I, 79, 80. On the ground that a particular fund was specified for payment, personal liability was not enforced in 6 C. L. J., 639 at 649, 13 C. W. N., 138. See also 4 C. L. J., 246; 510 (513), 5 C. L. J., 287, 9 C. L. J., 5; (1901) P. L. R., 155.]

[10 Cal. 743]

APPELLATE CIVIL.

The 28th May, 1884.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR JUSTICE NORRIS.

Gopal Chunder Sircar. . . . Plaintiff

versus

Adhiraj Aftab Chand Mahatab .Defendant.*

Cesses, Liability for—Debutter land—" Owner and holder"—Bengal Act IX of 1880, s 56.

Bengal Act IX of 1880 contemplates the payment of the cesses by persons beneficially interested in the land in respect of which the cesses are levied

[744] The words "owner and holder" in s 56 of that Act are not limited to any one person nor for the purposes of that section must the owner be in actual possession. The plaintiff, who was a putnidar of the defendant, having paid certain cesses in respect of what he described in his plaint to be "debutter lakhraj lands" lying within the ambit of his putni, sued the defendant to recover the amount of such cesses. The defendant admitted that he was proprietor of the estate in which the lands were situated, but denied his liability for the cesses.

Held, that the defendant was not liable to pay the amount of the cesses, but that the person liable was the idol through its shebait, or some person in receipt of the rents and profits of the land, or some person in actual possession of the land in occupation of it

IN this case the plaintiff, who was a putnidar of the defendant, had to pay certain road and public work cess in respect of lands described in the plaint as the debutter lakhraj lands of an idol named Shib Thakoor. The plaintiff alleged that the defendant was the proprietor and in possession of the land and as such was liable to make good the amount paid in respect of the cesses.

Before the Munsif the defendant admitted his title to the land in question, but contended that he was not liable, and that the plaintiff should have sued the person who was in actual occupation of the land. The Munsif, however, gave the plaintiff a decree for the amount claimed, on the ground that he was entitled to have the amount of the cesses paid by the defendant, inasmuch as he was the *proprietor* of the rent-free land

On appeal the Subordinate Judge reversed the decree of the Munsif, and dismissed the suit on the following grounds, as stated in the judgment :—

"The plaint in this case does not appear to have been rightly framed. The property from which cess was claimed was described as the debutter lakhraj property of some idol—Shib Thakoor. Nevertheless, the plaint stated that the Maharajah-defendant was the proprietor and was in possession. If the property is actually debutter, the idol is, and must be presumed to be, the malik, and if the Maharajah is in possession he cannot but be the trustee or shebait. The suit does not seem to have been framed against the defendant in his character as shebait or trustee. The Maharajah in his written statement says that on enquiry he finds that he is not in possession, and that those in

* Appeal from Appellate Decree No. 1686 of 1883, against the decree of Baboo Jogesh Chunder Mitter, Second Subordinate Judge of Burdwan, dated the 26th of March and 29th of March 1883, reversing the decree of Baboo Gopal Chunder Bose, Second Sudder Munsif of Burdwan, dated the 15th of December 1882

possession [746] should have been sued, and he pleaded non-liability for the plaintiff's claim. The lower Court decreed the plaintiff's claim in this state of the pleadings, saying that he has the undoubted right to sue the proprietor of the rent-free land, and therefore the defendant was liable. I think this view of that Court is not supported by the law. Section 56 of Act IX of 1880 recognizes three classes of persons as bound to pay cesses for rent-free lands —

- (1) Owner and holder of any rent-free land
- (2) Every person in receipt of the rents and profits
- (3) Every person in possession and enjoyment of the land

"The Maharajah does not admit that he is in possession or enjoyment of the land, nor has the plaintiff adduced evidence to show that he is so in possession. If the Maharajah is in receipt of the rents, he is the shebait of the debutter property. This does not seem to be the plaintiff's case. Nor has it been proved by the evidence. The Maharajah may be 'owner,' but it has not been shown that he is also the 'holder.' The word 'and' in the section couples the words 'owner' and 'holder.' It does not, as urged by the respondent's pleader, disjoin them. So that there is nothing to show how the Maharajah can be held liable."

Against that decision the plaintiff now specially appealed to the High Court.

Baboo *Gruja Sunkur Mazoomdar* for the Appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Basunt Coomar Bose* for the Respondent.

The **Judgment** of the High Court was as follows

Tottenham, J. (NORRIS, J., *concurring*) -- In this case the plaintiff, who is the appellant in this Court, was a putnidar of the Maharajah of Burdwan. As a putnidar he had to pay road cess and public work cess, in respect of certain debutter lands lying within the ambit of his putni. He sues the Maharajah to recover these cesses from him.

In the first Court there appears to have been an admission made by the Maharajah's pleader that the Maharajah had some [746] right in the lands in dispute. The Munsif says "The defendant, admitting his title to the land in question, urges in his written defence that the plaintiff should have sued the person who is in actual occupation of the lands," and the Munsif was of opinion that that defence had no foundation in law, that inasmuch as the Maharajah admitted himself to be the proprietor of the rent-free lands he was liable for the cesses. The first Court, therefore, made a decree in favour of the plaintiff.

On appeal the Subordinate Judge reversed the decision of the Munsif and dismissed the suit apparently on two grounds. He thought that the plaint had not been rightly framed, for whereas the plaint described the property as debutter, *i.e.*, the lakhray property of an idol, Shib Thakoor, the defendant Maharajah was sued in his capacity of proprietor, though the land belonged to an idol and not to the Maharajah. If the Maharajah was the holder of it at all, he must have held it as shebait. The Maharajah not being sued in that capacity, the Subordinate Judge thought that he was not liable for the amount claimed. The Subordinate Judge further differed from the first Court as to the construction to be put upon the words of the Cess Act, s. 56, Bengal Act IX of 1880. The Munsif held that it was quite enough for the defendant to admit his ownership of the land to make him liable for the cesses thereof. The Subordinate Judge says that it was not enough. The defendant must not only be

proved to be the owner, but also the actual holder of the land. He points out that s. 56 recognizes three classes of persons as bound to pay cesses for rent-free lands: *First*, the owner and holder of any rent-free lands, *secondly*, any person in receipt of the rents and profits; and, *thirdly*, every person in possession and enjoyment of the land. The Subordinate Judge holds that the terms "owner and holder" must relate to the same person, that the owner is not liable to pay cesses unless he is also a holder; and that in the present case the Maharajah, not having admitted being in possession, nor having been proved to have been in possession in any capacity, he is not liable for the cesses claimed.

As regards the first ground stated, we think the Subordinate [747] Judge was right, and that upon the suit as framed, the plaintiff had no right to recover the cesses from the Maharajah. From the plaintiff's own showing the debutter land belongs to an idol. The party liable to those cesses is, therefore, that idol, through its shebait, or some person in receipt of the rent and profits of the land, or some person in actual possession of the land in occupation of it. The suit against the Maharajah in his capacity of proprietor must, we think, fail. He is not the proprietor of the rent-free lands if they belong to an idol, and in his capacity of proprietor of the estate within the limits of which geographically the debutter lands are situated, he would not be liable, excepting he paid the cesses in the first instance and recovered them from the idol afterwards, or from the plaintiff putnidar. Upon that ground alone, therefore, we think that the decree of the lower Appellate Court should be affirmed.

As regards the other ground stated by the Subordinate Judge, we are of opinion that he is mistaken in his construction of the law. We do not take the words "owner and holder" in s. 56, when referring to rent-free lands, to be limited to any one individual, or that the owner must also be in actual possession. We think that these words are intended to apply to both classes of cases, namely, where the lakhraj land is the actual property of the owner, and where, as in the present case, the debutter being the property of an idol is held on behalf of that idol by a trustee or shebait. We think that the Act contemplates the payment of the cesses by persons beneficially interested in the land in respect of which the cesses are levied, and that in the present case, the Maharajah, neither being admitted nor found to be beneficially interested in this debutter land, the lower Court was justified in holding him free from the liability which the plaintiff seeks to impose upon him.

The appeal is dismissed with costs

Appeal dismissed.

[748] APPELLATE CIVIL.

The 18th May, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS

Jugmohun Mahto..... Judgment-debtor

versus

Luchmeshur Singh.Decree-holder *

Limitation--Execution of decree--Limitation applicable to execution of decree passed when Act XIV of 1859 was in force--Disability of decree-holder--Minority--Limitation Act (XIV of 1859, ss 11, 14 and 20 and XV of 1877, s. 7)

In execution of a decree, dated the 29th April 1862, certain proceedings were taken which terminated on the 5th September 1866, when the execution case was struck off the file. Between that date and the 25th September 1882 no further proceedings were taken. On the latter date an application was made for execution. The decree-holder was a minor when the decree was passed and did not attain his majority till the 25th September 1879.

Held, that the words to "bring an action" as used in s 11, Act XIV of 1859, must be taken to be synonymous with the words to "bring a suit" and that the word "suit" must be construed in the same way as the word "suit" used in s 14, and following the decision of the majority of the Full Bench in *Huro Chunder Roy Chowdhry v. Shooroahonee Dobra* (9 W. R. , 402) must be taken to include execution proceedings, *Muthom a Doss v. Shambhoo Dutt* (20 W. R. , 53) dissented from.

Held, therefore, that as Act XIV of 1859 was applicable to the case previous to the date on which Act XV of 1877 came into operation, and as under s 11 the decree-holder was entitled to have the time during which he was a minor deducted from the period during which limitation was running against him, his right to execution was not barred when Act XV of 1877 came into force, and that being so, and the present application being made within three years of the date on which he attained his majority, execution of the decree was not barred. *Gurupadapa Basapa v. Virbhadiapa Irsangapa* (I L R. , 7 Bom. , 459) discussed, *Behary Lal v. Gobeidhun Lal* (I. L. R. , 9 Cal. , 446, 12 C. L. R. , 431) dissented from, *Nursingh Doyal v. Hurryhur Saha* (6 C. L. R. , 489), *Shumbhu Nath Saha Chowdhry v. Guru Churn Lahury* (6 C. L. R. , 437) approved.

THIS appeal arose out of an application for execution of a decree, dated the 29th April 1862, passed in favour of the Maharajah of Durbungah. When the decree was obtained the Maharajah was [749] a minor, and it was not disputed that he attained his majority on the 25th September 1879. The present application for execution was made on the 25th September 1882, and it appeared that certain proceedings had been taken in execution between the years 1862 and 1866, but that those proceedings terminated on the 5th September 1866 when the case was struck off the file, and that between that date and the present application no proceedings of any kind had been taken.

* Appeal from Appellate Order No. 57 of 1884, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated 22nd of January 1884, affirming the order of Babu Koylash Chunder Mookerji, the Subordinate Judge of that district, dated 10th of March 1883.

The first Court decided the question of limitation in favour of the decree-holder on the ground that Act XV of 1877 was applicable to the case, and that under s. 7 of that Act the decree-holder was allowed three years after attaining his majority, and that the present application was made within that period, the 25th September 1879 being excluded from such period under the provisions of s. 12.

In the lower Appellate Court it was contended on behalf of the judgment-debtor that, inasmuch as the Limitation Acts of 1859 and 1871 did not save applications for execution from being affected by the ordinary periods of limitation on the ground of minority of the decree-holder, but only "suits," the right to apply for execution in the present case was gone before the Act of 1877 was passed and that s. 7 of the latter Act could not apply, and the right could not be revived. The Court, however, held that Act XV of 1877 was applicable to the case, on the ground that the law applicable to proceedings in execution is not the law in force at the date of the institution of the suit, but the one in force at the time of the application as laid down in *Gurupadapa Basapa v. Virbhadrappa Irsangapa* (1 L. R., 7 Bom., 459), and as the decree-holder could not have applied for execution before that Act came into force, and as the application was made within the time limited by it, he was entitled to have the decree executed.

The appeal was accordingly dismissed with costs.

Against that decision the judgment-debtor now specially appealed to the High Court.

Baboo Behari Lall Mitter for the Appellant.—The decree being one passed in the year 1862, the Limitation Act applicable is Act XIV of 1859, and s. 7 of Act XV of 1877 has no application [730] to the case. Under the Act of 1859 the right to execution was barred, as under that Act the decree-holder was not entitled to any extension of time on the ground of minority as he would be now under the provisions of Act XV of 1877, and as the decree was barred before the latter Act came into force, the right to execution cannot be revived.

In support of these contentions, the following authorities were cited :—

Mungul Pershad Dicht v. Griya Kant Lahiri (L. R., 8 I. A., 123; I. L. R., 8 Cal., 51), *Behari Lall v. Goberdhun Lall* (I. L. R., 9 Cal., 446, 12 C. L. R., 431); *Muthooru Dass v. Shumbhoo Dutt* (20 W. R., 53), *Shumbhu Nath Saha Chowdhry v. Guru Churn Lahiry* (6 C. L. R., 437), *Nursingh Doyal v. Hurry-hur Saha* (6 C. L. R., 489), *Gurupadapa Basapa v. Virbhadrappa Irsangapa* (I. L. R., 7 Bom., 459).

Baboo Mohesh Chunder Chowdhry (with him Baboo Ram Charan Mitter) for the Respondent

The Limitation Law applicable to the case is Act XV of 1877 (*Gurupadapa Basapa v. Virbhadrappa Irsangapa* (I. L. R., 7 Bom., 459) and the right to take out execution was not barred before that Act came into force. Though it may be said that under s. 20 of Act XIV of 1859 the right was barred before Act XV of 1877 was passed, that is not so, for s. 20 of Act XIV of 1859 must be read in conjunction with s. 11 of that Act. Under the latter section, if at the time when the "right to bring an action" first accrues, the person entitled to such right is under a disability, the "suit" may be brought by him within the same period after the disability ceases. The words "right to bring an action" is merely another way of expressing "right to sue," and the word "suit" is used in the same section in the same sense as the word "action." Now in s. 14 the word "suit" is used in precisely the same sense as the word "action" is now in s. 11, and as used in that section it has been held by the

majority of a Full Bench of the Court in the case of *Huro Chunder Roy Chowdhry v. Shoonodhonee Debia* (9 W. R., 402) to include any proceeding instituted in [751] a Court of Justice, and would thus include a right to sue out execution. Therefore the words "right to bring an action" in s. 11 must be construed in the same way and not in their restricted sense, and if that is done they would include a right to apply for execution. Then the decree-holder would under that section be entitled to three years, after he had attained his majority, in which to apply for execution, and as he did not attain his majority till the 25th September 1879, the right was not barred when Act XV of 1877 came into force. The period allowed under that Act is the same, and as the present application was made within that period the decision of the lower Courts is correct.

Baboo Behari Lal Mitter in reply.

The **Judgment** of the High Court (MITTER and NORRIS, JJ.) was as follows:—

Mitter, J. (NORRIS, J., *concurring*)—The question for decision in this case is whether the execution of a decree, dated 29th April 1862, is barred by the law of limitation or not, the present application for its execution being made on the 25th September 1882. When the decree was obtained the decree-holder was a minor and his estate was in the Court of Wards. It appears that certain proceedings relating to the execution of the decree were taken between the years 1862 and 1866, and on the 5th September 1866 the execution case was struck off. Between that date and the present application no proceeding was taken either by the Court of Wards, or by the decree-holder after he attained his majority, which the Courts below have found was on the 25th September 1879. The lower Courts have decided this question of limitation in favour of the decree-holder. It has been held that s. 7 of the Limitation Act of 1877 entitles the decree-holder to make his application within three years from the date on which he attained majority. If the Limitation Act of 1877 is the Act applicable to this case, it is not disputed that the present application is within time.

It was not disputed, probably because it has now been conclusively settled, that either the day on which the decree-holder attained his majority or the day on which the application for execution is made, must be excluded from computation. One [752] of these two days being excluded the application is made on the last day allowed by law, if the law is such as has been contended for by the learned vakeel for the respondent. Against the judgment two points have been made before us—*First*, that the decree being a decree of the year 1862, when the Limitation Act of 1859 was in force, s. 7 of the Limitation Act of 1877 has no application. In support of this contention the learned vakeel for the appellant has relied upon the well-known decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Mungul Pershad Dicht v. Gya Kant Lahiri* (L. R., 8 I. A., 123, 1 L. R., 8 Cal., 51), he has further relied upon the decision of this Court in *Behari Lal v. Gobarbhun Lal* (I. L. R., 9 Cal., 446, 12 C. L. R., 431). In this latter case this Bench held, upon the authority of *Mungul Pershad Dicht's case*, that an application for execution made after the Limitation Act of 1877 came into force, in a suit which was pending at the time when Act XIV of 1859 was in operation, must be governed by the provisions of the latter Act. It was contended that if the law laid down in this last mentioned case be correct, then the lower Courts are not right in applying the provisions of s. 7 of the Limitation Act of 1877, but that the law applicable was the Limitation Act of 1859. That being so, it was further contended that under the Limitation Act of 1859, the execution was barred by limitation, because

under that Act, it was contended, the decree-holder was not entitled to any indulgence on the ground of minority, and in support of that contention the ruling in the case of *Muthoor Dass v. Shumbhoo Dutt* (20 W. R. 53) was cited. The next point that was made was that the present application is barred by limitation, because at the time when the Act of 1877 came into force, the decree was altogether barred by limitation, and that contention is also based upon the ground that under Act XIV of 1859 the decree-holder is not entitled to any indulgence on the ground of minority. It was contended that if, in the year 1877 when Act XV of that year came into operation, the present decree was not capable of being enforced, nothing in the Act itself would revive the [753] right to take out execution, which right had then been extinguished under the old law. In support of this contention the learned vakeel for the appellant has relied upon two decisions of this Court, *Shumbhu Nath Saha Chowdhry v. Guru Churn Lahury* (6 C. L. R., 437) and *Nursingh Doyal v. Hurryhur Saha* (6 C. L. R., 489). As regards the first contention, the learned vakeel for the respondent, as well as the lower Courts, rely upon a decision of the Bombay High Court in *Gurupadapa Basapa v. Virbhadrappa Irsangapa* (I. L. R., 7 Bom., 459). In that case the learned Judges dissented from the view laid down in *Behary Lall v. Goberdhun Lall* (I. L. R., 9 Cal., 446, 12 C. L. R., 431). This latter decision was a decision of this Bench, and I am free to confess that I overlooked in that case one important point, viz., whether or not, at the time when the Limitation Act of 1877 came into operation, there was any proceeding pending within the meaning of s. 6 of Act I of 1868. The learned Judges of the Bombay High Court say: "In the case quoted, *Behary Lall v. Goberdhun Lall*, 'proceedings' are identified with 'suit', but we think that where a decree has been obtained, the application for execution initiates a new set of proceedings." As to "proceedings" being identified with "suit" it seems to me that we held that proposition to be correct on the authority of the Privy Council decision in *Mungal Pershad Dicht's* case, and after hearing arguments in this case, and after considering the judgment quoted, I still adhere to that opinion, viz., that an application for execution of a decree is an application in the suit which resulted in the decree. That was distinctly held in *Mungal Pershad Dicht's* case, and we are bound by that decision. But at the same time it seems to me that, although it is an application in that suit, it may not be an application in a pending proceeding. The suit having matured into a decree could not properly be said to be pending thereafter. A proceeding to be a pending proceeding after the decree, must be initiated by an application for execution. But after a suit terminates in a decree, if nothing further is done, it cannot be said to be a pending proceeding. It is on that ground that I think we were not right in the deci-[754]sion in *Behary Lall v. Goberdhun Lall* (I. L. R., 9 Cal., 446, 12 C. L. R. 431). There we assumed as a fact that the proceedings were pending, although there was nothing on the record to show that anything in the shape of proceedings were pending. Then, as regards the next contention, it seems to us that the view taken by this Court, if I am permitted to say so, in the decisions in *Shumbhu Lall Saha Chowdhry v. Guru Churn Lahury* (6 C. L. R., 437), *Nursingh Doyal v. Hurryhur Saha* (6 C. L. R., 489) is quite correct, and I entirely concur in that view, not because the words "right to sue" in s. 2 of Act XV of 1877 necessarily mean "right to sue out execution," but because from the provisions of that section and other sections in that Act it is clear that it was the intention of the Legislature to extend the provisions of that section to proceedings in execution also. Mr. Justice PONTIFEX, at page 493, referring to s. 2, Act XV of 1877, says: "No doubt there is some foundation for this argument," viz., (the argument which was urged, then, that the words used were 'to revive any right to sue,' and that

these words did not include a right to take out execution), "from the imperfect language used in the Act, but we think that s. 2 at least indicates the policy of the Act." Upon this ground it was held that it was the intention of the Legislature (as far as it could be gathered from that section and other sections of the Act) to extend the provisions of s. 2 of the Act to applications for execution also. We, therefore, come to the conclusion that if it can be shown that this application, if made just the day before Act XV of 1877 came into operation, would have been barred, then s. 7 of the Act of 1877 would have no application. The question therefore is whether the decree was barred on that date. Now, upon this point, it is quite clear that the law to be looked at is Act XIV of 1859, because that has been held by the Judicial Committee of the Privy Council in *Mungal Pershad Ditchit's* case. The decree is dated 1862, when Act XIV of 1859 was in force; and, although there had been an intermediate Limitation Act in 1871, it was held by their Lordships of the Judicial Committee that, if the decree is dated at a time when Act XIV was in force, that Act alone would govern the application for execution of [755] decree. We, therefore, come to the consideration of the question whether under Act XIV of 1859 the decree-holder would have been barred if he had made his application in the year 1877. The answer to this question depends upon the construction to be put upon ss. 11 and 20 of the Limitation Act of 1859. Section 20 says. "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force within three years next preceding the application for such execution." That is the general position, viz., that unless there is some proceeding taken within three years next before the application it would be held to be barred by limitation. It was pointed out in some cases decided under the old Act, that there is a defect in the language of the section, and that it really means that no process of execution shall issue from any Court not established by Royal Charter unless an application for execution shall have been made within three years from the date of the decree, etc. Now, in this case, if s. 20 applies, there is no doubt that the application was barred by limitation, because the date of the decree is 29th April 1862, and the last proceeding taken was struck off on the 25th September 1866, and nothing was done between that date and the date when the Act of 1877 came into operation. Therefore, clearly, under s. 20 the application made on that date should have been held to be barred by limitation. Therefore, unless the decree-holder was entitled to rely upon s. 11 of the Limitation Act of 1859, the present application must be held barred. Upon this point the learned vakeel for the respondent relied upon a Full Bench decision in *Huro Chunder Roy Chowdhry v Shoorodhoney Debia* (9 W. R., 402), that was a decision upon the construction of s. 14 of the Limitation Act of 1859. The same difficulty arose in applying s. 14 to execution proceedings as in applying s. 11, and it was held by the majority of the Court in that case that the word "suit" must not be construed in a restricted sense, and that it means any proceeding instituted in a Court of Justice. Having regard to the arguments used in support of this conclusion I do not see any distinction between the construction [756] tion to be put as regards this point upon s. 14 and s. 11. No doubt in s. 14 the words used are. "The time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, etc.," and in s. 11 the words used are: "If at the time when the right to bring an action first accrues the person to whom the right accrues is under a legal

disability, the action may be brought by such person." But it seems to me that the words "to bring an action," may be converted into the words "right to bring a suit," and that is also clear because in the section itself the word "suit" has been subsequently used as a substitute for the word "action." If we give effect to the argument upon which this broad construction was put on the word "suit," then we are compelled to come to the same conclusion as to the construction to be put upon s. 11 as the learned Judges in the last mentioned case came to as to the construction to be put on s. 14. Therefore it seems to me that s. 11 also applies to execution proceedings. No doubt this view is opposed to that expressed in the decision in *Muthoora Dass v. Shumhboo Lall* (20 W. R., 53) and the cases there cited, but the decision in *Huro Chunder Roy Chowdhry v. Shoorodhoney Debta* (9 W. R., 402) being a Full Bench decision, and we agreeing with the reasons given in that judgment, are not bound by the decision and the decisions cited therein. For these reasons I am of opinion that under Act XIV of 1859 the decree had not been barred by limitation at the time when Act XV of 1877 came into force. There is only one point which remains to be noticed, viz., that when the Act of 1877 came into operation the decree-holder was not in a position to execute the decree as he was then under the guardianship of the Court of Wards, but this would not prejudice his rights, it has been so held by the Privy Council in the case of *Phoolbas Koonwar v. Lalla Jogeshur Sahoy* (I L. R., 1 Cal., 226).

On these grounds I am of opinion that the decisions of the lower Courts are correct. The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[As regards retrospectivity, see the Notes to (1889) 16 Cal., 267, in the LAW REPORT REPRINTS; see also (1894) 18 Mad., 482, (1909) 10 C. L. J., 463.]

[757] APPELLATE CIVIL.

The 16th May, 1881

PRESENT.

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND
MR JUSTICE BEVERLEY

Mahomed Gazee Chowdhry Plaintiff

versus

Ram Loll Sen and others Defendants.

Execution of decree—Sale—Application by judgment-creditor to be permitted to bid at sale—Refusal—Purchase by judgment-creditor—Invalidity of sale—Civil Procedure Code, Act XIV of 1882, s. 294.

A mortgagee having obtained a decree, declaring his lien on certain property, put up for sale in execution of this decree the mortgaged property. The decree-holder asked for, but was refused leave to bid at the sale, but notwithstanding such refusal, purchased the property in the name of a third person.

* Appeal from Original Decree No. 169 of 1882, against the decree of F. W. J. Rees, Esq., Judge of Naskhally, dated the 4th of April 1882

Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession of the property

The defendants contended that, inasmuch as the plaintiff (decree-holder) had been refused leave to bid at the sale, his purchase could not be enforced. *Held*, that the plaintiff had been guilty of an abuse of the process of the Court, in bidding at the sale and buying the property bonami, and that the sale, therefore, ought not to be enforced

THIS was a suit to recover possession of a 10-anna share in a certain taluq and for mesne profits.

The plaintiff stated that in 1281 B. S. he lent a sum of money to Aktuinessa and Maimona Bibi, and that as security for this advance they executed a bond mortgaging to him the 10 annas of the taluq above referred to. That on the 23rd August 1879 he instituted a suit, and obtained a decree against them on the 9th October declaring his lien on the property

That in execution of this decree, property was sold and was purchased by his benamidar, Chunder Kant Dass, but Chunder Kant's possession was opposed by the defendants, the plaintiff, therefore, brought the present suit to recover possession.

The defendants stated that the plaintiff had asked permission from the Court to bid at the sale, and that such permission had been refused, but that notwithstanding such refusal, the plaintiff had purchased the property in the name of Chunder Kant Dass, and they contended that the sale therefore was void.

The Court of First Instance found that the Court had refused to [758] allow the plaintiff to bid at the sale, and that, therefore, the purchase through Chunder Kant Dass was fraudulent and could not be enforced, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court

Baboo *Rashbehari Ghose* and Moulvi *Seraful Islam* for the Appellants contended that, no objection having been made by the judgment-debtor to the sale under s. 294 of the Code of Civil Procedure, the suit should not have been dismissed. That s. 294 did not make the sale void, but only voidable at the application of the judgment-debtor—*Javherbai v. Haribhai* (1 L. R., 5 Bom., 575).

Baboo *Bhuban Mohan Doss* and Baboo *Ratneswar Sen* for the Respondents relied on the case of *Rukhinee Bullubh v. Brojonath Sircar* (1 L. R., 5 Cal., 308) as showing that without permission of the Court such a purchase would be invalid.

Judgment of the High Court was delivered by

Garth, C.J. (BEVERLEY, J., *concurring*)—The plaintiff in the suit was the mortgagee of certain property. He brought a suit to enforce his rights, and obtained a decree for sale, and the property was sold in execution under that decree.

The mortgagee then applied to the Court to be allowed to bid at the sale, but his application was refused. He, however, notwithstanding that refusal, purchased the property through a benamidar, and the Court, in ignorance of the fact, confirmed the sale.

The mortgagee then brought this suit against the mortgagor, and other persons who had purchased a portion of the mortgagor's interest, for possession of the mortgaged property, and for mesne profits, and the defence was that the plaintiff had bought the property, not only without the permission, but contrary to the express orders of the Court, and that consequently he had no right to enforce his sale.

The Judge of the Court below has dismissed the suit upon the ground that the plaintiff was guilty of a fraud ; and that the purchase was one which the plaintiff had no right to make, having regard to s. 294 of the Code.

Upon appeal it has been contended by the plaintiff that the [759] Court below was wrong ; and that s. 294 in its present amended form does not render such a sale absolutely void, but only voidable by an application to the Court under the last clause of the section, which runs thus : " When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale, and the costs of such application and order and any deficiency of price, which may happen on the resale, and all expenses attending it, shall be paid by the decree-holder."

It is contended that a purchase made by a mortgagee, without the permission of the Court, is not *ipso facto void*, but only voidable at the instance of the mortgagor, under the clause which I have just read, and in support of that view we have been referred to a case of *Javherbai v. Haribhai* decided by the Bombay High Court and reported in I. L. R., 5 Bom., 575, in which the Court says " In the absence of such an application (that is, an application made under the last clause of s. 294), the Code does not, in s. 294, contemplate a sale being set aside."

But in order to understand that case correctly, we must see what the nature of the suit was. A mortgagee had purchased property under a decree without the permission of the Court, and having done so, he failed to deposit the earnest money, in consequence of which the Court ordered the property to be sold again, and another person bought it for Rs. 125 less than what had been bid by the defaulting purchaser at the first sale.

- The mortgagor then sued the mortgagee, the first purchaser, for Rs. 125, upon the ground that he had been a loser to that extent by reason of the first purchaser's default, and the answer to that suit by the mortgagee was, that he had purchased without the permission of the Court, and that his purchase was consequently void

Of course this was no defence. His purchase would only be void at the option of the mortgagor. If the mortgagee chose to bid without permission, and made a bad bargain, he could not, of course, take advantage of his own wrong to throw his purchase [760] up. His purchase could only be avoided at the instance of the mortgagor, or of somebody who was interested in setting it aside.

Another case (*Rukhinee Bullubh v. Brogonath Sircar*) to which we were referred, and which is applicable here, is reported in I. L. R., 5 Cal., 308. That was a suit brought by a mortgagor to set aside a purchase made by a mortgagee without permission of the Court, when Act X of 1877 was in force ; and consequently before the clause, which I have just read, formed part of s. 294, and the Court held that it was competent to the plaintiff to set the purchase aside.

At that time a regular suit was the only remedy which the mortgagee (?) could take ; but now he has a further remedy. He can, if he chooses, by a summary application, not only have the sale set aside, but he may also recover the costs of the application, and any deficiency in the price which may happen on the re-sale, and all expenses attending it.

But in this case the plaintiff is in a much worse position. He has not only not obtained the permission of the Court, but he has applied to the Court and his application has been refused, and then knowing that his own bidding would not be accepted, and that the Court would not confirm any purchase

which he might make, he gets a benamidar to buy for him, and is guilty of an abuse of the process of the Court, and now he asks as against the mortgagor that his sale should be enforced. It is clear that the Court below was quite right in dismissing his suit

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[This case was followed in (1909) 32 Mad , 242 See also (1900) 5 C W N., 265 (267) ; (1901) 23 All , 478 (480) as regards maintainability of separate suit ; (1894) 21 Cal., 554, (560) which was a case under the Bengal Tenancy Act.]

[761] APPELLATE CIVIL

The 6th May, 1884

PRESENT ·

MR JUSTICE WILSON AND MR JUSTICE TOTTENHAM

Sorbojit Roy and others. Defendants

versus

Gonesh Prosad Misser and others..... Plaintiffs. ¹

*Jurisdiction of the High Court over Sonthal Pergunnahs—Act XXXVII of 1855, s. 2—Civil Procedure Code, Act XIV of 1882, ss 1 and 3—
Notifications in Gazette*

An appeal lies to the High Court from the Sonthal Pergunnahs in all civil suits in which the matter in dispute is over Rs 1,000 in value.

THE plaintiffs, the sons and nephews of one Chuni Lal Misser, brought a suit in the Court of the Sub-Judge of Deoghur in the Sonthal Pergunnahs for a declaration of their rights in respect of certain immoveable properties of the estimated value of Rs. 1,000, which had been attached and sold in execution of a decree obtained by the present defendants against Chuni Lal Misser, and had been purchased at the auction sale by the defendants

The Court of First Instance found that only the right, title and interest of Chuni Lal had passed to the defendants under their decree, and therefore gave the plaintiffs a decree declaring their right to the property claimed exclusive of the interest of Chuni Lal therein.

* Appeal from Appellate Decree, No. 806 of 1883, against the decree of W. Oldham, Esq., Deputy Commissioner of the Sonthal Pergunnahs, dated 12th January 1883, modifying the decree of S. S. Jones, Esq., Subordinate Judge, of Deoghur, dated 10th of August 1882.

The defendants (the auction purchasers) appealed to the Deputy Commissioner valuing their appeal at Rs. 825. The Deputy Commissioner affirmed the decree of the lower Court.

The defendants appealed to the High Court, and at the hearing the respondents' (plaintiffs') pleader objected—(1) that there was no provision for an appeal from the Sonthal Pergunnahs to the High Court, (2) that even if there was, the value of the present appeal (Rs. 825) was too low to allow the High Court to entertain it.

Baboo Kallu Kissen Sen for the Appellants

Baboo Hari Mohun Chuckerbutty for the Respondents.

The **Judgment** of the Court (WILSON and TOTTENHAM, JJ.) upon the preliminary points was as follows —

[762] **Wilson, J.** (TOTTENHAM, J., *concurring*).—A *preliminary objection* has been argued before us in this case, *viz.*, whether this appeal will lie.

The suit was brought in the proper Court within the Sonthal Pergunnahs in respect of property exceeding Rs 1,000 in value. It was brought on appeal before the Deputy Commissioner, and he states that the appeal is under Rs 1,000 in value. The objection has been put in two ways *First*, it is said that there is now no provision for an appeal from the Sonthal Pergunnahs to this Court, even in cases above Rs 1,000 in value. We think that argument is not well founded. The matter depends upon several enactments which must be noticed. The root of the special legislation is Act XXXVII of 1855. That Act says, *first*, in s 1, with regard to the districts now known as the scheduled districts, that they are removed from the operation of the general regulations of the Bengal Code, and of the laws passed by the Governor-General of India in Council, "except so far as is hereinafter provided." It says further "No law which shall hereafter be passed by the Governor General of India in Council shall be deemed to extend to any part of the said districts unless the same shall be specially named therein." Then it goes on to provide for special officers to administer civil justice in most cases, and whose decisions were to be final in cases not exceeding Rs. 1,000. But it provided in s. 2 "that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the general laws and regulations in the same manner as if this Act had not been passed." It therefore reserved suits of the value of Rs. 1,000 and upwards to be dealt with as they would have been before the passing of this Act under the ordinary laws. In effect such suits were at present left to be determined by the old tribunals, though a change was afterwards made, after that the Procedure Code, Act VIII of 1859, was passed. That Act was not by its own force put into operation in the scheduled districts. Section 385 says "This Act shall not take effect in any part of the territories not subject to the general regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council, or by the local Government to which such territory is subordinate and notified in the Gazette." That section, therefore, gave the local Government power to extend the Act to the scheduled districts by notification in the Gazette. Accordingly, on the 19th of August 1867, a notification appeared in the *Calcutta Gazette* by which Act VIII of 1859 with a subsequent amending Act were extended to the Sonthal Pergunnahs. There were in the notification certain modifications and qualifications which it is unnecessary now to notice. Between the date of that notification in 1867 and the passing of the next Procedure Code in 1877, it was repeatedly held that Act VIII of 1859 was in force in the Sonthal Pergunnahs, and under it, appeals to

this Court were from time to time entertained. The cases on the point are numerous, and it is unnecessary to refer to them in detail.

Then came the Code of 1877 (Act X), and that Act said in s. 1, after giving the short title and the commencement of the Act, that "this section and s. 3 extend to the whole of British India. The other sections extend to the whole of British India except the scheduled districts." Then in s. 3 it said, "the enactments specified in the first schedule hereto annexed are hereby repealed": and amongst the Acts repealed is Act VIII of 1859. Therefore Act VIII of 1859 can no longer apply in the Sonthal Pergunnahs or elsewhere, because the repeal extended to the whole of British India. And the Code of 1877 does not, by its own proper force, apply in the scheduled districts, because it is only s. 1 and s. 3 that apply to the whole of British India. But s. 3 contains a further clause, "but when in any Act, regulation or notification, passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1861, or the Code of Civil Procedure, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code, or the corresponding part thereof." It appears to us that the effect of that is, that we should take the notification of 1867, strike out of it the words "Act VIII of 1859," and read into it in their place "Act X of 1877" subject to the qualifications contained in the notification itself.

Then followed the present Code of 1882, which contains provisions similar to those in the Code of 1877. It has a similar [764] s. 1 and a similar s. 3. It repeals the Code of 1877 with respect to the whole of British India including the scheduled districts, and it contains a similar provision that the Act itself, the Code of 1882, is to be taken as substituted in the place of Act VIII of 1859 and Act X of 1877, in any Act, regulation or notification.

We must, therefore, again go back to the notification of 1867, strike out of it what the Act of 1877 had inserted, and insert in its place the Act of 1882.

The effect is that the Act of 1882 is now in force in the Sonthal Pergunnahs subject to the qualification contained in the notification.

Then there remains a second question. It is said that even supposing that an appeal lies under the present law from the Sonthal Pergunnahs, still the value of this appeal is too low to allow this Court to entertain it. We think that is not a correct construction of the law. The question depends upon s. 2 of Act XXXVII of 1855. That section says: "All civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the general laws and regulations." By that section the question is made to depend on the value of the suit, not on the value of the appeal. Inasmuch as the suit in this case is over Rs. 1,000 in value, although the value of the appeal is less, there is an appeal.

[The learned Judge then proceeded to give a decision on the merits, and dismissed the appeal with costs.]

Appeal dismissed.

NOTES

[See the remarks upon this case in (1890) 18 Cal., 133 (138)]

[10 Cal. 764]
APPELLATE CIVIL.

The 20th May, 1884.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Behary Loll Doss and others. Defendants

*versus*Tej Narain... .. Plaintiff.¹*Bond, Suit on a—Penalty—Liquidated damages—Evidence—Oral evidence when admissible to show intention of parties to treat a clause in a bond as penal.*

Where a document contains covenants for the performance of several things, and then one large sum is stated to be payable in the event of a breach, such sum must be considered a penalty ; but when it is agreed [765] that if a party do or refrain from doing any particular thing, a certain sum shall be paid by him, then the sum stated may be treated as liquidated damages.

A bond for Rs. 20,000, which provided for payment of interest at the rate of Re. 1-4 per cent. per month, contained the following clause “ We hereby promise and give in writing that we shall pay year by year a sum of Rs. 3,000 on account of the interest . . . And in case of our failing to pay year by year the said sum of Rs. 3,000, the same shall be considered as principal and thereon interest shall run also at the rate of Re. 1-4 per cent. per month.”

And in a suit on such bond the defendants sought to adduce evidence to show that after the execution of the bond the plaintiff stated that the clause was intended to operate as a penal clause, and that the conditions therein would not be enforced

Held, that the clause was not penal, but in the nature of an agreement to pay liquidated damages, and that the plaintiff was entitled to a decree for the amount due in the bond with interest as agreed upon

Held, also, that the evidence tendered was not admissible

Bahsu Lakshmanan v Govinda Kanji (I L R , 4 Bom , 594) and *Hem Chunder Soon v Kally Churn Dass* (I.L.R , 9 Cal , 528) approved and distinguished

THE plaintiff brought this suit to recover the sum of Rs. 20,000 with interest due on a bond, dated the 30th June 1874

The bond provided for the payment of interest at the rate of Re. 1-4 per cent. per month, or Rs. 3,000 per year, year by year, the principal to be repaid in the month of Bhadro 1285 (August—September 1878), that in case of their failing to pay the said sum of Rs. 3,000 year by year the same was to be considered as principal, and interest was to run thereon at the same rate of Re. 1-4 per cent. per month, and that in the event of the yearly interest not being paid when due, the plaintiff was to be at liberty to recover the same by suit. The bond further mortgaged a 2-anna share in a certain taluq by way of security for the repayment of the loan, and contained clauses providing for the non-alienation of the taluq, etc., until the plaintiff should be repaid.

The defendants pleaded that the agreement to pay Rs. 3,000, year by year, and in the event of non-payment thereof that the same should be treated as

¹ Appeal from Original Decree No. 202 of 1882, against the decree of Moulvie Hafiz Abdool Karim, Khan Bahadoor, First Subordinate Judge of Bhaugulpore, dated the 31st of May 1882,

principal and interest paid thereon, was in the nature of a penalty and could not be enforced, and they also set up a contemporaneous oral agreement by which the plaintiff undertook that this clause should not be enforced.

[766] They also contended that, inasmuch as the plaintiff was at liberty to recover the amount of interest due each year by suit, he was not entitled to compound interest thereon, and that as the rate of interest was exorbitant, he should only be allowed the Court rate of 6 per cent. on the principal from the date on which it became due and repayable.

They further pleaded a payment of Rs. 10,000 in respect of the principal due on the bond for which the plaintiff had made no allowance

The lower Court gave the plaintiff a decree, holding that the agreement was not a penal one, and that the defendants could not be allowed to give evidence of the oral agreement for the purpose of varying the terms of the bond under s. 92 of the Indian Evidence Act. The Court also found that the payment alleged by the defendants had not been made in respect of this debt, but in respect of a totally different bond debt, and, holding that the plaintiff was entitled to the compound interest claimed, gave him a decree for a smaller amount than he claimed, on the ground that the compound interest had not been calculated in the proper manner.

Against that decree the defendants now appealed to the High Court.

Mr. *R. E. Twidale* for the Appellant

Baboo *Mohesh Chunder Chowdhry* and Baboo *Juggut Chunder Banerjee* for the Respondent.

The **Judgment** of the High Court (TOTTENHAM and NORRIS, JJ) was delivered by

Tottenham, J.—This is an appeal from a decision of the Subordinate Judge of Bhaugulpore. Two points have been raised by the learned pleader for the appellant in support of the appeal. The first point is that, upon a true construction of the bond, the clause stipulating for the payment of interest at 15 per cent. per annum upon unpaid interest should have been construed as a penalty clause and not as a clause entitling the plaintiff to such interest as liquidated damages. The words of the bond are as follows —“In case of our failing to pay year by year the said sum of Rs. 3,000 the same shall be considered as principal, and thereon interest shall run [767] also at the rate of Re. 1-4 per cent. per month.” No doubt at times some difficulty arises in deciding whether the sum named in a contract to be paid upon a breach is a penalty or liquidated damages. But we do not think there is any difficulty in this case. The law upon the construction of contracts in this respect is thus laid down in Chitty on Contracts, 7th edition, p. 782 “It has been said to be very difficult to lay down any general principle in cases of this kind, but still there is one which may be safely stated, viz, that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty, but where it is agreed that if a party do (or as in this case refrain from doing) such a particular thing, such a sum shall be paid by him then the sum stated may be treated as liquidated damages.” The rule is stated in the words used by HEATH, J, in *Astley v Weldon* (2 B and P., 346); and that case was said by TINDAL, C. J., in *Kemble v. Farren* (6 Bing, 141) “to be decided on a clear and intelligible principle”, and in *Sparrow v Paris* (7 H. and N., 594), BRAMWELL, B., in giving the judgment of the Court of Exchequer, says. “It is a sum payable in one event, it is not a sum to secure the performance of several matters, this is the distinction upon which the

question turns, the names the parties give, the money, penalty or liquidated damages are immaterial." In this case the payment to be made depends upon the happening of one event only, viz., the non-payment of Rs. 3,000 as interest at the end of the current year in which such interest should have been paid. We are, therefore, of opinion that Mr. *Twidale's* first point fails.

The second point urged was that the Subordinate Judge was wrong in refusing to receive parol evidence tendered by the defendants to show that after the execution of the bond the plaintiff stated that the clause in question was intended to operate as a penalty clause, and that the conditions therein contained would not be enforced. In support of this contention we were referred to two cases, viz., *Baksu Lakshman v Govinda Kanji* (I.L.R., 4 Bom., 584), and *Hem Chander Soor v. Kally Churn Das* (I. L. R., 9 Cal., 528). If we may say so, we [768] entirely concur in those decisions; indeed, the luminous and able judgment of MELVILL, J., in the Bombay case cannot but commend itself to the mind of every lawyer. But we are of opinion that the principle upon which those cases were decided is not applicable to the present case. But suppose it is, ought it to be applied in this case? We think not. MELVILL, J., in *Baksu Lakshman v Govinda Kanji* says "The rule, which on a consideration of the whole matter, appears to me most consonant, both to the statute law and to equity and justice, is this, namely, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement, but if it appear clearly and unmistakeably from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale, and, thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement." Now, if we apply this rule, it is impossible to say that it appears clearly and unmistakeably from the conduct of the parties that the clause in question has been treated as a penalty clause, "the Court, therefore, will not give effect to it as a penalty clause," and will not, therefore, admit parol evidence of an alleged oral agreement that it was to be treated as such. Mr. *Twidale* urged that the fact of the plaintiff's abstaining from suing for the interest of each year as it became due was evidence of the intention of the parties to treat the clause as a penalty clause. We are unable to agree with him, if it is evidence of anything, we think it is evidence of a contrary intention. In our judgment the second point fails, and we think this appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

["Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal money, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty," (1906) 34 Cal., 150 (158), see also (1886) 13 Cal., 164 (169) On the point as to oral evidence, see (1901) P. R., 72 = (1901) P. L. R., 114]

[769] APPELLATE CIVIL.

The 9th May, 1884.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Secretary of State for India in Council.....Appellant

versus

Sham Bahadoor and another..... ..Respondents.

Land Acquisition Act (X of 1870), ss. 27, 28, 30, 35—Construction—Appeal from decision of Judge and Assessors, Right of—Collection charges, Amount of, to be deducted in cases of mokurrari lease.

In a case under the Land Acquisition Act, if there be a difference of opinion between the Judge and the Assessors, or any of them, upon a question of law or practice or usage having the force of law, but ultimately they agree upon the amount of compensation, s. 28 must be taken to apply, and no appeal will lie against the decision of the Court with reference to the point upon which the Court and the Assessors differed.

If, however, in addition to differing upon any question of law, &c., they ultimately differ also as to the amount of compensation to be awarded, s. 28 does not apply, but under s. 35, coupled with s. 30, in such a case an appeal will lie, and in such appeal all questions decided by the lower Court, whether the opinion of the Assessor coincided with that of the Judge or not upon these questions, are open to the parties in the Appellate Court.

When in a land acquisition case it was shown that the land to be acquired was subject to a mokurrari lease in favour of the Government, and the Court in estimating the compensation had deducted 5 per cent from the rent on account of collection charges. Held, that such deduction was excessive, and that, having regard to the fact that the amount was Rs. 85-4-0, and was collected only once in a year, 4 annas was all that should have been deducted.

THIS was an appeal against a decision passed under s. 35 of the Land Acquisition Act of 1870:

The land sought to be acquired by the Government measured 13 bighas and odd cottahs situated in Bankipore, pergunnah Azimabad, and the amount of compensation tendered was Rs. 1,321-6, besides the additional compensation payable under s. 42.

The Deputy Collector, who made the reference to the District Judge, was of opinion that the whole of the land in question was covered by a mokurrari lease granted by the predecessor in title of the claimants on the 1st January 1808 in favour of the Government, when, as the claimants contended, only 7 bighas of the [770] land was subject to that lease, and that the residue was not affected by it.

Upon the basis of that lease the Collector calculated that, as the annual rent was Rs. 85-4-0, and as deductions on account of the Government revenue and collection charges should be made, the actual amount enjoyed by the proprietors was Rs. 66-1-1 1/5. And allowing twenty years' purchase for that actual profit, tendered the sum of Rs. 1,321-6-0. The collection charges were estimated by him at 10 per cent.

* Appeal from Original Decree No 320 of 1882, against the decree of H. Beveridge, Esq., Judge of Patna, dated 25th of September 1882.

The District Judge and the Assessors differed in the amount of compensation which they considered should be awarded. The latter were of opinion that the whole of the land was covered by the lease, and awarded compensation calculating the profits of the land in question upon the basis of the mokurrari rent; whereas the former was of opinion that only 9 bighas were affected by the lease, and accordingly awarded compensation upon the basis of the mokurrari rent as regards those 9 bighas and as regards the remaining 4 bighas odd cottahs upon the amount of rent which, according to the evidence, the claimants would be entitled to realize if the land was let at a reasonable rent. Upon that basis, after allowing for collection charges at 5 per cent. and estimating the value at twenty-three years' purchase, he awarded Rs. 5,129 as compensation, together with the usual 15 per cent. additional and costs.

Both parties being dissatisfied with this decision appealed to the High Court.

Baboo *Annoda Pershad Banerjee* (senior Government Pleader) for the Appellant.

Munshi *Mahomed Yusuf* and Baboo *Saligram Singh* for the Respondents.

The main question between the parties was, whether the whole of the land in question was covered by the mokurrari lease above referred to or not, and if not, how much was unaffected by it, but there was a further question raised, *viz.*, whether either party had a right of appeal to the High Court at all under the provisions of the Land Acquisition Act

[771] Upon this latter question the **Judgment** of the High Court (MITTER and NORRIS, JJ) was as follows —

Mitter, J.—This is an appeal against a decision passed under s. 35 of the Land Acquisition Act of 1870. The Assessors disagreed with the Judge as to the amount of compensation to be allowed. The District Judge has allowed Rs. 5,129, whereas the Assessors were of opinion that the claimants, the respondents before us in this case, were entitled to a sum considerably less than this. This difference of opinion between the Assessors and the District Judge has arisen in the following way. The land, which is sought to be taken for public purposes on behalf of Government under the Act in question, according to the Deputy Collector, who made the reference to the District Judge, measures 13 bighas odd cottahs. The Deputy Collector was of opinion that the whole of this land is covered by a mokurrari lease granted by the predecessors in title of the claimants on the 1st January 1808 in favour of Government. On the other hand, the claimants contended that out of the aforesaid lands only 7 bighas are covered by the said lease, and the residue, *viz.*, 6 bighas odd cottahs, were not covered by the lease. The Assessors being of opinion that the whole of the land was covered by the lease awarded compensation calculating the profits of the land in question upon the basis of the mokurrari rent, whereas the District Judge calculated the compensation receivable by the claimants, as regards 9 bighas, upon the basis of the mokurrari rent, and as regards the remaining 4 bighas odd cottahs upon the amount of rent which, according to the evidence, the claimants would be entitled to realize if the said lands were let at a reasonable rent. Therefore, one of the questions which we have to decide, and which is also, it seems to us, the main question upon the merits, is whether the whole of the 13 bighas odd cottahs is covered by the mokurrari lease mentioned above, or only a portion of it, but a preliminary question as to whether or not in this case there is a right of appeal was discussed in the course of the argument. That question arises in the following way: Under s. 27 of the Land Acquisition Act of 1870 the Assessors are to record their

opinion upon the whole case; then s. 28 says: "In case of a difference of opinion between [772] the Judge and the Assessors, or any of them, upon a question of law or practice or usage having the force of law, the opinion of the Judge shall prevail, and there shall be no appeal therefrom." Section 39 is to the effect that, "in case of difference of opinion between the Judge and both of the Assessors as to the amount of compensation, the decision of the Judge shall prevail, subject to the appeal allowed under s. 35." Then s. 35 says: "If the Judge differs from both the Assessors as to the amount of compensation, he shall pronounce his decision, and the Collector or the person interested (as the case may be) may appeal therefrom to the Court of the District Judge, unless the Judge, whose decision is appealed from, is the District Judge, or unless the amount which the Judge proposes to award exceeds Rs 5,000, in either of which cases the appeal shall lie to the High Court." We entertained some doubt whether, having regard to the provisions of s. 28, there was any right of appeal to either party in this case. It may be mentioned here that both the claimants and the Government being dissatisfied with the award in the lower Court have preferred appeals. No doubt at first sight it seems that if the difference be on a question of law, s. 28 prohibits an appeal, it says that in that case the opinion of the Judge shall prevail, and there shall be no appeal therefrom. But then again s. 30 says: "That in case of difference of opinion between the Judge and both the Assessors as to the amount of compensation, the decision of the Judge shall prevail, subject to the appeal allowed under s. 35." Section 35 also lays down without any restriction that an appeal will lie if there is a difference of opinion between the Judge and both the Assessors as to the amount of compensation. In this case there was a difference of opinion between the Judge and both the Assessors as to the amount of compensation, and, therefore, if we give effect to s. 35 we must come to the conclusion that there is an appeal. On the other hand, s. 28 provides that no appeal shall lie in any case in which there is a difference of opinion on a question of law between the Judge and the Assessors. We have to construe these sections in a way in which they may be reconciled with one another, we must construe them in some way in [773] which all these sections may have full effect given to them, and that can be done by putting this construction upon s. 28, viz, that if there be a difference of opinion between the Judge and the Assessors, or any of them, upon a question of law or practice or usage having the force of law, but ultimately they agree as to the amount of compensation, no appeal will lie against the decision of the Court with reference to the point upon which they differed, but if, on the other hand, they ultimately differed as to the amount of compensation, an appeal will lie under s. 35, and in that appeal all questions decided by the lower Court, whether the opinion of the Assessors coincided with that of the Judge upon these questions or not, would be open to the parties in the Appellate Court. For instance, there might be a difference of opinion between the Judge and the Assessors on a question of law, but ultimately they might agree as to the amount of compensation, there s. 28 would have full operation, and no appeal would be allowed, but if this difference of opinion on a question of law ultimately results in a difference of opinion as to the amount of compensation to be awarded, s. 35, coupled with s. 30, would allow the aggrieved party a right of appeal. We think that this is a reasonable construction of the sections cited above. Putting that construction we think that both the Government and the claimants are entitled to appeal against the decision of the lower Court. As regards the merits of these two appeals we find that the claimants do not question the rate of valuation adopted by the Judge, which is twenty-three years' purchase, we may, therefore, dismiss that point from

our consideration. The claimants in their appeal urged that the lower Court is in error in allowing collection charges at the rate of 5 per cent. It seems to us that, so far as the collection of the mokurrari rent is concerned, this deduction of 5 per cent. for collection charges appears to be too high. We disagree, therefore, with the Judge upon this point. At the same time we are of opinion that some charge, no doubt, would be incurred in collecting the mokurrari rent, and will hereafter consider as to what deduction should be made for collection charges.

[His Lordship then proceeded to deal with the facts of the case and with the construction to be put upon the mokurrari lease, and '[774] after coming to the conclusion that the view taken by the Assessors was the correct one, proceeded.] In this view, although with some hesitation, my brother NORRIS concurs. Having disposed of this point, we have now to determine the amount of compensation to which the claimants are entitled. We have now come to the conclusion that the whole of the land, which the Government now seek to take for public purposes, is covered by the mokurrari lease, and, therefore, we have the fact established that Rs. 85-4 is the amount of rent which the claimants derive from the Government annually. Having regard to the fact that this amount is collected once a year, we think that annas 4 would be a sufficient deduction to make for collection charges, and we, therefore, come to the conclusion that the claimants receive Rs. 85 nett from Government. We do not make any deduction on account of Government revenue. The claimants will have in future to pay the whole of the Government revenue of the mehal, and will not be entitled to any deduction on that account, as we capitalise also the Government revenue payable by the claimants in respect of the lands now taken. The District Judge is of opinion that twenty-three years' purchase is quite sufficient compensation, and there being no appeal upon that point we must take that figure. Then we have the value of the land at twenty-three years' purchase Rs. 1,955, to which shall be added 15 per cent., or Rs 293-4, the whole making Rs 2,248-4. We accordingly award the said amount of compensation to the claimants. As we find that the amount tendered by Government was Rs 1,331-6, and as we award Rs. 2,248-4, under s. 33 of the Land Acquisition Act of 1870, we think that the Government must bear the costs of the lower Court as well as of this Court

Norris, J.—I am not, as at present advised, quite certain that there is a right of appeal in this case. Upon all other points I fully agree with the judgment of my learned brother.

Appeal allowed and decree varied.

[776] APPELLATE CRIMINAL.

The 15th May, 1884.

PRESENT.

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Queen-Empress

versus

Uzeer.

Confession—Inducement to confess—Criminal Procedure Code, Act X of 1882,

s. 163—Evidence Act—Act I of 1872, s. 24.

A Deputy Magistrate, before taking down a statement from a person brought before him by the Police, noted on the paper on which he was about to take down the statement, the following words which, after excluding the Police Officers from his presence, he had verbally addressed to the accused:—"After excluding from my presence the Police Officers who brought him, I warned the accused that what he would say would go as evidence against him, so he had better tell the truth"—*Held*, that the use of such language was calculated to hold out an inducement to the prisoner to confess, and that such a confession was therefore inadmissible in evidence against him.

IN this case one Uzeer was charged with murder. It appeared that when brought before the Deputy Magistrate by the Police, the accused made a statement to the following effect, viz., that owing to a refusal on the part of his wife to get him a light, he had dragged her by her hair into an inner room and slapped her, and that on his getting a light and seeing that his wife was insensible, he, in his fright, cut her throat with a *dao*, and told the neighbours that she had committed suicide. This statement was prefaced with the following note by the Deputy Magistrate:—"After excluding from my presence the Police Officers who brought him, I warned the accused that what he would say would go as evidence against him, so he had better tell the truth."

The accused was subsequently committed to the Sessions Court on two charges (a) murder, s. 302 of the Penal Code, (b) culpable homicide, s. 304 of the Penal Code. The Judge differed from the assessors, and mainly relying upon the confession, found the accused guilty under s. 302, but sentenced him to transportation for life, as it had not been established that the accused had any intention at the time to cause death, although he knew that he was likely to cause death.

[776] The prisoner appealed to the High Court. No one appeared on the appeal.

The **Judgment** of the High Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—The appellant in this case, Sheikh Uzeer, has been convicted of the murder of his wife, and has been sentenced under s. 302, Indian Penal Code, to transportation for life.

We have read the proceedings of the Sessions Judge, and we are of opinion that the conviction cannot be supported. The prisoner and his wife were sleeping alone in their homestead on the night of the occurrence, the woman's throat was cut, and she died from the injury thus inflicted, and the consequent

* Criminal Appeal No. 198 of 1884, against the order of H. Muspratt, Esq., Sessions Judge of Sylhet, dated February 8th, 1884.

loss of blood. The theory of the prosecution is that the prisoner cut his wife's throat. The medical evidence does not support this theory. On the contrary, the native doctor considered that the wound might have been self-inflicted. It may be said that the opinion of a native doctor on a question of this kind is not of very great value, but this is the medical evidence whatever it may be worth. There is no testimony of a medical expert to support the theory of the prosecution that the wound was inflicted by the prisoner, and the only medical evidence on the record is against that theory, and in favour of the statement made by the accused on more than one occasion. The Sessions Judge permitted the witness Sarai Bibee to say that the accused said to the darogah that his wife refused to give him water when he wanted to go out and ease himself, so he struck her once and she fell insensible, and then he cut her throat. This evidence being inadmissible, the Sessions Judge should not have recorded it. The conviction is mainly based upon a confession alleged to have been made by the accused to the Deputy Magistrate. This confession is prefaced with the following note. "After excluding from my presence the Police Officers who brought him, I warned the accused that what he would say would go as evidence against him, so he had better tell the truth." A Magistrate of the first class ought to know that to tell a prisoner that he had better tell the truth is a violation of the provisions of the law (*See* s 163 of the Code of Criminal Procedure) The use of this language has been repeatedly decided to render a confession [777] inadmissible, and we think that in consequence of this inducement having been held out to the prisoner, the confession in the present case must be rejected. We may observe that it is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him. Putting aside the inadmissible confession and the evidence of a further confession made to the Police, there remains no legal evidence upon which the prisoner can be convicted. We therefore set aside the conviction and direct that the appellant be acquitted and released. A copy of this judgment should be sent to the committing Magistrate

Appeal allowed

[10 Cal. 777]
PRIVY COUNCIL

The 9th February, 1884

PRESENT.

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH AND SIR A. HOBHOUSE.

Moung Hmoon Htaw Defendant
versus
Mah Hpwhah..... Plaintiff

[On appeal from the Court of the Recorder of Rangoon.]

Act XVII of 1875, s. 4—Buddhist law in British Burmah—Wife's claim upon husband for maintenance.

By the Buddhist law of marriage, as administered in the Courts of British Burmah, it is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessities; but it appears that this law would not be applicable where she has sufficient means of her own. No authority has been found for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so.

A wife, married according to Burmese rights and customs, claimed from her husband in a Court in British Burmah, a certain sum for her expenses of necessities and living for a past period during which she had maintained herself. Held, that this was a question "regarding marriage," within the meaning of the Burmah Courts Act XVII of 1875, s. 4, and that, therefore, the Buddhist law formed the rule of decision. The law, as stated above, was accordingly applicable.

Semble, that if this had been a case in which, by the above Act, a Court would have had to act according to the rule of justice, equity, and good conscience, there would have been no ground for making the husband [778] liable upon this claim regard being had to the Burmese law as to the property of married persons.

APPEAL from a decree (21st June 1881) of the Recorder of Rangoon.

The principal question raised by this appeal was whether, by the Buddhist law prevailing in British Burmah, a husband was liable to pay for the maintenance of his wife for a period during which she, having had means of her own, had maintained herself.

The facts are stated in their Lordships' judgment.

The plaintiff, alleging herself to have been married to the defendant according to the customs of the Burmese, claimed from him Rs. 10,000 for the expenses of her living for five years during which she had maintained herself.

The defence was a denial of the marriage, and of the right of the plaintiff to any maintenance from the defendant.

The Recorder found the fact of marriage, and on the question of the liability of a husband, according to the law of Burmese Buddhists, to pay for the subsistence of his wife, expressed his opinion as follows:—

"There are many passages in the Menu Wonanna and Menu Thara Shwe Myeen Damathats, both recognized as of high authority, which show that a husband is bound to maintain his wife, and in the Menu Kyay Damathat, translated by the late Dr. Richardson, which is the Damathat hitherto

most generally used as a guide in questions of Burmese law, probably from the fact of its being the only one translated into English, in the chapter on the different kinds of wives, paragraph 14, page 14, the liability is clearly indicated. There it is laid down in the case of a husband going on a trading trip leaving a sufficiency for his wife's subsistence, that should she marry before the expiration of eight years he may take away all her property and sell her, and if there be debts she must bear them all. But if the husband does not leave subsistence for his wife, and shall be absent eight years trading, and she has not enough for her necessary food and clothing, and publicly incur debts for her subsistence, when her husband arrives he must pay them, and cannot say that they were contracted without his knowledge. Whether or not only one wife is per-[779]missible, according to the older Damathats, on page 93 of Menu Kyay Damathat, which at any rate is an old work, in s 46, book III, it gives the law when debts are incurred by a head wife, a lesser wife, or the six kinds of concubines. When a head wife incurs the debt for necessary expenses even without the husband's knowledge, and the creditor has informed him of it during her lifetime and she dies, he has to pay it with cent per cent interest. If it be incurred by a lesser wife he has to pay principal with 50 per cent. interest, and if a concubine who had not been purchased or connected by means of money, but who did not eat out of the same dish with him, then he has to pay the principal with 25 per cent. interest. In the Menu Wonanna, page 112, s. 116, referring to the husband going to a distant country, and expecting to remain there, it says he must provide subsistence before he leaves."

"Having found that the plaintiff is the wife of the defendant, although by mutual consent and for his convenience in trade, she lived in Rangoon whilst his residence was at Moulmein, his position is somewhat analogous to that of the husband who goes for the purpose of trading into a distant or foreign land, and is bound to supply his wife with subsistence according to his means and position. I see no reason why, because a woman happens to be a second wife, his liability to maintain her should not also attach as in the case of a first wife"

The Recorder decreed the claim with costs

On this appeal—

Mr. J. T. Woodroffe appeared for the Appellant.

The principal arguments for the appellant were that, on the assumption that the parties had been married according to Buddhist usage, two broad questions remained, on which depended the liability of the appellant, viz, *first*, whether the marriage had not been dissolved by the husband and wife having discontinued to live together for more than three years before the suit, the husband having refused to recognize the respondent as his wife, and she having expressed her desire to be divorced from him; *secondly*, whether, if the marriage still subsisted, the wife was entitled to the maintenance claimed, under the Buddhist law and [780] customs, which were binding on the parties. By Buddhist law the husband and wife might be divorced without any decree or order of Court, see *Mee Hneen Gnoang v. Nga Oung and Mee Lee** in which it was decided that neither a decree of Court, nor a written agreement, witnessed, were essential to divorce. Not only might divorce take place by mutual consent, which consent might be express or implied, see *Mee Thet Shay v. Nga Isan* (Select Decisions, Burmah, p. 3) but also, on certain terms agreed upon as

* 3 Jardine's notes on Buddhist Law, part 3 on Marriage; Appendix B, p. xi. This work is entitled Notes on Buddhist Law by the Judicial Commissioner, British Burmah. (Rangoon 1882.)

to the distribution of the profits of their property, at the will of either of the parties. Sparks's Code of British Burmah, chap. 3; *Shway Yin v. Mee Thoo Gneh* (4 Jardine's notes on Buddhist Law, App. III).

Lord FITZGERALD stated the opinion of their Lordships that, there having been no issue raised at the hearing as to divorce, this question could not now be argued.

Mr. J. T. Woodroffe continued

With regard, then, to the second question, viz., the right of the wife to maintenance under the circumstances of this case, it was submitted that this "regarded marriage," and was, therefore, to be decided according to the law indicated in Act XVII of 1875, s. 4, viz., Buddhist law. Marriage did *not*, of itself, independently of its form, and under all systems of law, operate as a contract entitling the wife to compel her husband to pay for her maintenance. The affirmative of that proposition appeared to have been put forward by one of the Judges of the Bombay Supreme Court in *Aiduseen Cursetjee v. Perozboye* (6 Moore's I A., 348), but it was not assented to by this Committee. There being then no authority for the general right under every system of law, of a wife to maintenance (as to which the observations of the Queen's Advocate, *arguendo*, in the case cited at p. 379, might be referred to), it followed that the wife's claim in this case could only rest on a liability on her husband's part created upon marriage by Buddhist law

[781] Marriage among Buddhists in British Burmah was merely a civil contract for co-habitation, involving the subordination of the wife to the husband, and the mutual performance of conjugal duties, *see* the Menu Kyay Damathât, Book XII, s. 1, and s. 30, Menu Tsaya Damathât, s. 59 (Jardine's notes on Buddhist Law, App. A, p. X), *Moung Ko v. Ma Shway Gel* (Sandford's Rulings on Buddhist Law, p. 15), Wagaru Damathât, part II, s. 1 (4 Jardine's notes on Buddhist Law, part III, p. 3)

According to the Buddhist law the husband and wife did not become united, so as to be regarded as one person. Nor did either husband or wife acquire any interest in the separate property of the other, whether originally belonging to such other or acquired by him or her, after marriage. Each of these kinds of property had their separate names. Husband and wife were, however, equally entitled to the joint profits of both, in other words, the profits arising from the employment by both of the separate property of either, as also were they equally entitled to all property acquired during marriage by their skill and industry. Sparks's Code of British Burmah, chap. 1, s. 14; 1 Jardine's notes on Buddhist law, part II, Menu Kyay Damathât, chap. XII, s. 3 (Menu, Richardson's translation, 1874, pp. 342, 344)

The respondent also was at best but a wife of the less degree, a first wife, or former wife, to whom the defendant had originally been married on becoming a married man, being alive, and not divorced. As to the position of such a wife, *see Mah Shway Chor v. Moung Oung Gyee* (4 Jardine's notes on Buddhist Law, part 5, p. V). Moreover, the wife had means of her own in this case, and carried on a trade, deriving profit from thus, employing her separate property. Even if the defendant could be held bound to maintain her, he would still have a defence in this suit on the ground that, by permitting her to use the joint profits to which he, as well as she, was entitled, he had contributed to her maintenance. Buddhist law did, no doubt, provide for the punishment of the husband or wife, who, being possessed of sufficient

*Richardson's translation of the Damathât; or the laws of Menu translated from the Burmese (Rangoon 1874), pp. 336, 347, 348.

means, [782] neglected to maintain his, or her, disabled spouse, if the latter should be in want. Such a rule of law accorded with the legislation in our Indian Code of Criminal Procedure in this respect. But the Recorder's conclusion was not supported by the texts, as they applied only to the wife wholly without means of subsistence. Reference was made to Menu, Richardson's translation, pp. 82, 84, 93, 94, 139, and 141. 3 Jardine's notes on Buddhist Law, p. 27.

The Respondent did not appear.

On a subsequent day, 9th February 1884, their Lordships' **Judgment** was delivered by

Sir R Couch.—The appellant was the defendant in an action brought by the respondent in the Court of the Recorder of Rangoon in which the respondent alleged that she was married in Rangoon to the appellant according to Burmese rights and customs, and claimed Rs. 10,000 for her expenses of necessaries and living for five years, deducting Rs. 1,400, the amount realized by the sale of a house given to her by the appellant. The appellant denied the marriage, and that the respondent was entitled to any maintenance. The Recorder found, as a fact, that she was the wife of the defendant by a validly constituted marriage, the Burmese law recognizing a plurality of wives, and the plaintiff being what is generally called a lesser wife. Their Lordships are of opinion that this was quite in accordance with the evidence. He then considered the question of maintenance, as to which the material facts may be taken from the evidence which the plaintiff herself gave.

They were married in Tagoo 1235 (about 1873 A. D.) The defendant is a trader in timber and a forester, and has forest leases in Zimmay, the Mine-loon-gyee forest. The plaintiff carried on a business of her own at Rangoon. At the marriage the defendant gave her a dower of Rs. 20,000 and they lived together for some time, principally at Rangoon, but the defendant's business frequently took him away. He wished her to reside at Rangoon, and requested her to live in a respectable style, which she did, entertaining the relatives and friends of the defendant, and he not giving her any money towards the expenses of those entertainments. The plaintiff always carried on a business [783] of her own, dealing in mineral oil and rice, and accumulated Rs. 80,000 in different kinds of property, and lived, she said, in the same style after marrying the defendant as she had done before. In the opinion of the Recorder the plaintiff received from the defendant about Rs. 23,500, but she said she had expended all that and large sums of her own in works of merit for the defendant at his request.

Upon the question of maintenance, the Recorder said: "There are many passages in the Menu Wonnana and Menu Thara Shwe Mveen Damathâts, both recognized as of high authority, which show that a husband is bound to maintain his wife, and in the Menu Kyay Damathât, translated by the late Dr. Richardson, which is the Damathât hitherto most generally used as a guide in questions of Burmese law, probably from the fact of it being the only one translated into English, in the chapter on the different kind of wives, paragraph 14, page 14, the liability is clearly indicated." Then after stating what was there laid down, he said he was of opinion that the plaintiff was entitled to maintenance suitable to her position as second wife, having reference to the defendant's means and ability to pay. The judgment, from which it is unnecessary to quote more, ended by saying that the plaintiff was not estopped from claiming for the period during which she lived at her cost, provided it was not barred by the law of limitation, and giving the plaintiff a decree for the amount claimed, viz., Rs. 10,000, and costs.

Since this judgment was given, Mr. Jardine, the present Judicial Commissioner of British Burmah, has published some valuable notes on Buddhist law, with translations of the Wonnana Damathât, and several others, on marriage and divorce, and inheritance and partition, with notes, and cases illustrating the Burmese law of marriage and divorce as now administered in the British Courts. In coming to an opinion upon this appeal, their Lordships have had the advantage of his additional information about Burmese law.

For the purposes of marriage, divorce, and inheritance, the property of the married persons is considered separate or joint.

The following is defined as separate property of the husband [784] and wife by Major Sparks in his Code, which has been used in the British Courts as an authority on Burmese law.—

- (1) What belonged to either before marriage.
- (2) What has been given specially to either since marriage.
- (3) What has come into the possession of either by inheritance from his or her own family since marriage
- (4) Clothes, jewels, and ornaments.

The profits or interest arising since marriage from the employment or investment of the separate property of either husband or wife, as also the property acquired during the coverture by their mutual skill and industry, are their joint property.

It is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessities, but it appears to their Lordships that this law would not be applicable where she has sufficient means of her own. They have not found any authority for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so

By the Burmah Courts Act, 1875, s. 4, it is enacted that where in any suit or proceeding it is necessary for any Court under that Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Buddhist law, in cases where the parties are Buddhists, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in British Burmah. And in cases not provided for by the former part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience. It appears to their Lordships that this is a question regarding marriage, and is to be decided according to the Buddhist law, but assuming that it is a case in which the Court is to act according to justice, equity, and good conscience, their Lordships have considered whether the decree appealed from can be supported on those grounds. The Recorder seems to have taken this view of the case, for he says: "It seems to me unjust that merely because a wife had tacitly lived at her own expense under a particular set of circumstances [78J] she should, as it were, be taken thereby to have contracted herself out of her rights, and be unable to recover them when those circumstances have become changed, and that through the fault of the husband." Their Lordships do not agree to this. Having regard to the Burmese law as to the property of married persons, they do not see in the facts of this case any ground in equity or good conscience for making the defendant liable for maintenance. It may be that he requested the plaintiff to live in a respectable manner, but

she incurred no additional expenses in consequence. It did not cause any change in her style of living, and it is not possible to assign any portion of her claim to that request.

It remains to be noticed that in the reasons for the appeal it is said that there had been a divorce according to Buddhist law by the conduct of the parties. This was not made a ground of defence in the defendant's written statement, and there was no issue upon it. And consequently their Lordships intimated to the Counsel for the appellant that they could not allow this question to be argued.

For the reasons above given their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to order the suit to be dismissed with costs in that Court. The costs of the appeal to be paid by the respondent.

Solicitors for the Appellant. Messrs Sanderson & Holland.

Appeal allowed.

NOTES.

[See (1893) L B R, (1893-1900), 31, where it was held that under the Buddhist Law in Burma, the wife cannot bring a suit for maintenance where she has independent means of subsistence.]

[10 Cal. 785]

PRIVY COUNCIL.

The 22nd and 23rd February, 1884.

PRESENT

LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Kishnanand.....Plaintiff

versus

Kunwar Partab Narain Singh.....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Limitation Act XV of 1877, sch. II, art. 109—Mesne profits—Interest.

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877, sch. II, art. 109.* An under-proprietor having

* [Art. 109 :—

Description of suit.	Period of limitation	Time from which period begins to run.
For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant	Three years	When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession.]

been dispossessed by a manager of the superior estate, appointed under the Oudh Taluqdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits.

[786] *Held*, that a person who had not himself received the mesne profits having come into possession of the taluq upon its being released from management under the above Act, would not be chargeable with sums, which, as it was alleged, might have been received by way of mesne profits, but had not been received in consequence of the manager's wilful default; there being nothing to show that such taluqdar could be charged with anything more than was actually received by him. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not.

APPEAL from a decree (15th December 1881) of the Judicial Commissioner of Oudh, affirming a decree (19th May 1881) of the Additional Judge of the Faizabad District.

In the lifetime of the late Maharaja Man Singh, taluqdar of Mehdaona in the Faizabad District, the appellant held possession in sub-settlement right ("hakh puktadari") of villages Dewariya and others, forming part of the taluq. After the death of the Maharaja, and whilst the taluqdari estates were in charge of a manager appointed by the Chief Commissioner (under powers conferred on him by the "Oudh Taluqdars' Relief Act" XXIV of 1870), the appellant was dispossessed, in January 1871, of his undertenure, for possession whereof he sued in the Court of the Settlement Officer then carrying on settlement operations in the Faizabad District. Both the manager, and the Maharani Subahao Koer, the Maharaja's widow, on whose behalf as guardian of a minor, then regarded as the probable successor to the taluqdari estates, were being managed, were made defendants. No claim was made for mesne profits. A decree in favour of the plaintiff was made by the Settlement Officer in 1873, and having been reversed by the Commissioner on appeal was, in the end, restored by order of Her Majesty in Council, dated 26th June 1879, the plaintiff regaining possession of his holding on 25th September 1879.

The suit out of which this appeal arose was instituted on the 26th July 1880 by the present appellant against the "Mehdaona estate," to recover Rs. 5,764 on account of mesne profits from the date of his dispossession of his undertenure, *viz.*, the 20th January 1871 to the 1st September 1879, when he recovered possession. He alleged that as the suit for possession had been [787] pending from 22nd May 1873 to 25th September 1879, he was unable to sue for mesne profits during that period, and that the cause of action had arisen at the latter date.

The taluqdari estate was, on the 1st October 1880, released from management, and was made over to the respondent, Kunwar Partab Narain Singh, to whom the estate had been adjudged by order of Her Majesty in Council, dated 13th August 1877. At the hearing the manager appointed under Act XXIV of 1870 did not appear, and on the 21st October 1880 this appellant petitioned that, as the estate had since the commencement of the suit been released from management, the respondent who had succeeded to it should be made defendant. This was ordered and the present respondent, appearing on summons as a defendant, the manager's name was struck off. Issues were fixed raising the question whether the plaintiff's suit for mesne profits, for the period anterior to the three years preceding the date of the institution of this suit, was barred by limitation, also as to the amount, and as to the costs of collecting rents; and whether any part of the realizable assets had not been received

by reason of want of ordinary care on the part of the officials managing the estate under Act XXIV of 1870; and if so, to what amount, and whether, with reference to art. 3, s. 4, and ss. 17 and 23 of the above Act, the plaintiff was precluded from receiving more than the sum actually realised by the manager.

On the question of limitation the Judge held as follows.

"It appears to me that the law, as it at present stands, provided expressly for such cases where the law of limitation worked hardly on the parties, and that it was the duty of the plaintiff to have moved the Court to provide, in its decree, for the mesne profits from institution of suit till the delivery of possession (s. 211 of Act X of 1877), and that, not having done so, the plaintiff must accept such remedy as remains to him by law. That limitation is three years under art. 109, sch. II of the Limitation Act. I have carefully examined the body of the Act, and can find no section which excludes, in a suit for mesne profits, the period during which a suit for possession is pending. When a plaintiff, seeking mesne profits, has been ousted by a decree of Court, the law (art. 109, sch. II) does take the [788] period elapsing between this legal but wrongful ouster, and the time when he succeeds in recovering possession, into consideration, but it makes no such exemption when the plaintiff has been otherwise ousted, as in this case."

And on the other issues his judgment was

"Generally they may be said to be, what are the mesne profits which plaintiff can legally recover? The estate was during the whole period held under Act XXIV of 1870."

Defendant contends they are only so much as was actually collected in the books of the manager.

• Mesne profits, as defined in s. 211 of the Civil Procedure Code, include more than actual realisations: they include such profits as the person in possession might with due diligence have received. The person in possession was the manager, and neither the present defendant, the present taluqdar, nor Trilokinath, who was, for a time, recognised as such, had any power to collect at all. He having, under Act XXIV of 1870, been debarred from making any alteration whatever, no want of due diligence can then be asserted against him personally.

Let us suppose, however, that there was negligence on the part of the management. Can defendant be held responsible for this? Looking at the terms of Act XXIV of 1870, I do not see that he can. He was, for the time, absolutely in the hands of the management. He could do nothing himself. He could not, under s. 23, obtain any redress against the management, and I am of opinion that plaintiff cannot recover as against the defendant.

The Judicial Commissioner upheld this judgment.

On this appeal,—

Mr. J. F. Leith, Q.C., and Mr. J. G. W. Sykes appeared for the Appellant.

Mr. J. Graham, Q.C., and Mr. J. T. Woodroffe for the Respondent.

For the appellant it was argued, first, that art. 109 of sch. II of Act XV of 1877 was inapplicable to this claim; secondly, that interest should have been allowed on such mesne profits as were recoverable. The present defendant had derived [789] benefit from the manager's having had the use of the mesne profits, because they had gone towards paying off the encumbrances on the estate, whereby it had been the sooner released from

management under Act XXIV of 1870. Mesne profits being treated as sums due at the end of each year, interest thereon should have been calculated and allowed by way of damages. Reference was made to the subsequent enactment in Act XIV of 1882, ss. 211, 212, also to the interest Act XXXII of 1839.

Lord BLACKBURN having intimated that their Lordships would hear counsel for the respondent on the question of interest only—

It was argued for the respondent that it was within the discretion of the Court below to allow, or not to allow, interest. That discretion had been reasonably exercised. The respondent was no wrong-doer, and, as had been pointed out by the Additional Judge, had had no right to interfere.

In the argument on both sides reference was made to the following cases.

Chowdry Wahed Ali v. Mussumat Jumaye (19 W. R., 87), *Nursing Roy v. Anderson* (19 W. R., 125), *Protap Chander Borooah v. Rance Surnomoyee* (14 W. R., 151), *Madhub Chander Dutt v. Haradhum Paul Sootiodhum* (14 W. R., 294), *Hurrodurga Chowdhuran v. Shariat Soonlery Dabea* (I. L. R., 4 Cal., 675, I. L. R., 8 Cal., 332)

At the end of the arguments their Lordships' **Judgment** was delivered by

Sir R. Couch.—The facts of this case are that on the 22nd of May 1873 the plaintiff instituted a regular suit for possession of certain villages which are named in his plaint, and he obtained from the Court of the Settlement Officer a decree for sub-settlement, right enjoyable for life. This decree was set aside by the first Court of Appeal, which was confirmed by the second Court. The plaintiff then appealed to Her Majesty in Council, and the decree in his favour was restored, so that he was declared [790] entitled to recover possession of these villages, of which, in January 1871, the manager under the Oudh Taluqdars' Relief Act, Act XXIV of 1870, had taken possession, and dispossessed the plaintiff. The present plaint is entitled "Kishnanand Misir, plaintiff, against the Mehdaona estate, defendant." but it appears from the proceedings that a summons had been issued and served upon the manager of the estate. On the 21st of October 1880, pending the suit, the estate, having been released by the Government, it was asked that a fresh summons should be issued. Although this summons does not appear on the proceedings, it would appear to have been a summons to the present respondent, who had been put in possession of the estate on its being released by the Government. His counsel appeared for him before the Judge on the 24th November 1880. It may, therefore, be taken that he became the defendant in the suit. The plaint stated that the plaintiff, having thus regained possession under the decree of Her Majesty in Council, was entitled to profits from the time of the dispossession, and during the pendency of the suit, and claimed mesne profits for nine years. No written statement was put in, but it appears from what was stated by the counsel for the defendant, when he appeared before the Judge, that the defence raised was that the suit was barred by the law of limitation, except as to the mesne profits for three years before the filing of the plaint, that is, before the 26th of July 1880. The first Court gave judgment for mesne profits for that period, and refused to allow the mesne profits for the previous time. That judgment was affirmed by the Judicial Commissioner. There was also a claim for interest, which was not allowed; both Courts saying that they did not think it reasonable to allow it.

Upon the appeal to Her Majesty in Council, which has now been heard, three questions were raised by the learned counsel for the appellant. First he contended that under the law of limitation he was entitled to a greater amount of mesne profits than had been allowed. Art. 109, sch. II, of Act IV of 1877, which was the Limitation Act in force at the time when the suit was brought, was referred to. That article is in these terms: "For the profits of immoveable [791] property belonging to the plaintiff which shall have been wrongfully received by the defendant:— When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession " The learned counsel sought to show that the dispossession was in the nature of a dispossession under a decree, because the Settlement Officer, or the manager acting under the Oudh Taluqdars' Relief Act, was acting, as it were, judicially, but when he found that, in the course of the argument, he could not support such a contention, he very properly abandoned it. The question of the law of limitation may be therefore considered as disposed of.

Another question raised was that the Courts had only allowed in the mesne profits for the three years the sums which had actually been received, and it was sought to charge the present defendant, who was not the person who received the mesne profits, but who had come into possession of the estate upon its being released by the Government, with sums which might have been received except for wilful default. It seems clear that, whatever case might have been made against the manager of the estate, there is nothing to show that the defendant could be charged with anything more than was actually received by him. That disposes of the second question

• The remaining question was whether interest ought to have been allowed upon the mesne profits for the three years. It is not necessary to say anything upon the question whether in the present state of the law, having regard to the provision in the last Procedure Act, in which there is an explanation of mesne profits, interest was allowable. In the present case the claim cannot be put higher than that it is a matter for the Court to determine, under the circumstances, whether it is reasonable to allow interest. There is no rule obliging the Court to allow the interest. It is a matter in the discretion of the Court, upon the consideration of the facts of the case. In this case both the Courts have considered that it was not reasonable that interest should be allowed; and there are no facts proved which would enable their Lordships to say that this is a wrong decision. Mr. *Sykes* argued that the interest ought to be allowed, because the present defendant, in getting possession of the estate at an [792] earlier period than he might otherwise have done, has had the benefit of the use of the money. But there is nothing in the evidence to support this, or to show that it was the fact. The question must be left as it has been decided.

Consequently the decision of the lower Courts ought to be affirmed, and their Lordships will humbly advise Her Majesty to affirm it, and to dismiss the appeal, and the appellant will pay the costs of it.

Solicitors for the Appellant: Mr. *T. L. Wilson*.

Solicitors for the Respondent. Messrs. *Watkins & Lattey*.

NOTES.

[The awarding of interest on mesne profits is a matter within the discretion of the Court, and where the decree is silent, it cannot be recovered in execution (1900) 22 All., 262; (1900) 27 Cal., 951; (1886) 13 Cal., 283; though where the discretion is improperly exercised, an appeal may lie:—(1907) 6 C. L. J., 462 (471).

As regards the limitation applicable to mesne profits antecedent to the suit, *see* 35 Cal., 996=8 C. L. J., 181=13 C. W. N., 15, 13 C. W. N., 815, the commentary of Mitra in his Limitation (1911) Vol. II, pp. 1022, *et seq*]

[10 Cal. 792]

PRIVY COUNCIL

The 8th, and 12th February, 1884

PRESENT

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH AND SIR A. HOBHOUSE.

Thakur Ishri Singh Plaintiff

versus

Thakur Baldeo Singh..... Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh]

The Oudh Estates' Act I of 1869—Will of a Taluqdar—Customary rule of succession in a family to impartible estate—Primogeniture.

However true it may be that, if there is absolutely nothing to guide to any other conclusion, impartible estate will descend in a family according to the rule of primogeniture, evidence may establish the usage in a family to be that, of several sons, one son, selected without reference to primogeniture, succeeds to the impartible estate. The eldest of three brothers had succeeded to impartible family estate, and to a taluq also impartible, which had been, during the lifetime of their father, entered in the first and second, but not in the third, of the lists prepared in conformity with s. 8 of the Oudh Estates' Act I of 1869. Before his death, this eldest brother made an instrument registered as a will, but using the word "tamlık"

and stamped as a deed whereby he gave the taluq to the third brother, reserving an interest on the whole for his own life, and in half for any son that might be born to him with maintenance to his wife on her becoming a widow.

Held, with reference to the *indicia* of a testamentary character, there being provisions for contingencies which might not be ascertained till the death of the maker of the instrument, as compared with the technical matters attending it, that this instrument was not a transfer *inter vivos*, but was a will, and within the above Act.

Held, also, on the objection that a will or declaration made by the father had fixed a mode of descent which could not be altered by his successor, that s. 11 of the above Act, giving to every heir and legatee of a taluqdar power [793] to transfer, or to bequeath, his estate, is not controlled by the proviso in s. 19, declaring that nothing in that section shall affect Wills made before the passing of the Act.

The impartible family property other than the taluq descending, like the latter to a single successor, one of these brothers, the question as to which of them that one should be, depended on the custom of the family. On the evidence adduced as to the custom in this respect, the plaintiff, who was out of possession, and on whom, in order to make out his title, was the burden of proving that the rule of primogeniture prevailed, failed so to do.

APPEAL from a decree of the Judicial Commissioner of Oudh (19th March 1881), affirming a decree of the District Judge of Lucknow (31d October 1880).

At the settlement of Oudh in 1858-59, the village lands of Kanhmow, Hasnapur, and Nimchaina, in the district of Faizabad, were treated as a taluq named Kanhmow, and settled with Thakur Beni Singh, who, in common with the other taluqdars of Oudh was requested in July 1861, by the Chief Commissioner, to state what was the rule of succession in his family. Beni Singh replied that the custom of his family was that the family estate should be held by one male member, selected for his fitness, and he asked that after his death the Government would select that one of his three sons, Thakur Maharaj Singh, Thakur Ishri Singh, and Thakur Baldeo Singh, whom it might deem most fit to succeed him.

That answer not having been considered satisfactory by the Government, on the 8th March 1860, Beni Singh submitted another reply, which was as follows:

"Whereas the British Government has granted to me, for generation after generation, the proprietary rights in the Ilaka Kanhmow, situate in Pargana and Tehsil Bari; Taluqa Usri, situate in Pargana Pirnagar, Tehsil Sitapur, Taluqa Hasnapur, situate in Tehsil Biswan, and Taluka Nimchaina, situate in Pargana Maholi, Tehsil Misrikh, I desire and hereby pray that after my *Ilaka* (Estate) be maintained entire and undivided in my family, according to the custom of 'Raj-gaddi' and that the younger brothers be entitled to receive maintenance from the person in possession of the estate (Gaddi-nashin).

(Sd) BENI SINGH, Taluqdar of Kanhmow, &c.,
in Tehsil Bari."

8th March 1860.

[794] No further correspondence ensued, and after the passing of the "Oudh Estates' Act," I of 1869, the taluq was entered in the first and second of the lists prepared in accordance with the requirements of that Act; but not in the third list (which last includes taluqs descending by primogeniture).

Beni Singh died on the 19th September 1870, leaving the three sons above mentioned. The eldest son, Maharaj Singh, having been recognized by the revenue authorities as his successor, obtained "dakhil kharij," or entry of his name in the settlement record, as proprietor of the taluq. This was opposed by the second son, Ishri Singh, and pending the determination of the

dispute as to "dakhil kharij," Maharaj Singh executed in favour of his younger brother, Baldeo Singh, the following document, which having been marked C in the proceedings, is so referred to in their Lordships' judgment.

"I, Maharaj Singh, am the Talukdar of Kanhmow, &c., in the Sitapur District

"Whereas—I, hold and enjoy possession of my estate situate in the Sitapur District, of which the Government revenue is about Rs -16,000, I, while in the enjoyment of sound health and mind, without reluctance or coercion, assign (tamlik) the said property to my younger brother, Baldeo Singh, subject to the following conditions—

"(1) That during my lifetime, I shall hold and enjoy possession of it, and that after my death my aforesaid brother, Baldeo Singh, shall hold and enjoy the same like myself.

"(2) That, whereas I am childless, should a legitimate and self-begotten child be born to me, it shall become the owner of one-half of the estate, and Baldeo Singh shall be the owner* of the other half.

"(3) That after my death, Baldeo Singh shall be bound, like myself, to maintain and take care of my wife. Hence I have written out these few words in the way of a deed of assignment (tamliknama) so that it may witness in future. Dated 28th June 1871."

This document, C, was, on the 3rd July 1871, registered under s 41 (for the registration of wills) of the Indian Registration Act, VIII of 1871, which came into force on the 1st July of the same year.

[795] On the 14th April 1872, Ishri Singh, the second son, brought a suit against Maharaj and Baldeo, claiming the taluq. He set up a will in his favour, alleging it to have been executed by the deceased Beni Singh, on the 20th February 1860, shortly before the submission of the reply by Beni Singh above set forth. This suit was dismissed by the Deputy Commissioner of Sitapur on the 3rd October 1872, with a declaration that the alleged will in favour of Ishri Singh was a false one, and that, Beni Singh having died intestate, Maharaj Singh had become entitled to the taluq under Act I of 1869, s. 22.

This was affirmed on appeal, and criminal proceedings having been taken against Ishri Singh, for fraudulently using a false document as true, ss 467, 471 (Indian Penal Code), he was convicted and sentenced to five years' rigorous imprisonment. Maharaj Singh died without issue on the 19th November 1879, and Baldeo Singh, being recognized as his successor by the revenue authorities, obtained an order for "dakhil kharij" in the settlement record, in his name, on 20th December 1879, whereupon he took possession of the taluq, and of the family estate. This was opposed by Ishri Singh, who claimed as the brother next in the succession to Maharaj Singh, and failing to get possession, brought, in 1880, the present suit against Baldeo.

By his plaint, which was filed in the District Court of Sitapur, the appellant claimed that the order of the Deputy Commissioner of 20th December 1879, might be set aside, that document C, of which he questioned the validity, might be declared void, and that possession of taluq Kanhmow, the property mentioned in schedule A of his plaint, might be decreed to him, as being the person entitled thereto on the death of Maharaj Singh, intestate, and without issue, under the provisions of his father's will of 8th March 1860, and clause 6 of s. 22 of Act I of 1869. He also claimed possession of the family property, moveable and immoveable, of which Maharaj Singh had died

possessed, being that in schedule B, of the plaint, by right of succession, according to family custom, on the death of his brother, intestate. For the defence, as regards the taluq, it was insisted that the document of the 8th March 1860 had no reference to the succession of brother to brother, but only to that of Beni Singh's son to [796] Beni Singh, that the will of Maharaj Singh, document C, was valid under Act I of 1869, that, as regards all the family property, Maharaj Singh's right of succession had been settled in the prior litigation, and that Baldeo Singh was entitled to the whole property.

This suit was transferred from the Court of the Deputy Commissioner of Sitapur to that of the District Judge of Lucknow, when it had reached the stage of the fixing of the issues, which were principally as to the effect of the "tamliknama," or document of 28th June 1871, marked C. and as to the title of the plaintiff as eldest surviving brother of Maharaj Singh to succeed both to the property in schedule A and in schedule B. The eighth issue raised the question of the plaintiff's title "by family custom or inheritance," and was afterwards altered by the addition of these words, relating to his title, *viz.*, "to the property in B, by inheritance, according to family custom."

At the hearing, oral evidence as to the revocation of the document C, of the 28th June 1871, was excluded, as being inadmissible under s. 57 of Act X of 1865, the Indian Succession Act, or s. 92 of Act I of 1872 (the Indian Evidence Act), whether or not such evidence bore on the question of undue influence at the making of the instrument

The suit was dismissed by the District Judge of Lucknow, and on appeal the Judicial Commissioner confirmed his judgment. The latter held that the document C, of the 8th March 1860, had no effect to take away the right to control the devolution of the taluq, which was given by s. 11 of the Oudh Estates' Act to the succeeding taluqdar, who had exercised that right in making C, the instrument of 28th June 1871, which was a taluqdar's will within the contemplation of that Act. This will had not been executed under undue influence, nor had it been revoked, but it had been acted on. The finding on the eighth issue, as above set forth, was against the plaintiff, who was found not to have shown a better title to the ancestral family estate, including the taluq, than the defendant, in whose favour, accordingly, a decree was made.

On this appeal,—

Mr. J. T. Woodroffe appeared for the Appellant.

[797] Mr. J. H. Cowie, Q.C., and Mr. J. G. W. Sykes for the Respondent.

For the appellant it was contended that the family property, as well as the taluq, being impartible (a fact which was taken as common ground by both sides), and the family custom not having been shown to go further, it followed that, by law and custom, Ishri Singh, who was the eldest son of Thakur Beni Singh, and the elder of the brothers, was entitled to succeed Maharaj Singh. There was no burthen cast upon the appellant to establish that, by family custom, he was the one, of these two surviving sons, who was entitled to succeed, seeing that he was the elder. No other course of succession, save that indicated by the rule of primogeniture, having been shown to prevail. The

*[Sec. 57.—No unprivileged will or codicil, nor any part thereof, shall be revoked other-

Revocation of unprivileged will or codicil.

wise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same.]

Tippera case, Neelkisto Deb Burmono v. Beerchunder Thakoor (12 Moore's I. A., 523) showed that where a family custom of descent to a single heir was proved to exist, it superseded the ordinary Hindu law to that extent, but the ordinary Hindu law regulated all beyond the custom. That case might be said to show that the principle of survivorship was inapplicable to give the succession to a person who was not himself the nearest heir to the last holder at the time of his death; and Ishri Singh was entitled, not only as heir nearest to Beni Singh, but also as successor by survivorship, as the elder brother of Maharaj Singh. There was nothing in impartibility, as attaching to family property, to enable the holder of an impartible estate to defeat the rights of the other members of the family; and although the joint interest of the latter only extended to this, that one, not all, of them would at a future time succeed, it was not competent to the holder for the time being to determine which that successor should be. The rule determining that question was, *prima facie*, the rule of primogeniture. Reference was made to Mayne on Hindu Law and Usage, paragraph 46, *Achal Ram v. Uddar Partab Addiya Dat Singh* (L. R. 11 I. A. 51; 1 L. R., 10 Cal., 511), *Katima Natchiar v. The Raja of Shrivanganga* (9 Moore's I. A., 539). Considerations applied to the property in schedule B of the plaint, different from those appli-[798]cable to schedule A. Referring now exclusively to A, neither the document made by Beni Singh, on the 8th March 1860, which was such a document as had been held to be tantamount to a will—see *Hurpurshad v. Sheodyal* (L. R., 3 I. A., 259)—nor the document C, executed by Maharaj Singh on 28th June 1871, operated to deprive Ishri Singh of his right to succeed to the taluq. As to the first document, Beni Singh, in declaring that his estate should descend in the mode in which impartible property descended by custom, did not thereby disinherit Ishri Singh, but had indicated a line of succession according to which that son would be entitled to succeed. As to the second document (C), Maharaj Singh had not, in the "tamlinama" C, made an effective transfer. It was not a will within the meaning of s. 2 of Act I of 1869, the Oudh Estates' Act. On the contrary, purporting to be a transfer *inter vivos*, it was invalid under s. 17 of that Act, not having been registered within one month from its date, and there having been no delivery of possession within six months.

The effect of document C being thus got rid of, it followed that Ishri Singh was the legal successor to the taluq, according to his title by primogeniture, which was applicable to both the schedules A and B. But document C, considered as a will, could not alter the character of the succession, which was determinable according to the rule presumed to prevail, and this had been indicated in the former will of Beni Singh, referring to the rule of descent.

It was further argued that, it being incorrect to argue from the case of the taluq to that of the other family property, the eighth issue as altered did not raise all that was in contest between the parties. It was the duty of the Court to determine the real issue—see *Abuthnot v. Betts* (6 B. L. R., 273). What should have been put in issue, was not only custom, but the question of the operation of ordinary Hindu law of inheritance upon the appellant's claim to the property in schedule B, in the absence of any custom, and this would have given scope to the proposition that the family estate being impartible the existence of a *prima facie* presumption that [799] it descended by the rule of primogeniture rested upon the general Hindu law. This proposition was maintainable, but it had not been brought out upon the issue in the distinct manner in which it should have been. Moreover, oral evidence as to the fact of the alleged annulling of document C (assuming it not to have been a will) had been incorrectly rejected, and whether it was

to be taken as a will, or a document *inter vivos*, oral evidence bearing on the question whether or not it was made under undue influence, ought not to have been excluded. For the respondent it was argued that the impartibility of the estate did not carry with it that the estate descended according to the rule of primogeniture; and that there was no evidence to show that the property, either in A or in B, descended to the eldest son according to the custom of this family. The burthen was on the plaintiff. There was, on the contrary, some evidence tending the other way. The evidence of the appellant himself, in the litigation which went before this suit, when he stood in the position of a second son, was that in this family the eldest son did not succeed. The Courts below had rightly held that document C was a valid instrument, and the Commissioner had correctly decided that it operated as a taluqdar's will under Act I of 1869, passing the proprietary right in the property in schedule A to the respondent. As regarded the property in schedule B, the appellant had not made out his title, either by family custom, or under the ordinary law of inheritance. Impartibility implied descent to a single successor; but there was no proof in this case, that primogeniture gave the rule, nor was there any implication in favour of it. The views of Beni Singh had been in favour of a power of selection, the exercise of which had been attempted in the making of the document C, and the evidence supported the right of the respondent to maintain his possession.

Mr. J. T. Woodroffe replied, arguing that, even if C was held a valid instrument, there could be no presumption (in the absence of evidence) that the property in B accompanied the taluq in A, and that the succession to the whole family property went to the taluqdar. The descent of the taluq was regulated by express enactment; and there was no reason why it should attract [800] to it the other family property. Lastly, even if the custom could, on the whole case, be held to be that the family estates should belong to a selected member of the family, there had been no selection. However, this could not arise, for there was enough in the case to raise the presumption in favour of the rule of primogeniture.

Their Lordships' Judgment was delivered by

Sir A. Hobhouse—This case has been argued so recently that the introductory facts need not be recapitulated. It will be sufficient to bear in mind that the suit concerns property of two classes—that comprised in list A and that comprised in list B—to which quite different considerations apply.

With respect to the property in list A, the whole controversy turns upon the validity and the character of the instrument which is marked as Exhibit C in the cause, being an instrument executed on the 28th of June 1871, by Maharaj Singh, for the purpose of effecting a transfer of the property contained in it to Baldeo Singh, the respondent. It will be convenient first to consider the character of the instrument, because certain arguments were advanced against its validity depending entirely on the hypothesis that it is a transfer operating *inter vivos*, and their Lordships have come to the opposite conclusion, namely, that it must be considered as a will.

The reasons for considering it to be a will are these. It answers the definition of a will which is contained in s. 2 of Act I of 1869. It was registered as a will; and though that may have been done at the instance of the Registrar, it certainly was done with the full knowledge and assent of Maharaj Singh. It provides for contingencies which are not ascertainable, or may not be ascertained, until the death of the testator: for instance, the contingency of his having a child, which he had not at the time of the will, and the contingency of his leaving a widow surviving him. It does not purport to give to anybody

any possessory or present interest until the death of Maharaj, the donor. And it makes a gift to the children of Maharaj, which, if it be a deed of transfer operating at once, cannot take effect, because no child was in existence; whereas, if it is a will, the gift may [801] perfectly well take effect. All those are very strong indicia of a testamentary character; and the question is whether they are overborne by evidence tending in the opposite direction.

As regards judicial opinion, it may be observed that the question of will or deed was an issue between Baldeo and Ishri after the death of Maharaj, before the Deputy Commissioner of Sitapur, upon the application for mutation of names; and he held it to be clearly a will. The Judicial Commissioner in the present case gives no opinion upon the point. The District Judge thinks that it is a deed, though he says it is not very material whether it is held to be one or the other. His reasons for thinking it to be a deed are that the donor Maharaj uses the word "tamlik" ("assign") and calls his deed a "tamliknama," and he has it stamped as if it were a deed. It appears that the stamp is not exactly that which the instrument would bear if it were a deed of assignment, but the District Judge says it is not so far distant from it, but that it carries to his mind a conviction that the stamp, coupled with the use of the name, shows that Maharaj intended something different from a will. Then he says that it cannot be a will, because it affects the property in the lifetime of Maharaj, but that seems to their Lordships to be an assumption of the question. Of course if it affects the property in the lifetime of Maharaj it cannot have a testamentary character, but the very question is whether it does affect the property in the lifetime of Maharaj. The District Judge does not assign any additional reason for thinking it does affect the property in that way.

Mr. Woodroffe in his argument relied very strongly upon the use of the word "assign," and upon the reservation of a life-interest to the donor. No doubt both those circumstances tend towards the conclusion to which Mr. Woodroffe wished to lead their Lordships, but they are by no means conclusive. If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument, but the instrument was prepared by Lal Sundar, and we must not construe with too great nicety, or assign too much weight to the exact words that he uses for a transfer of property, as if he were accurately weighing the difference [802] between a testamentary instrument and one operating *inter vivos*. We must remember that wills are comparatively new in any part of India, and are of more recent introduction in Oudh in respect to this class of property. So with respect to the reservation of a life-interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Upon the whole, therefore, looking at what are the substantial characteristics of the document which have been referred to, setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that the reasons for holding it to be a will have a decided preponderance over those which would lead them to hold it to be a deed.

It remains to consider the objections to the validity of the instrument considered as a will. First, it was said that the disposition made by it was beyond the power of Maharaj Singh, because the property was governed by a

previous will or declaration, whichever it may be, of Beni Singh, dated the 8th March 1860, which fixed a character upon the property that no subsequent possessor could depart from. The answer to that is that Act I of 1869, s. 11, gives not only to the original taluqdar, but to every heir and legatee of a taluqdar, power to transfer or to bequeath the estate which is granted to him. It was suggested that s. 11 is controlled by s. 19, in which there is a proviso, "that nothing herein contained shall affect wills made before the passing of this Act." But s. 19 is for the purpose of applying to wills made under Act I of 1869 a number of sections contained in the Indian Succession Act; and their Lordships are of opinion that the proviso only applies to the sections or provisions contained in s. 19, and not to those contained in the whole of Act I of 1869.

[803] Then it is said that there was undue influence used to coerce Maharaj Singh into executing the instrument. On that point there is the finding of both the Courts below against the appellant, and the subject-matter is one on which this Board would be exceedingly reluctant to disturb concurrent findings of the Court below. But it is said that they ought to be disturbed, because evidence of undue influence was tendered and rejected. It becomes important then to see whether there was any evidence tendered for the purpose of showing any undue influence. It is not shown that any such evidence was tendered, excepting what is called a revocation, or an attempt to revoke, by Maharaj, long after the date of the instrument in question. Now of course it might happen that a revocation or an attempt to revoke should be accompanied by circumstances showing that undue influence had been used in procuring the execution of the instrument or throwing light upon that question. But no such circumstances are suggested. In the argument of counsel nothing is spoken of but the bare fact of what is called the revocation, which it is said is a relevant fact corroborative of another relevant fact, *viz*, the undue influence. On the passage which shows how the Court dealt with the matter the same remark occurs. And the reasons given for appealing to the High Court seem to make it quite conclusive that no other evidence was tendered. There are two separate reasons—one relating to undue influence and the other relating to the revocation. The one relating to undue influence uses this language. "From the time when and the manner in which document C was executed, and the circumstances under which such an unnatural and unusual disposition of a valuable property was unnecessarily made by Maharaj Singh, the presumptions and probabilities are very strong in support of the oral evidence adduced by the plaintiff in proof of the document having been obtained by means of fraud, misrepresentation, coercion, and undue influence. That raises the whole question as to what occurred at the time when the document was executed, and no evidence was excluded on that point. Then the 18th reason for appeal is "The lower Court is wrong in having excluded oral evidence of the cancellation of the document C by Maharaj Singh," and [804] it goes on to argue that oral evidence of that fact was admissible. So that it is quite clear that the fact alone was to be proved by the rejected evidence, and it is impossible to suggest that the fact standing alone would have any bearing on undue influence used on the execution of the instrument.

All the other arguments against its validity, as to its return into Maharaj's hands, its cancellation, non-delivery of possession, and so on, turn upon the hypothesis that the instrument was a transfer and not a will, and therefore it is not necessary to make any further observations upon them. The consequence is that all the objections to Exhibit C fail, and as to list A, the suit must be decided against the appellant.

Now their Lordships come to list B, which comprises things not affected by Exhibit C. With respect to that property there was an alteration in the issue settled by the first Court, and a great deal of argument was used to show that there ought to have been no such alteration, but it is quite clear that the appellant is not damnified by it, whether it was right or wrong. If he could claim the whole of the property, and when that was decided against him could fall back and claim half, he might possibly be injured by the alteration of the issue, but he cannot do that, because the impartibility of the property is and always has been common ground between him and the respondent. Treating the property as impartible, the case can be argued in favour of the appellant just as well under the issue as it stands as it could be argued under the issue as it was originally framed.

As the issue stands the argument is presented in this way. Mr. Woodroffe says that as between Beni and his three sons the latter take by way of unobstructed inheritance, that if the property had been subject to the ordinary law of the Mitakshara, on Beni's death the three sons would have taken, but it is an impartible property, and therefore the eldest son Maharaj took the whole, on the death of Maharaj the question comes, who is the heir to Beni, and again, the estate being impartible, the eldest must take the whole. And a passage was read from Mr. Mayne's "Hindu Law," referring to authorities, and saying that in general such estates—that is, impartible estates—descend by the law of primogeniture.

[805] Now, however true it may be that, if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the law of primogeniture, it is impossible to say that there is no such guide in this case. As to the taluq, there is a great deal of evidence to the effect that the law of primogeniture has not prevailed. On the 20th February 1860, Beni Singh, the then taluqdar, being called upon to state what the law of devolution of the estate is, says "The usage established by prescription in petitioner's family is still in force, namely, that out of several sons an able one had up to this time been selected and nominated as taluqdar, without reference to seniority." and then he prays that the Government will select an able one. That is to say, according to him, the law which is familiar to us under the name of Tanistry, or something very like it, prevailed in his family.

On the 8th March 1860 Beni Singh executed an instrument by which he states his desire that after his death his estate shall be maintained in his family entire and undivided according to the custom of Raj-gaddi, the younger brothers receiving maintenance from the Gaddi-nashin, the successor to the estate for the time being. That document is not without ambiguity, but it does not assert the law of primogeniture with clearness.

The next document is a parwana issued by the Deputy Commissioner of Sitapur to Beni Singh on the 19th of August 1861, and it seems to have been issued because the Government had not been told with exactitude what the rule of succession was or was to be. The parwana runs thus "You are instructed that if the rule of primogeniture or the custom of Masnad Nashin be not in force in your family, it is essentially necessary that you should execute a will naming your successor therein." Now Beni Singh does not reply to that, that the rule of primogeniture was in force in his family, and therefore he did not wish to execute a will, but he answers, "in compliance with your order conveyed in the foregoing letter, I will execute my will in favour of an heir." It does not appear that Beni Singh did execute any will, but he promised to make a will on the footing that the rule of primogeniture was not in force in his family.

[806] The next act is the formation of the lists of taluqdaries ; and in that important operation we find the taluq entered, not in list 3, which contains the primogeniture estates, but in list 2, which contains the estates which go to a single heir.

Now, in all these proceedings it is the taluq, or the property comprised in list A, which is the main object, though statements are made in general terms as to the custom of the family. But in 1872 a suit was instituted by Ishri, the present appellant, to recover from Maharaj Singh the taluq, and also moveable property valued at Rs. 84,000. Baldeo Singh was also made a defendant to the suit, so that whatever was decided in that suit was decided between the parties to this appeal. The Rs. 84,000 would seem to come under the same considerations as the moveables in list B in the present suit. It is observable that in the present suit, list A contains no moveables at all. All the moveables are in list B, and though it is not so clear as might be wished, the probability is that the moveables which were the subject of the suit of 1872 were governed by the general custom of the family.

In that suit Ishri filed a written statement in which he says " On the 20th February 1860 plaintiff's father, by a will of the same date "—meaning the statement made to the Government—" stated the family usage regarding succession, which plaintiff's father desired to be followed after his death." Then he is examined, and in his examination he says. " In my family the eldest brother has never succeeded to the taluq," and he gives one or two instances to show that such is the fact. In giving judgment, the Deputy Commissioner of Sitapur observes that all he has to consider is the plaintiff's title to the taluq Kanhmow. He takes a distinction between the considerations that apply to the taluq Kanhmow and the considerations that apply to Njmchaina—something which was the subject of a subsequent grant ; but he takes no distinction between the considerations that apply to taluq Kanhmow and those which apply to the moveables on which he is deciding.

The case set up by Ishri principally consisted of a document which was held to be forged ; and it is remarkable that in that document he continues to put into Beni's mouth the assertion of the principle that the ablest person is to succeed ; and after [807] extolling the intelligence and gravity of temper and other good qualities of Ishri, Beni is made to say in the forged instrument that he desires Ishri to succeed him in preference to Maharaj or Baldeo. But the Deputy Commissioner of Sitapur dismissed the suit on the ground that, though there was evidence that it was the custom of the family for the most able to succeed, there was no evidence that Ishri had been selected as such. Towards the end of his judgment he says : " There is no doubt that this was the custom in most taluqs in this district, and was probably the custom of the smaller taluqs in the greater part of Oudh. Wills, however, at that time were unknown."

That seems very like a decision with regard to property other than the taluq, that Tanistry rather than primogeniture was the governing rule of the family. Even if the decision concerns the taluq alone, their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluq to the law relating to all the other family property, and says there is a presumption from the actual decisions relating to the taluq that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to show that the other family property followed a line of devolution different from that of the taluq.

Whether the evidence would prove the case as regards list B in favour of the respondent if he were the party claiming and the appellant were in possession, is not now the question. The question is, whether the appellant, having the *onus probandi* on him to show that primogeniture is the law of the family, has proved his case, and he certainly is very far indeed from proving his case, the evidence so far as it goes being the other way.

The appellant, therefore, fails on all his points, and their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Watkins & Lattey*

Solicitors for the Respondent. Mr. *W. Buttle*

NOTES

[See (1904) 3 C L J., 370 = 8 C. W N , 614, as regards the tests to determine whether a particular document is a will or not

See (1901) 23 All , 369 (382), as regards succession to impartible estates being determined by family usage, also (1885) 9 Bom , 198 (213)]

[808] ORIGINAL CIVIL.

The 2nd, 9th and 16th June, 1884.

PRESENT

MR. JUSTICE PIGOT

Sutherland

versus

Singhee Churn Dutt

*Code of Civil Procedure, Act XIV of 1882, s. 135—Affidavit of documents—
Production of documents—Inspection of documents—Specific performance
of contract to purchase—Refusal to allow inspection.*

In a suit for specific performance of a contract to purchase an indigo factory, the defendant denied that the agreement relied on was final, and alleged that the plaintiff had induced him to sign the agreement by means of representations regarding the nature, the extent, the value, and the net income of the property, all of which representations the defendant charged were false and fraudulent to the knowledge of the plaintiff. The plaintiff, in his affidavit of documents, set out a list of title-deeds evidencing his title to, and the books of accounts and other papers and documents relating to the property agreed to be purchased, and these he claimed to withhold from the defendant's inspection, on the ground that they were not sufficiently material at that stage of the suit.

Held, that the documents were not protected

* Original Civil Suit No. 99 of 1884

THIS was an application to consider the sufficiency of the plaintiff's affidavit in verification of his list of documents, made in a suit for specific performance instituted by the plaintiff against the defendant. The plaintiff stated that on the 6th of October 1883 the defendant had, in Calcutta, agreed in writing to purchase from the plaintiff the Ramnaghur Indigo Factory and Silk Filature situated in the districts of Moorshedabad and Nuddea for Rs. 1,25,000 as from the first of September 1883, that plaintiff guaranteed the net income to be Rs. 13,000 a year, and that the defendant was to take over the *dena-powna* and pay for the outlay made by the plaintiff on the concern since the 1st of September 1883. The plaintiff went on to state that the defendant refused to perform the agreement, that the defendant had laid out on the factory on the defendant's account, since the 1st of September 1883, a sum of over Rs. 15,000, and that the plaintiff was willing to perform his part of the contract. Certain correspondence which had passed between the parties and between their solicitors was annexed to the plaint.

[809] The defendant pleaded that the Court had no jurisdiction to entertain the suit; he denied the agreement set out in the plaint, save so far as in the written statement admitted, denied a refusal to perform, or that the plaintiff was ready and willing to perform. He then stated that on the 6th day of October 1883, one Cozen, whom he charged to be the plaintiff's agent, came to him and asked him to buy a zemindari, called Ramnaghur, with indigo factory and silk filature attached, alleging that it contained from 13,000 to 14,000 bighas of land, that the Government revenue was from Rs. 40,000 to Rs. 42,000, that the net annual income was Rs. 13,000 (besides the profits of the indigo factories and silk filature), and that the owner wanted Rs. 3,00,000 for it. The defendant (who denied all knowledge of the existence of the property until informed by Cozen) offered to treat for the purchase if the price were reduced. Thereupon Cozen went away from the plaintiff's house, returned again in the afternoon of the same day, and took the defendant to the plaintiff's office, at No. 1 Commercial Buildings, where they saw the plaintiff, who, the defendant alleged, confirmed the representations regarding the property which had been previously made to the defendant by Cozen. The plaintiff also stated that the ryots on the property had no *mourosi* right, that they paid a bonus of Rs. 5 a bigha on re-settlement, that the factory house had cost Rs. 40,000 to Rs. 50,000, and that he was prepared to prove by documents and by admission of the ryots that the net annual rental was Rs. 13,000. The defendant, in his written statement, further went on to say that "after some bargaining, which was conducted by the defendant on the basis of the information given to him by the said J. E. Cozen and the plaintiff as aforesaid, for no papers of any kind were produced or shown to him, and relying entirely upon such information and upon the assertion of the plaintiff, that the said zemindari, with the said factories and filatures attached, was worth more than Rs. 1,25,000, the defendant agreed to purchase the same for the said sum of Rs. 1,25,000, provided his attorney approved of the plaintiff's title thereto;" the defendant also agreed to purchase the zemindari as from the 1st September 1883, allowing the plaintiff all moneys laid out since that date on the factory, and also agreed to take over [810] the *dena-powna* at a rate agreed on. Immediately after this interview (according to the defendant's work sheet) the parties proceeded to the office of the plaintiff's solicitors, where, at the instance of the plaintiff, a draft agreement was prepared by Mr. J. C. Orr, which draft was taken away by the defendant with the plaintiff's consent, for the express purpose of having it approved by his solicitors before he signed the agreement. Before leaving the office of the plaintiff's solicitors, the defendant, at the

instance of the plaintiff, signed (without reading it) a letter then and there written by Mr. Orr, which the defendant believed contained the terms agreed on between the parties as aforesaid.

The defendant then submitted that (1) the letter of the 6th of October 1883 was never intended to be a final agreement, (2) that if the said letter were found to be a final agreement, then the defendant was induced to sign by means of false and fraudulent representations concerning the nature, value, extent, and net income of the property made by the plaintiff to the defendant, and (3) supposing the letter were final and there was no fraud, then that the plaintiff's conduct in withholding from the defendant all information concerning the property, and in refusing to produce or show to the defendant any deed or document concerning the same, disentitled him to the relief claimed. In support of the last ground of defence the defendant referred to the correspondence annexed to the plaint, from which it appeared that the plaintiffs were not willing that the defendant should get possession of the deeds, documents, etc., until after he should have paid the earnest money, namely, Rs. 10,000

On the 26th of May 1884 the plaintiff filed an affidavit verifying a list of documents set out in a schedule thereto. The material portions of this affidavit are as follows

"(1) That I have in my possession or power the documents relating to the matters in question in this suit set forth in the first, second and third parts of the schedule hereto annexed

"(4) That I object to produce the said documents set forth in the third part of the said schedule hereto

"(5) That I do so object to produce the said last-mentioned documents, on the ground, as I am advised and verily believe, that the defendant is not entitled to inspect the same, which consist of [811] the title-deeds evidencing my title to, and the books of account and other papers and documents relating to, the indigo factory, silk filature and property in the agreement, dated the 6th of October 1883, in the plant in this suit mentioned, until this Honourable Court shall have decided and determined in this suit whether the said agreement constitutes a valid and binding contract in law for the sale by me of the said indigo factory, silk filature and other property to the said defendant, which is the main question raised upon the pleadings in issue between the defendant and myself in this suit "

Mr. *Bonnerjee* for the defendant contended that the affidavit was insufficient to guard the documents mentioned in the third part of the schedule from inspection by the defendant, regard being had to the issue raised by the pleadings in the cause.

Mr. *Phillips*, *contra*, cited *Kettlewell v Barstow* (L. R., 7 Ch. App., 686) : *Saull v. Browne* (L. R., 9 Ch. App., 364), *Heugh v Garrett* (44 L. J. Ch. N. S., 305), *Adams v. Fisher* (3 M. & Cr., 526).

Mr. *Bonnerjee* in reply

Pigot, J.—The defendant seeks inspection of certain documents of the plaintiff, which plaintiff claims that he is entitled, under section 135 of the Code, for the present to withhold.

This is a suit for specific performance in which several defences are set up: one, that no contract was ever entered into, another, that if such a contract was ever entered into, the defendant was induced to enter into it by the misrepresentation of the defendant.

The acts of misrepresentation alleged by the defendant are, perhaps, as to some of them, somewhat loosely indicated in the written statement. But as to one, which I must for the purpose of the present application at any rate treat as material, it is clear enough.

The defendant alleges that the plaintiff represented to him before the negotiation, or the contract, whichever it was, was entered into, that the property to be sold was of the net annual value of Rs. 13,000. The defendant's case is, that this was a false representation, and that at the outside the net annual value [812] was to plaintiff's knowledge very greatly below Rs. 13,000. Upon this question the parties are at issue.

Another question arises in the case with respect to the annual value of the property. In the letter of October 6th, which plaintiff alleges, and defendant denies, to have been a final agreement, it is recited that the plaintiff guarantees the net annual income to be not less than Rs. 13,000, and that if the annual income be less than Rs. 13,000, a proportionate reduction is to be made in the price.

The defendant alleges that the property offered to him was described to him as a zemindari, and that the net annual value meant the annual net rental derived therefrom over and above Government revenue, assessments and such like outgoings.

This the plaintiff denies, alleging that this stipulation referred to net annual income derived from all sources of income, including the income derived from certain mulberry cultivation carried on upon the estate, and also as I conclude the income derived from the indigo factory and silk filature on the property, that property being indeed described in the letter of October 6th, drawn up by the plaintiff's solicitor, and signed (though, as he alleges, not read) by the defendant, as the Ramnaghur Indigo Factory and Silk Filature.

The defendant in paragraph 21 of his written statement alleges that not merely did the property not yield the Rs. 13,000 net annual value in the sense attributed by him to those words, but that even as an indigo factory it had been carried on for years at a loss, as the plaintiff knew.

Those are the two chief points in dispute between the parties as to the question of greater or less money value, and the representation or guarantee said to have been made or entered into respecting it.

Then, there is another dispute closely connected with the above, namely—what it was, which was offered to the defendant.

The defendant says what plaintiff offered him for sale was a zemindari with a profit rent; with, no doubt, a factory, etc., on it; combining this, with the previous contentions, he in result, alleges that he was offered, as a profitable zemindari, what was in truth a worthless trading concern.

[813] The plaintiff says what he sold was an indigo factory, etc., with rent-paying tenants on the land and that it was a valuable property. There are no doubt other questions raised in the suit, but I do not think I need advert to them for the purpose of the matter now before me.

The documents which the plaintiff claims to withhold from inspection are those set out in part III of the schedule to his affidavit, and consist of title-deeds evidencing his title to and the books of account, and other papers and documents relating to the indigo factory, silk filature, and other property in the agreement, dated the 6th October, mentioned.

He says the defendant is not entitled to inspect these documents until it shall have been decided in this suit whether or not the agreement sued on in the suit was or was not binding on the defendant. It was argued for the plaintiff that defendant would not be allowed to go into the question of title at the hearing; that the question at the hearing would be simply, was there a binding contract, and that upon that being found, if it should be found in favour of the plaintiff, the Court would direct the usual reference as to title, until which time, the right to inspect those documents would not arise, the issue upon which their contents would be material not arising until then.

If the matter stood solely on that footing, I should accept the plaintiff's contention and refuse the discovery sought. The case of the defendant is not so framed (I will put it no further) in respect of the mere question of title, as to lead to a departure from the usual, though not absolutely invariable, practice of directing a reference.

But it is not upon a mere question of title that discovery of these documents is now sought. Upon one question, whether the contract, if made, is voidable on the ground of misrepresentation, they are or they probably are, or they may be, material to the defendant's case. So far as I can judge from the correspondence, I should think it probable that they are material. I do not like saying more than that, it is not the time to construe the letter of October 6th. But it is enough if they may reasonably be thought material to an issue which must be raised at the hearing.

* [814] It is obviously a case, which it is better not to discuss, at this stage, a jot more than is necessary, else there are one or two further considerations to which I might perhaps refer. I shall only add that I am glad to think that the burden of inconvenience here is lighter than in some cases which might be imagined in which inspection of the title-deeds might be ordered. The documents which the plaintiff seeks to withhold would have been, as I gather from the correspondence, always open to the defendant's inspection, had he paid his deposit, yet even then the present defence would have been available for him if his case be true, and he had paid the money before discovering the facts on which it is founded.

I feel the objection to ordering discovery of a party's title-deeds, when it can be avoided, that if I saw my way to it, I should let the questions of misrepresentation and the one or two other questions to which I have not particularly referred, stand over until the question of the effect of the signature by the defendant of the letter of October 6th could be determined. But I cannot do it. It would be perhaps to order two distinct trials followed by a reference as to title.

The plaintiff must give the discovery sought for, costs to be costs in the cause.

Messrs. *Barrow and Orr* for the Plaintiff.

Messrs. *Beeby and Rutter* for the Defendant.

[10 Cal. 815]

FULL BENCH REFERENCE

The 5th June, 1884.

PRESENT :

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND MR JUSTICE WILSON.**

**Gossami Sri Sri Gridharji Maharaj Tickait.Plaintiff
versus**

Purushotum Gossami and others.Defendants

*Civil Procedure Code, Act XIV of 1882, ss. 575, 597—Decision when appeal
heard by two or more Judges—Letters Patent of 1865, cls. 15, 36.*

Section 575 of Act XIV of 1882 does not take away the right of appeal which is given by clause 15 of the Letters Patent

When the judgment of a lower Court has been confirmed under s. 575 of the Code of Civil Procedure, by reason of one of the Judges of the appeal Court agreeing upon the facts with the Court below, an appeal will lie **[815]** against such judgment, notwithstanding the terms of s. 575—*Appaji Bhuvrar v. Shivlal Khubchand* (I.L.R., 3 Bom., 204) approved

THIS was a suit to recover a temple and certain properties dedicated and belonging thereto, which was heard by Mr. Justice CUNNINGHAM on the Original Side of the High Court, who made a decree in favour of the defendants, dismissing the plaintiff's suit.

The plaintiff appealed, the main point for decision being one of limitation, which depended on a question of fact, as to this question of fact, the Court consisting of the Chief Justice and Mr Justice WILSON differed in opinion, Mr Justice WILSON agreeing with the Court below. The appeal, therefore, was dismissed, and judgment given (in accordance with s. 575 of the Civil Procedure Code) in confirmation of the judgment of the lower Court. The plaintiff appealed under s. 15 of the Letters Patent against the judgment of Mr. Justice WILSON and applied to the Chief Justice for the nomination of a Bench to hear the appeal.

The Chief Justice considered that as there was a serious difference in opinion amongst the Judges of the High Court as to whether such an appeal would lie, the question ought to be referred to a Full Bench. The question referred being—whether, where the judgment of the Court below has been confirmed under s. 575 of the Code, by reason of one of the Judges of the appeal Court agreeing upon the facts with the Court below, an appeal may still be had against that judgment, notwithstanding the terms of s. 575

The Advocate-General (Mr. Paul) (with him Mr. Gasper) for the Appellant.

Section 15 of the Charter gives an appeal where the Court is equally divided. Section 575 of the Code of Civil Procedure lays down the rules as to decisions where the appeal is heard by a Bench of two Judges. It, however, leaves untouched s. 15 of the Charter, and this is shown by s. 597 of the Code, which gives no appeal to the Privy Council where two Judges differ in opinion.

The case of *Appaji Bhuvrar v. Shivlal Khubchand* (I. L. R., 3 Bom., 204) lays down that s. 36 of the Letters Patent is superseded by s. 575 of the Code, and s. 575 does not touch appeals, but only references. Clause 15 **[816]** is,

therefore, untouched by s. 575, an appeal will therefore lie. The case of *Ranee Shurno Moyee v. Luchmeput Doogur* (7 W. R., F. B., 512) shows that an appeal lies under s. 15 of the Charter.

Mr. Phillips (with him Mr. Bonnerjee and Mr. Handley) for the Respondent.

Section 15 of the Charter was adapted to a different state of affairs to what we have now. Section 36 of the Charter gives to the senior Judge the decision whether on facts or law, if the decision is arrived at by casting vote of the senior Judge, the Charter gave an appeal. That mode of deciding appeals has been done away with by s. 575 of the Code, which lays down that unless there is a majority, the decree is not to be interfered with, this does not come within the purview of the Charter. Section 15 of the Charter gives an appeal, and the question is, is that appeal taken away by s. 595. Section 575 has made a difference by taking cases decided by the voice of a senior Judge out of the category of the Charter.

In clause 15, my argument rests on the word "judgment", "judgment" means a judgment given in the manner provided by clause 36, and has no reference to a judgment under s. 575. If this is correct, the clause goes on to give an appeal to the Privy Council. Then does s. 597, without noticing the last part of clause 15, take away the appeal to the Privy Council? I submit not.

The opinion of the Full Bench was as follows —

We think that s. 575 of the Civil Procedure Code does not take away the right of appeal which is given by clause 15 of the Letters Patent.

We agree in the view taken by the Bombay High Court in the case of *Appaji Bhivray v. Shivalal Khubchand* (I L R., 3 Bom., 204), that the effect of s. 575 of the Code is to supersede the provision in clause 36 of the Letters Patent, that in the event of any disagreement between two Judges of a Division Bench, the judgment of the senior Judge shall prevail, but (*sic*), and still that notwithstanding that section, clause 15 of the Letters Patent remains in full force.

One very cogent reason, which has induced us to take this view, and which seems almost conclusive upon the point is, that [817] if the appeal under clause 15 of the Charter were taken away, a judgment in this Court of a Judge in a Division Bench, who agreed with the Court below upon a question of fact, would be absolutely final. However important the case might be, no appeal would lie to the Privy Council from that judgment. This is clear from s. 597 of the Civil Procedure Code, which enacts that "no appeal shall lie to Her Majesty in Council from the judgment of one Judge of the High Court, or of one Judge of a Division Court, or of two or more Judges of the High Court, where they are equally divided in opinion."

It is, therefore, we think, obviously intended that in any such case an appeal should be had in the first instance to a Division Bench of the High Court, before an appeal can be preferred to Her Majesty in Council, and such an appeal can only be had under clause 15 of the Charter.

We are of opinion, therefore, that the question referred to us should be answered in the affirmative.

Attorney for Appellant. Baboo Aushootosh Dhu.

Attorney for Respondent: Mr. Pittar.

NOTES.

[Similar rulings have been given in 25 Mad., 548; 11 M. L. J., 10 (14), 20 Cal., 762, 28 Cal., 517, 13 Bom., 449, 18 Bom., 355, 8 All., 105, (1913) 17 C. L. J., 206. The case of (1889) 11 All., 176 (180) should be distinguished on the ground that the Code did not apply there having been no hearing of the appeal.]

[40 Cal. 817]

APPELLATE CIVIL.

The 10th June, 1884.

PRESENT :

MR JUSTICE McDONELL AND MR. JUSTICE FIELD.

Ishan Chunder Roy.....Judgment-debtor

versus

Ashanoolah Khan.....Decree-holder

*Execution of decree, Power of Court to stay—Code of Civil Procedure
(Act XIV of 1882), ss. 239, 250, 243 and 246.*

It is not open to the Court to refuse to execute a decree against which no appeal has been proffered and the time for appealing against which has expired.

ONE Ashanoolah Khan obtained a decree for enhancement of the rent of certain taluqs, together with other decrees for the rents of those taluqs for the years 1279—1283. Against these decrees an appeal was preferred to the Privy Council, and pending that appeal the High Court passed an order for stay of execution. [818] Meanwhile Ashanoolah obtained an *ex-parte* decree for the rents of 1285—1288 in respect of the same taluqs. In the course of the execution proceedings the judgment-debtor objected that the execution of the latter decree could not proceed, as the execution of the decree for the rent of the previous years had been stayed by the order of the High Court on account of the appeal to the Privy Council. The Subordinate Judge adverted to the circumstance of the *ex parte* nature of the decree, and disallowed the objection mainly on the ground, it would seem, that the property attached in execution of the decree was other than the taluqs or undertenure to prevent the sale of which the execution of the prior decrees had been stayed. From that order the judgment-debtor appealed to the High Court. The High Court at first refused the appeal, as a copy of its order staying execution of the previous decrees had not been placed before it, nor had the appellant tendered sufficient security. Upon a subsequent application in the same matter, the High Court granted a review of its former order and restored the appeal.

Mr. Phillips and Baboo Grish Chunder Chowdhry for the Appellant.

Mr. Evans, Baboo Srinath Banerji and Baboo Kuloda Kinkur Roy for the Respondent.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—This is an appeal against an order of the Subordinate Judge of Tipperah, dated 18th August 1883, refusing to stay the execution of a decree. The facts of the case are briefly these: The decree-holder obtained a previous decree for enhancement of the rent of certain taluqs. That decree, together with other decrees for the rents of these taluqs for subsequent years, is at present under appeal to the Privy Council. The years, the rents of which are thus *sub judice*, are 1279—1283, inclusive. In the case now before us an *ex-parte* decree was obtained for the rents of 1285, 1286, 1287 and 1288. Against that decree no appeal was preferred, and the time for preferring an appeal has now expired. Under these circumstances, the question arises

* Appeal from Order No. 841 of 1883, against the order of Baboo Roma Nath Seal, second Subordinate Judge of Tipperah, dated the 18th of August 1883.

ther the Court of First Instance had any jurisdiction to refuse to [819] execute the decree. There is no express provision in the Code of Civil Procedure for such a case. But it has been contended that there are sections in the Code which appear to contemplate the existence of such a discretion in a Court of First Instance as regards a decree against which no appeal has been preferred. Sections 239 and 250 have been referred to, and the words in the latter section—"unless he sees cause to the contrary"—have been relied upon as indicating the existence of such a discretionary power. It appears to us that these words are sufficiently explained by a reference to express provisions contained in other sections of the Code, (see, for example, s. 246) which provide for setting off cross decrees against each other, the effect being that no execution of the decree for the smaller amount will take place. We may also refer to s. 243, and we may bear in mind that when a decree-holder dies, while execution proceedings are pending, the Court may properly see cause not to issue its warrant until a proper person has been substituted on the record in the place of the deceased decree-holder. We are therefore unable to say that there are any provisions in the Code which indirectly empower a Court of First Instance to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired, and we think that we would not be justified in importing into the Code a provision which the Legislature has not thought fit to insert expressly or by necessary implication. We are of opinion, therefore, that the Subordinate Judge had no power to refuse execution of this decree. It must be borne in mind that even if the judgment-debtor succeeds in his appeal to the Privy Council, inasmuch as the present decree is not under appeal and would therefore not be directly affected by the result of the appeal in the Privy Council case, the decree-holder would still be entitled to demand execution, unless and until proceedings were taken either to obtain an injunction or to obtain a modification of the decree upon review. We must therefore dismiss this appeal, but, having regard to the circumstances, we think it should be without costs. The order passed as to costs when this appeal was dismissed on the previous occasion will stand.

Appeal dismissed.

NOTES.

[See (1890) 15 Bom., 407 (308), as regards execution at the instance of assignees]

[820] APPELLATE CIVIL.

The 10th June, 1884.

PRESENT .

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR JUSTICE BEVERLEY.

Nuddyarchand Shaha and others... .. Plaintiffs

. *versus*

Meajan and another... .. Defendants :

*Encroachment by tenant—Landlords' right—Encroachment
acquiesced in by landlord*

If a tenant during his tenancy encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment not for his own benefit, but for that of his landlord, and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself

THIS was a suit brought to recover possession of 3½ cottahs of land.

The plaintiffs were taluqdars and claimed the land as belonging to their ancestral taluq which they held under defendant No. 2.

Defendant No. 1 stated that the plaintiffs had never been in possession of the land, and that he (defendant No 1) had been put into possession by the defendant No. 2, who was his zamindar

The Munsiff found that the land did not belong to the plaintiffs' taluq, but considered that it belonged to defendant No. 2, and that as it adjoined other lands of the plaintiffs, they had at some time or other appropriated it by encroachment. But he further held that the plaintiffs had occupied the land for more than twenty years, and that they had therefore acquired a valid title both against defendant No. 1, and defendant No. 2 their landlord.

Defendant No. 1 appealed to the Subordinate Judge, who held that the plaintiffs' case had been that they occupied the land as included within their own taluq held under defendant No. 2, but that having failed to prove that the land was so included in their taluq, they could not be permitted to turn round and plead [821] adverse possession against their own admitted landlord, and he further held that the defendant No. 1 was in possession apparently with the consent of the landlord, and that unless they could show a better title, they could not eject them, he therefore reversed the decision of the Munsiff

The plaintiffs appealed to the High Court

Baboo Dwarkanath Chakravarti for the Appellants.

Baboo Joygopal Ghose for the Respondents.*

Judgment of the High Court was delivered by

Garth, C.J., who, after stating the facts, continued.—It has been contended on appeal that the Subordinate Judge was wrong; and that as it has been found that the plaintiff had been in possession of the land for upwards of

* Appeal from Appellate Decree No. 2559 of 1882, against the decree of Baboo Dwarka Nath Mitter, Officiating Additional, Subordinate Judge of Mymensing, dated the 6th of September 1882; reversing the decree of Baboo Jagat Chandra Das, Munsiff of Issurgunge, dated the 18th June 1881.

12 years, paying no rent for it, and as the land did not form part of his taluq, he must be considered as having held it adversely to his landlord, and as he has held it in this way for more than 12 years, he has acquired a title to it by limitation.

This case, therefore, directly raises the question, what the law of this country is with regard to encroachments made by a tenant upon his landlord's property.

There is no doubt whatever that by the English law, an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of, his holding, is presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord. See the recent cases of the *Earl of Lisburne v. Davies* (L. R., 1 C P., 259) and *Whitmoir v. Humphries* (L. R., 7 C. P., 1).

And this rule applies to all lands so encroached upon, whether the landlord has any interest in it or not. If a tenant, during his tenancy, encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment, not for his own benefit, but for that of his landlord, and if he has acquired a title against the third person by an adverse possession, he has acquired it for his landlord, and not for himself. See *Kingsmill* [822] v. *Millard* (11 Ex., 313); *Andrews v. Hailes* (2 E. and B., 349), and this doctrine appears to have been adopted here in the case of *Goroo Doss Roy v. Issur Chunder Bose* (22 W. R., 247), as well as in other cases.

It is true, that by the English law, if it could be distinctly proved that the tenant made the encroachment adversely to his landlord, an adverse possession for 12 years might then give the tenant a title by limitation, and probably that would be so in this country.

But that was clearly not the case in this instance, because the plaintiff himself in his plaint claims the land in question *as part of his taluq*.

The only possible ground, as it seems to us, upon which a person in the plaintiff's position could claim to retain possession of the land so encroached upon, would be, that the landlord had either expressly or impliedly acquiesced in the encroachment, or, in other words, that he had allowed the tenant to add the area encroached upon to his holding.

It might be supposed from the language of the judgment in the case to which we have last referred that the learned Judges there intended to lay down the rule more broadly, and to say that in all cases, whether the encroachments were made with or without the landlord's consent, the tenant making it had a right to retain the land so encroached upon till the end of his tenancy. But we have consulted our brother MITTER as to this, and we find that it was by no means the intention of the Court in that case to lay down the rule thus broadly.

It would, indeed, seem strange if, as a matter of law, a tenant were allowed, *without his landlord's permission*, to appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass, and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it, until the expiration of his tenure.

In this particular case, however, it was no part of the plaintiffs' case that the zemindar, either expressly or impliedly, had consented to the encroachment. His case in the first instance was, [823] that the land in question formed part of his original taluq. That has been negatived by both the Courts.

He then contended that he had held it adversely to his landlord; but that, for the reasons already given, we have found to be untenable.

The result, therefore, is that the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[ENCROACHMENT ON LANDLORD'S PROPERTY—

The presumption is that the land enclosed from waste is added to the holding whether the landlord has or has not assented to the encroachment (1871) *Whitmore v. Humphries* (1871) L. R., 7 C. P., 6.

Where the tenant takes in land belonging to his landlord which was not originally enclosed in his holding, but is not waste land, so that it is not subject to the above presumption, it is a question of fact to be decided on all the circumstances of the case whether he has taken it in as part of his holding; if he has, and if he has held it for more than twelve years, he is entitled to retain it till the end of his term, but must then give it up to the landlord with the original land —*Tabor v. Godfrey* (1895) 64 L. J. Q. B. 245. Until the tenant perfects his title to the encroachment by adverse possession for the prescribed period, the landlord may at his option treat the tenant as a trespasser in respect thereof —(1897) 25 Cal., 302 (903); (1902) 16 C. P. L. R., 36 (39); (1903) 31 Cal., 397 (402).

See as to landlord's rights under various circumstances in such cases, (1905) 2 C. L. J. 125.

As regards the limitation applicable, to a case of this sort, see (1908) 13 C. W. N., 698.]

[10 Cal 823]

FULL BENCH REFERENCE.

The 16th June, 1884.

PRESENT ·

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND MR. JUSTICE WILSON.

Hurry Mohan Rai.....Plaintiff

versus

Gonesh Chunder Doss and others..... Defendants.*

Hindu law—Repairs to houses held by a Hindu lady having a life interest—

Credit—Death of life tenant before payment—Liability

of estate for the debt.

A daughter succeeding to the estate of her father ordered a quantity of lime for the purpose of making repairs to certain houses on the estate, the repairs were completed, but the lady died before the debt contracted by her for the lime had been paid off.

At the time of her death there remained outstanding a large sum due as rent, which the lady had neglected to collect during her lifetime.

In the suit brought by the creditor against the heir of the lady, and the reversionary heirs of her father's estate (into whose hands the estate had passed), in which he asked for a decree—(1) against the estate in the hands of the reversioners, and (2) sought for payment out of the rents uncollected in the lady's lifetime, or, in the alternative, that the lady's personal estate might be held liable on a reference being made to a Full Bench, as to whether the plaintiff could enforce his claim against the estate in the hands of the heirs of Raj Chunder generally, or as against the amount of rents, which accrued due to the lady and which remained uncollected.

Held, by MITTER, McDONELL and PRINSEP, JJ (GARTH, C. J., and WILSON, J., *dissenting*) that the plaintiff was certainly entitled to be paid out of the arrears of rent since collected, but that he also was entitled to enforce his claim against the heirs of the last full owner of the estate generally.

[824] ONE Raj Chunder Doss died intestate, leaving him surviving a widow, Rasmoni Dossee, and three daughters, Koomaree Dossee, Poddomoney Dossee and Juggodumba Dossee, and five grandsons by these daughters.

* Full Bench Reference on a judgment of NORRIS, J., dated 19th July 1883.

On the death of Raj Chunder, Rasmoni became entitled as his widow to all his property, and continued in possession thereof till her death in 1871. On her death (Koomaree Dossee having predeceased her mother) Poddomoney and Juggodumba became jointly entitled to the estate of their deceased father, and continued in such possession until a partition took place, when they severally enjoyed the rents, issues and profits of the shares allotted to them. In 1878 Poddomoney died and Juggodumba thereupon became entitled as the sole surviving daughter of Raj Chunder to the whole of the estate. Amongst the property, which thus from time to time fell to her, were several brick houses; and for the repair of these houses Juggodumba, through her manager, ordered from one Hurry Mohun Rai large quantities of lime. The first of such orders was made in 1873, when a hathchitta was granted to Hurry Mohun Rai duly signed by Juggodumba. Between 1873 and 1880 accounts between Juggodumba and Hurry Mohun were periodically adjusted, and the balance found due to Hurry Mohun after each such periodical adjustment was carried forward, the last of such adjustments being come to in Bysack 1287 (April and May 1880), when a balance of Rs 2,145 was found due to Hurry Mohun, the amount being carried forward and entered in a fresh hathchitta, which was duly signed by Juggodumba.

Subsequently to the last adjustment, Hurry Mohun supplied to Juggodumba a further quantity of lime, valued at Rs. 1,261, and received in part payment thereof Rs. 1,000, this transaction was then entered in the hathchitta abovementioned. Juggodumba died on 31st December 1880, and the estate thereupon devolved on the grandsons of Raj Chunder.

At the time of the death of Juggodumba there remained outstanding large sums of money due to Juggodumba as rents which had become payable to her in her lifetime, and had been uncollected, but which since her death had been realized by the [825] Receiver who had been appointed in a suit brought by the grandsons for partition of the estate.

Hurry Mohun then brought this suit against the heirs of Raj Chunder to recover Rs. 2,406 for lime supplied by him, asking that he might be paid out of the rents which had been uncollected during the lifetime of Juggodumba, and which were now in the hands of the Receiver, and which had, as he submitted, devolved on the defendants, subject to the debts and liabilities incurred by Juggodumba, and in the alternative, he asked for a decree against Troylokonath Biswas, who was the sole heir of Juggodumba, in respect of her stridhan; and further prayed, should Troylokonath not admit sufficient assets, that the estate of Juggodumba might be administered. Hurry Mohun had previously to this suit put in a claim for the amount now sued for, in the administration suit brought to administer Juggodumba's estate.

The defendants stated that the income enjoyed by Juggodumba during her lifetime had amounted to several lakhs of rupees per annum, and that the repairs ought to have been paid for out of the accumulated surplus income; and contended that the uncollected rents formed an accretion to the estate of Raj Chunder and were not, therefore, liable for the debt.

Mr. Jackson and Mr. Pault for the Plaintiff.

Mr. Bonnerjee, Mr. Trevelyan, Mr. Hill, and Mr. Sale for the different Defendants.

Mr. Justice NORRIS gave judgment in favour of the plaintiff, holding that the estate of Raj Chunder was liable for the amount of the plaintiff's claims, and directed the Receiver to pay over the amounts sued for with costs to the plaintiff.

The defendants appealed.

The appeal came on for hearing before Sir RICHARD GARTH, C. J., and Mr. Justice CUNNINGHAM, on the 15th February 1884, and the Court, after hearing Counsel, decided to refer the following questions to a Full Bench :—

(1) Whether, under the circumstances of the case, the plaintiff is entitled to enforce his claim against the estate of Raj [826] Chunder generally in the hands of the heirs of Raj Chunder.

(2) Whether the plaintiff has a right to enforce his claim against the rents due and uncollected at the death of Juggodumba.

The Advocate General (Mr. Paul) and Mr. Bonnerjee for the Appellants.

Mr. Paul.—Every debt is ordinarily payable by the person ordering the credit. If uncollected rents belong to the reversioner, it must follow that the personal debt is chargeable on the person only, and cited *Ram Koomar Mitter v. Ichamoyi Dasu* (I. L. R., 6 Cal., 36), *Ramasami Mudaliar v. Sellattammul* (I. L. R.) 4 Mad., 375), *Gadgeppa Desai v. Apaaji Jivandrao* (I. L. R., 3 Bom., 237).

Mr. Bonnerjee on the same side.—What is the nature of the estate a widow gets in her husband's property, or that a daughter gets in her father's property?

The widow is not a manager of the property she is full owner, and she represents no one in the estate. She can throw away the income of the property if she chooses, so long as she does not interfere with the *corpus*. She uses the property so as to augment her income.

As to the acts of a widow binding on the inheritance, see *Vyavasthu Darpana*, v 39, p. 52, of Shyama Churn's book. The question is whether doing repairs to a house are of such a beneficial character to the estate as to justify the widow alienating.

The word "sale" in *Vyavasthu Darpana*, vs 40, 41, p. 55, signifies also any other alienation. Is it a correct proposition of law that from the time that the debt was contracted it became a charge on her estate?

It appears that Juggodumba in her lifetime brought a suit against the representative of Poddomoney to have it declared that the rents and profits formed part of the *corpus* of the estate, and that suit was decided in her favour—see the judgment of WILSON, J., dated 21st April 1880

[827] The case of *Ram Tuhul Singh v. Biseswar Lall Sahoo* [24 W. R., 307, L. R., 2 I. A., 131 (143)] shows that it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. So that even if the reversioner has enjoyed the benefit of the repairs done by the widow he is not bound to repay the money spent.

I submit the uncollected income became the property of the next heirs of her father after Juggodumba's death, and that the repairs are payable out of income, and the remedy is against her estate and not against the estate that has been repaired *Bungsee Dhur Hajra v. Thakoor Pyrag Singh* (7 Sel. Rep. 114); *Umroothram Byragee v. Narayandas Ruseekdas* (2 Bor., 223).

Mr. Evans (with him Mr. Amir Ali) for the Respondent, Troylokonath the son of Juggodumba.—I wish it to be declared that the uncollected rents are chargeable, but as I am one of the reversionary heirs I wish the suit to be dismissed.

I will confine myself to the point as to the difference in the position of uncollected rents and the ordinary *corpus* of a testator's estate. Inasmuch as uncollected rents became debts due to Juggodumba out of which she could

have paid for the lime they were her moneys. How do uncollected rents become to be accretions?

In *Isri Dut Koer v. Mussamut Hansbutti Keram* (L R., 10 I. A., 150. I. L. R., 10 Cal., 324) the question was whether property purchased by a widow out of the profits of the estate of her husband was to be considered an accretion.

The widow had no opportunity of electing whether she would spend or save the uncollected rents, as she died when they were on the way to her, can the Court then elect for her, there is no rule of Hindu law which would allow of this to be done. It must be remembered that the plaintiff has filed a claim for this debt in the administration suit, and I submit that, therefore, this suit should be dismissed.

Mr. O. C. Mullick for the Respondent Hurry Mohun—The [828] widow fully represented the estate, and was but a manager or trustee for the reversioners, subject to the restrictions on alienation. Whether she was rich or poor, or whether she applied the money to the repairs, are not points which can be considered in this reference.

[GARTH, C.J.—The question whether she had money to do the repairs must surely be considered, it is conceded that it was necessary to repair.]

Then would the widow be justified under any circumstances in leaving such a debt unpaid, it might be that she could not help leaving these debts outstanding, as to whether the heirs are liable in this suit? I submit that whoever takes the estate is responsible for the debts—See Shama Churn Sircar's *Vyavastha Darpana*, p. 123, under heading "Payment of debts", see p. 127. It is not the immediate succession which is in question, the principle is that the person who holds the estate takes over the debts with certain defined exceptions, see p. 539 of the revised edition of Shama Churn, also Macnaghten's Hindu Law, vol. II, ch. X, s. 283. If the reversioners are not liable to pay for the lime out of the estate, yet they are liable to pay for it out of the rents uncollected in the widow's lifetime and afterwards collected by the Receiver. As to whether accumulations are to be considered *corpus* see *Hansbutti Keram v. Isri Dut Koer* (I. L. R., 5 Cal., 512, 4 C. L. R., 511), as to the distinction between accumulations and the current year's income—see *Sreemutty Puddomoney Dossee v. Dwarka Nath Biswas* (25 W. R., 335).

The **Opinion** of the Court was as follows:—

Mitter, J.—I am of opinion that the estate of Raj Chunder Doss, to which the defendants have succeeded on the death of Juggodumba Dossee, is liable for the balance of the price of the lime supplied by the plaintiff for the repair of certain houses appertaining to that estate. The lime was ordered for the purpose of repairing some of the houses on Raj Chunder's estate, and was actually used for that purpose.

Under these circumstances the plaintiff, in my opinion, has the right to be paid out of the estate to which the houses apper-[829]tain, and Juggodumba is not personally liable for the balance of the price of the lime supplied by the plaintiff. She incurred this liability as representing the estate of Raj Chunder Doss.

The point referred to us has been argued before us as if the question for decision was, under what circumstances a Hindu female in possession of a qualified estate is competent to borrow money for the management of the estate, so as to bind it in the hands of the next heir. But it seems to me that is not the question before us.

The question before us is of a different character. It is, under what circumstances a contract or a transaction giving rise to pecuniary liability, entered into by a Hindu female representing an estate, is binding upon the heir of the last male owner after her death.

It is now settled law that a Hindu widow fully represents the estate, and when the estate is pretty large it becomes necessary to enter into various contracts or transactions with third parties in the course of its management. Circumstances may be imagined, where it would be manifestly unjust to hold that a particular contract, which a Hindu widow found it necessary to make with a third party for the benefit of the estate, was not binding upon the next heir after her death. Suppose the estate consists of Sunderbund grants in which periodically embankments are required to be constructed for their preservation.

Suppose a Hindu widow in possession of such an estate engages workmen to construct an embankment on the condition of paying for the work after it was finished; suppose the death of the widow takes place just after the work was completed. It seems to me, that it would be manifestly unjust to hold that the next heir succeeding to the estate would not be bound to pay for the work done out of that estate.

On the other hand, cases may be supposed where it would be unjust to the next heir, after the widow's death, to make him liable under a particular contract, though made by a Hindu widow in the course of the management of the estate.

Suppose a Hindu widow engages a builder to make sundry improvements in the family dwelling house while there is no [830] necessity for such improvement, and dies after the work is finished. It seems to me that it would be unjust to hold that the next heir is liable to pay for the work done out of the estate, though it is to a certain extent benefited thereby. It follows therefore that in order to bind the next heir it is not sufficient to show that the contract has conferred a benefit upon the estate, but it must be further established that the contract is of such a nature that a prudent owner in managing his estate would find such a contract necessary for the due preservation of the estate. A contract, therefore, which not only confers a benefit upon the estate, but is necessary for its good management, though made by a Hindu widow, is, in my opinion, binding upon the next heir after her death.

In the case before us both these requirements are fulfilled. The repair of the houses not only benefited the estate, but was necessary in order to prevent their deterioration in value. It is not disputed in this case, and the fact is well known, that the value of house properties considerably depends on their being kept in good repair.

It has been said that such outgoings as the costs of repairing houses appertaining to the estate must be met from the gross income of the estate. There is no doubt that it is so. But that circumstance cannot affect the rights of a third party who has a valid claim against the estate. Suppose on the last day on which revenue may legally be paid a widow finds herself unable to meet a Government demand, from deficiency in the collections of rent from the tenants. There cannot be a question that a third party, who under these circumstances lends money to the widow to meet the Government demand, is entitled to recover it out of the estate. But suppose the next day after the revenue was paid the arrears of rent were paid into her treasury, and she, without repaying the loan, squandered away the whole of the rent received, her act would not in the least degree affect the rights of the lender. The Government revenue is as much payable out of the gross income as the costs of

repairing houses on the estate. The estate would be liable if there is a valid necessity for the particular transaction, although if a widow neglects to meet the liability out of the gross income [831] she would be liable to be sued by the presumptive heir on the ground of waste.

But in this case there is no such charge of waste against the deceased widow. On the other hand, it is admitted that after her death the arrears of rent that accrued due during her lifetime have been since collected. If the costs of repairing houses on the estate are to be met from the gross income, the plaintiff is at least entitled to a decree to have his claim satisfied out of the arrears of rent collected since the death of the widow. But it has been contended that the accumulations go to the heir of the husband, and are not liable for the widow's personal debts. But *ex hypothesi* the whole of the arrears since collected cannot be considered accumulation, because if the costs of repairing houses on the estate and similar outgoings are to come out of the gross income, that portion of it would become accumulation which would remain after meeting them. The creditors of the widow cannot prefer any claim against the arrears of rent collected after her death, because such rent does not constitute her stridhan. Therefore the arrears of rent collected since the death of the widow cannot be considered assets left by her, and available to her general creditors. It is those creditors only, who have a claim arising out of the management of the estate by the widow, that are entitled to be paid out of the said rent. The heirs of the husband are entitled to have the control of the said fund, and not the personal heirs of the widow. But the former being only entitled to the accumulations properly so called, are bound to pay out of the said fund the necessary outgoings of the estate for the time during which the widow's estate lasted.

It is therefore clear to me that at any rate the plaintiff is entitled to be paid out of the arrears of rent since collected.

But it seems to me that the plaintiff's right is higher, and, in my opinion, he is entitled to enforce his claim against the appellants as the heirs of Raj Chunder generally.

McDonell, J.—We are asked to say, whether, under the circumstances stated in the order of reference, the plaintiff had a right to enforce his claim as against the appellants. (1) as against the heirs of Raj Chunder generally, (2) as against the amount of rent [832] which accrued due to Juggodumba Dossee and which remained uncollected at her death, and which has since been collected by the Receiver on account of the aforesaid heirs

I think that both the questions should be answered in the affirmative, and generally for the reasons given by my learned brother MITTER.

It is admitted that Juggodumba Dossee ordered the lime, for the price of which this suit is brought, and that she was legally bound to pay for it.

It is further admitted that the lime was ordered by her for the express purpose of repairing some of the houses appertaining to Raj Chunder's estate, and that it was actually used for that purpose. It is clear that the repairs of these houses not only benefited the estate of her father, Raj Chunder, but were necessary in order to prevent a deterioration in their value.

Under these circumstances, the plaintiff, in my opinion, has a right to be paid out of the estate to which the houses appertained, and Juggodumba or her heirs cannot be held to be personally liable for the balance of the price of the lime supplied by the plaintiff.

It has been argued that such outgoings, as the cost of repairing houses should, be met from the income of the estate; that this is so, I think, cannot

be doubtful, and if Juggodumba Dossee, having assets sufficient to meet such charges, had spent the income on her own amusements and had neglected to pay such debts as those due to the plaintiff, she might be liable to be sued by the presumptive heirs of Raj Chunder to restrain her from waste, but I argue with MITTER, J., that this would not affect the rights of a third party, such as the plaintiff, who has a valid claim against the estate, more especially in a case like the present one, where the heirs of Raj Chunder have received the amount of rent which had accrued due before the death of Juggodumba Dossee, which said amount is much more than sufficient to satisfy the plaintiff's claim.

Prinsep, J—This is a case tried on the Original Side of this Court, which an Appellate Bench has referred for our opinion on two points involving considerations of Hindu law.

The following facts have been found, or have been admitted in the course of argument.

[833] The plaintiff, from time to time, has supplied Juggodumba (who as daughter by right of inheritance was in possession of the estate of Raj Chunder Doss) with lime for the purpose of repairing some of the houses of Raj Chunder's estate, and the lime was used for this purpose. It was the practice for Juggodumba's man of business, from time to time, to make payments to the plaintiff on this account. at Juggodumba's death moneys were due to the plaintiff for lime thus supplied and used, and he has accordingly sued the heirs of Raj Chunder Doss, who have succeeded to the estate as liable to satisfy this debt out of that estate, but at the same time he has joined as a defendant the heir of Juggodumba herself, asking as an alternative that, should relief be refused against Raj Chunder's estate, the lady's personal estate may be held liable. It further appears that there were, at the lady's death, large outstandings due in the shape of uncollected rents which formed portion of Raj Chunder's estate, these have been realised, and are in the hands of a Receiver. The plaintiff asks in the first place to be paid out of these moneys.

I agree with MITTER, J., and generally for the reasons stated by him, that the heirs of Raj Chunder Doss are liable for the debt to the plaintiff, but I would add a few observations

I will first of all consider the rights of the plaintiff as against Juggodumba as if she were now alive. On his inability to obtain a private settlement of his claims he would be entitled to obtain the assistance of the Courts by means of a suit. If he desired to make Juggodumba personally liable, that is to say, if he were satisfied with obtaining a decree against her personally, which would be enforceable only by attachment of her person, or by attachment and sale of her own personal property, that is her stridhan, he would bring the suit against her alone. But it would be open to her to reply that she was not personally liable, that her dealings with the plaintiff were as representing the estate of Raj Chunder, that the articles for which payment was sought were such as could legitimately be purchased by her in the interests of that estate; and that they were supplied and used for such purpose.

The Court would then join the reversionary heir to Raj Chunder's estate as defendant to the suit, and try the issue of the liability of that estate, or whether the widow was alone liable. If the [834] allegations made by the widow, such as I have above stated, were established, a decree would, as I understand the law, be passed declaring Raj Chunder's estate to be liable to satisfy the debt. If, however, she should fail to prove her allegations that she was not personally liable, the plaintiff would receive a personal decree against her.

But it would also be open to the plaintiff to sue the lady and the next reversionary heir together, if he desired to make his claim for payment from the estate of Raj Chunder. In that case the Court would have to determine the same points that I have just stated, as might be raised if the lady were sued alone for the money as a personal debt. It would not, as I understand the position of the parties, be for the Court to determine in such a suit the question of legal necessity, as applied to the powers of a Hindu widow to alienate some of the immoveable family property by sale, or to borrow money by creating some incumbrance on it, but simply to decide whether the articles supplied were such as could legitimately be supplied to a Hindu widow, for the purpose of enabling her to perform her duty as the temporary proprietor, and as such, borrowed to maintain the family property. Whether non-payment of such debts amounted to waste is not a matter which could be raised in that suit.

It is a matter with which the plaintiff would have no concern. His right, under the circumstances stated above, to recover the money due to him cannot be affected by the omission or refusal of the Hindu widow to pay the money due out of her current income, such conduct on her part might, however, amount to an act of waste, which would entitle the reversioner to sue her for the purpose of obtaining an adequate remedy.

The death of the lady before payment was made, does not, in my opinion, alter the rights of the plaintiff, unless we hold that he was bound to give her no credit but to require cash payments. I do not understand that this proposition is insisted on. Whether Juggodumba has been guilty of waste in her management of Raj Chunder's estate, whether, out of her ample income from this source, she should not have paid this debt before her death, are matters with which in the present suit [835] we have no concern. We have rather to consider whether the plaintiff has any claim on that estate. If he has, mere forbearance on his part in realizing the money due to him promptly would not affect his right. If the lady has, as has been suggested, been wasting that estate so as to favour the heirs of her private estate that cannot concern the plaintiff. These are matters which concern only the heirs of the respective estates in determining to which estate any funds belong. Nor do I propose to consider any hypothetical cases of the position of a reversionary heir in the event of waste on the part of a Hindu widow. If Raj Chunder's estate is liable, the plaintiff is entitled to recover from it, any waste on her part would not shift the responsibility so far as regards payment to the plaintiff, unless possibly it could be shown that by his conduct the plaintiff had connived at that waste. He has had long dealings with the family, and has not been paid in cash, but he has had his account settled at intervals, and the accident of the lady's death at a time when there was a balance due to him could not affect his position. But even if it be held that this debt should have been met out of the lady's current income—a proposition not conceded by me except for argument's sake—we have it here that at her death large sums of uncollected rents were due, more than are sufficient to meet this demand.

For these reasons I would reply to the questions put by the Appellate Bench that, under the circumstances stated, the plaintiff has a right to enforce his claim against the heirs of Raj Chunder, either generally or as against the amount of rents which accrued to Juggodumba and which remained uncollected at her death.

Garth, C.J.—As the question referred to us is peculiarly one of Hindu law, I feel some hesitation in dissenting from my brother MITTER. If I could find any authority in favour of his opinion, or any recognised principle upon

which I thought it could reasonably be supported, I should be disposed to mistrust my own judgment, more especially, if I could see that any injustice would result in the majority of cases from my own view of the matter.

But as the question is admittedly now raised for the first time in a Court of law, and as there is no authority upon it, and as [836] I cannot help thinking that the position for which the plaintiff contends, will not only be inconsistent with recognised principles of Hindu law, but will give rise to a vast amount of inconvenience and litigation, I feel bound to record my own strong convictions in opposition to the views of the majority of the Court.

We have here, a Hindu lady in the enjoyment of a widow's estate in a very large property consisting in a great measure of houses in Calcutta. Her yearly income was estimated at no less than from four to five lakhs of rupees.

Her manager gives orders to the plaintiff for a quantity of lime, for the repair of these houses. The plaintiff supplies it from time to time, and is paid for it by the manager by sums on account out of the lady's income, which, of course, is very far more than sufficient to satisfy this, and every other, requirement of the estate.

There were no special terms entered into with the plaintiff. He was dealt with in the same way as any other merchant or tradesman who supplied goods or labour for the purposes of the estate by order of the lady or her manager.

Under these circumstances, it is contended that the plaintiff did not contract with the lady personally, but merely with her as representing her husband's estate for the time being, and that consequently the plaintiff, if he had sued her for the price of the lime, could not have obtained a decree against her personally, but only a decree enforceable against the estate, or, in other words, a decree under which the lady's own stridhan, if she had any, or her person, could not be taken in execution.

And, if I understand my brother MITTER rightly, such a decree could not be realised against the estate so as to affect the reversionary heirs. It could only be realised against income of the estate in her hands, or against her life interest in the property, and in case of her death after the decree was made it could not be realised against the estate in the hands of the reversionary heirs.

The consequence would be, that the creditor, having obtained such a decree, would have less security for his money than if he had contracted with the lady personally, and obtained a decree against her in the ordinary way, because, under a decree against [837] her personally, he could, not only, have proceeded against her stridhan and her person, but also, against any proceeds of the estate in her hands, or against her own life interest in the estate itself, [See *Barun Dabey v. Brij Bhookan Lall Awusti* (24 W. R., 307)].

The only way, so far as I can see, in which a creditor, under such circumstances, who had supplied goods upon the credit of the estate, could place himself in any better position than if he had personally contracted with the widow, would be, by suing the widow and the next reversionary heir in the same suit for the price of the goods, and having obtained a decree against both defendants, by putting up the entire estate (not only the widow's but the reversionary interest) for sale in execution, he might in this way sell the whole estate, or as much of it as would be necessary to liquidate the debt, but, of course, the reversionary heir, having notice of the proceedings, would have an opportunity, if he so pleased, of redeeming the property from sale.

In many cases, however, the reversionary heir would probably not think it worth while to redeem; as, for instance, in the case of a young widow likely

to live many years, where, the reversionary heir is an old man or a bad life. In such case if the reversionary heir did not choose to redeem, the estate would be sold to the injury of the inheritance.

Now this, as it seems to me, would be allowing a widow, or any other Hindu female heir, to do indirectly precisely what the Hindu law expressly forbids, and what our Courts and their Lordships of the Privy Council have been very careful in a long series of decided cases to prevent.

If there is any point of Hindu law more clear than another, it is this, that a Hindu widow has no right to sell or charge the estate to the prejudice of the inheritance, so long as the income from the estate is sufficiently large to satisfy all its proper requirements.

In other words, in order to justify any such sale or charge, a necessity of two kinds must be shown.

1st.—A necessity for the money sought to be raised, as, for [838] instance, that it is wanted for repairs, or for paying Government revenue, or for shrads, marriages or the like, and

2nd.—That the income of the property is not sufficient to provide the requisite funds, and that consequently it is necessary to sell or mortgage.

Unless this last necessity is shown, no mortgage or sale, by a Hindu widow, is valid as against the reversionary heir.

But if the plaintiff's contention be correct, it would never be necessary in a case like the present to consider whether the income of the widow is sufficient to pay for the repairs or not, all that the widow need do, is to order the materials, or the labour, or whatever else is necessary for repairing the property, and not to pay for them. The plaintiff's remedy would then be, as I understand the plaintiff's argument is, to sue the widow and the next presumptive reversionary heir as representing the estate, and under a decree in such a suit the whole estate, or a sufficient portion of it, might be irredeemably sold, unless, the reversionary heir chose to redeem the property by paying the widow's debts out of his own money.

Meanwhile the widow may be expending the income of the estate in her own amusement, or in any way she thinks proper, and the only remedy against her, as I understand the argument is, would be by a suit by the reversionary heir to restrain her from waste, the alleged waste consisting in this, that the widow has been spending the income of the property instead of paying as she ought the creditors upon it.

But then, as it seems to me, the mischief would have been done. The sale of the property would have been completed and the interest of the reversioner would have been sacrificed.

I should have thought that if this had been the law there would surely be some cases in the books upon the subject. But not a single instance has been adduced in which a suit like the present has ever been brought against the reversioners; not one in which a decree, such as we have been discussing, against the widow as representing the estate, or against the widow and the next reversionary heirs has ever been made, and no single instance in which a suit, such as is suggested, has been brought against a widow for waste.

[839] Having regard to the numbers of cases, in which Hindu widows and other female heirs are constantly attempting to raise money by sale or mortgage of the inheritance, and the many devices which are resorted to for that purpose by mookhtears and others employed by these ladies, it is certainly remarkable, that if the law is as the plaintiff contends, we should find no single trace of it in the reports.

And, in my opinion, if this were the law, it would lead to much inconvenience and injustice; and I will proceed to explain why I think so.

If I understand my brother MITTER rightly, he considers that a contract made by a widow for goods or labour, as in the present case, would only be binding upon the estate if the goods supplied were for the purpose of repairs or other necessary expenditure for keeping up the property.

Thus, for instance, if the lime supplied by the plaintiff were required for such repairs, then the plaintiff's contract (in the absence of any special agreement to the contrary) would be made upon the credit of the estate.

But if the lime were supplied for building new houses, or for any other purpose which would amount to a necessity, the contract would be made upon the personal credit of the widow herself.

If so, it will in future be very important for contractors in the plaintiff's position, when dealing with a Hindu widow, to ascertain for what purpose the goods or labour which they supply are required. If required for one purpose, their remedy will be against the estate, if required for another, their remedy will be against the widow personally.

This very case affords a good illustration of the difficulty to which this state of the law might give rise.

Suppose, that the widow in this instance had required the lime partly for necessary repairs to her property, and partly for other purposes which would come within the category of necessities, and suppose, the order to have been given to the plaintiff, without any information as to the purpose for which the lime was required. If the plaintiff, under these circumstances, would wish to ascertain his true legal position, he must find out how [840] much of the lime was required for necessities, and how much for other purposes, and in the event of his having to sue for the price, he must shape his case accordingly.

If his proper claim is against the estate, he would have to find out who is the next reversionary heir, and to make him a defendant in the suit, and here he would expose himself to two risks, which I must say it seems to me very hard to impose upon a contractor in the plaintiff's position.

His suit would be defeated as against the alleged reversioner—

1st.—By his failing to prove that he was the next reversionary heir; and

2nd.—By its being shown that the goods were not ordered or required for necessary repairs, but for purposes which were not necessities.

It is obvious that in such a suit the alleged reversioner must be allowed to set up either or both of these defences, because, generally speaking, it would be the object of the widow to shift the burden of the debt from herself on to the estate; and whatever representations might have been made to the creditor at the time when the goods were ordered, it would be open to the reversioner to show that in point of fact the goods were not used or required for necessary repairs.

And difficulties still more serious might arise in suits, such as have been suggested, against the widow for waste.

Even assuming that the next reversionary heir lived in the neighbourhood, how could he possibly ascertain, if he was purposely kept in ignorance of the fact, whether the widow was paying her debts or not? And, again, what amount of neglect on the part of the widow to pay such debts would justify a suit for waste?

If she left them unpaid for six months or a year, or two years, would that amount to waste? Or must the reversioner wait to sue for waste, until he is

actually sued for the debt, or his estate has been attached or put up for sale under a decree ?

These are all novel questions, of course, because the doctrine which gives rise to them is novel ; but I fear that if that doctrine is really to be the law of the land, we shall soon hear enough about it in the litigation which will follow.

[841] If Hindu widows find, that by shifting their debts from their own shoulders on to those of the reversionary heirs, they can manage to spend their income for their own purposes and upon their own pleasures, I am afraid that they will not be slow in availing themselves of the chances which the law affords them. And this brings us to the question, why should Hindu widows be in any different position as against tradesmen and others with whom they deal, than ladies of any other nationality who have a life estate in immoveable property ?

A European, a Mahomedan, or a Parsee lady, who has a life estate in land, contracts with tradesmen and others, as anybody else in that position would do, upon her own responsibility

The tradesman knows perfectly well that the person with whom he is dealing has only an estate for life, and if he is a wise man he looks after his own interests, and does not allow his customer to run too deeply into his debt.

There are thousands of persons in this country, officials and others, who have nothing but their salary, a life income to live upon, and their salary or income dies with them. Tradesmen and others who deal with such persons know this perfectly well, and are content to run the risk of it, and I cannot see why persons who deal with Hindu widows should be placed in any different position.

It may be, no doubt, as observed by my brother MITTER during the argument, that the legal status of a Hindu widow in former days was not so much that of a tenant for life, as of a temporary custodian of her husband's property

But that, surely, is not the state of the law now. The true nature of a widow's estate was carefully and fully discussed and considered in the Full Bench case of *Kerry Kolitany v. Monceam Kolita* (13 B L R., F. B., 1), and nine out of ten Judges of that Bench agreed in holding that the interest of a Hindu widow was not that of a mere custodian or trustee, but that she had an estate of inheritance in some respects larger than an ordinary estate for life under the English law.

Then why should she not be personally liable, like any other tenant for life, for goods or labour, which she orders ? And why [842] should persons contracting with her be in any worse or better position as regards their rights and remedies, than they would be as against any other tenant for life ? The question for this Full Bench is not, upon whose credit, as a matter of fact, the plaintiff contracted, that question would be one for the Division Bench, what we have to decide is this, with whom, as a matter of law, in the absence of any evidence beyond the facts found, the plaintiff contracted to supply the lime, and I am at a loss to see why a different rule should be applied to the case of a Hindu widow from that which would be applied to any other case of a tenant for life.

It may be, that in this particular instance it would be morally right that the plaintiff should be paid by the defendants, but I am strongly opposed to sacrificing principle, and introducing novel doctrines into this or any other Court in order to do justice in any particular case, and I consider that the plaintiff's contention is not only contrary to law, but that, as I have already explained, it would lead to much injustice and litigation.

There is more plausibility, and, no doubt, less danger, in the second proposition contended for by the plaintiff, but even this is very difficult to reconcile with the present state of the law.

Having regard to the discussion of their Lordships in the Privy Council in the case of *Ishri Dut Koer v. Hansbutti Koerain* (I. L. R., 10 Cal., 324 ; L. R., 10 I. A., 150) it is clear, that uncollected rents of a property held by a Hindu widow must belong at her death, not to her estate, but to the reversionary heirs, and, therefore, unless it could be shown that the plaintiff's debt was charged in some way or other upon these rents, it is difficult to see how they can be legally made available for its payment. If the rents were not charged with the plaintiff's debt in the widow's lifetime, it is difficult to see how they could have become so charged at her death.

An ordinary tenant for life under the English law is entitled to all rents, collected or uncollected, which became due in his or her lifetime. They belong to the estate of the life tenant and not to the reversioner.

And not only so, but by the Statute 4 & 5, William IV, c. 22, s. 2, all rents becoming due at fixed periods are made so apportion-[843]able between a tenant for life and the remainder man or reversioner, as that, on the death of the tenant for life during one of such periods, he or she is entitled to a proportionate part of the accruing rent up to the time of his or her death, and the remainder man or reversioner to the other part.

In this respect a Hindu widow is, by the present law of this country, placed at a great disadvantage, and her creditors also, because in case of her death all uncollected rents, instead of belonging to her estate, and being distributable amongst her creditors, belong to the reversionary heir.

It would undoubtedly be a very fair rule and productive, as far as I can see, of no hardship, that such uncollected rents should only be considered as belonging to the reversionary heir, subject to any debts which may have been incurred by the widow ; at any rate, debts which have been incurred by her in providing for the necessities of the family property.

But this would be such a serious qualification of the law as laid down by the Privy Council, that I, for one, do not feel justified at present in adopting such a rule.

In my opinion, therefore, the question referred to us should be answered in the negative.

It is much to be hoped, that having regard to the novelty, the importance, and the general application of this question, and the divided opinions of this Court upon it, it may be submitted, before long, either in this or some other case, for the consideration of the Privy Council.

Wilson, J.—The first question referred to us is, whether, under the circumstances stated in the reference, the plaintiff is entitled to enforce his claim against the estate of Raj Chunder Doss generally in the hands of the heirs of the latter.

I feel great hesitation in expressing an opinion upon this question at variance with that of some of my colleagues, whose experience in the administration of the Hindu law is much longer than mine. But I am unable to come to any conclusion other than that at which the Chief Justice has arrived.

I agree generally in the reasons given by the Chief Justice for that conclusion ; and I desire only to add some further considerations, which seem to me to support that view.

[844] We are asked to say whether a widow or daughter, in possession of an estate as such, who incurs a debt for necessary repairs, there being

no suggestion of any deficiency at any time of income out of which to pay it, nor of any necessity to charge the inheritance; and there being no evidence of an intention on anybody's part to charge the inheritance, and no evidence of a contrary intention, is to be taken, as matter of law, to contract on her own behalf or as representing the estate.

There is nothing, I think, peculiar about repairs; whatever rule we lay down in this case, must, I conceive, apply to all contracts properly made, and all liabilities properly incurred, in relation to the estate of which the widow or daughter is in possession; in fact, to all the ordinary outgoings which in a well-managed estate make up the difference between the gross income and the net income, such as Government revenue, rent (if any), maintenance and costs of collection.

In order to answer the question, in what capacity the lady contracts, or incurs liabilities in connection with the estate? I think, we must first ask another question: In what capacity does she hold the estate? If she holds it as a trustee or manager or on behalf or for the benefit of others, it may well be inferred that she makes contracts and incurs liabilities accordingly.

If she holds it as a beneficial owner, on her own behalf, and for her own enjoyment, I think, it follows that she contracts and incurs liabilities in a like capacity.

It is, I think, now well settled that a widow or daughter in question, not as such, holds as a beneficial owner, not as a trustee; and upon this principle the question now before us seems to me to be thereby disposed of. The authorities, I think, support the same view. They deal with the case of a Hindu widow; this is, in fact, the case of a daughter. The daughter's case is certainly not one more favourable to the plaintiff's view than the widow's.

In the cases I am about to refer to, it is necessary to bear in mind that the question has arisen after decree and execution, and has related to the effect of the decree and execution, and, of course, it is one thing, to say what was the decree and what did pass under the execution sale, and another thing, to say what might or ought to have been the suit and the decree, and what might [845] or ought to have been sold in execution. But in the cases in question, as in many other classes of cases with which we are familiar, the nature and incidence of the original liability has been considered in construing the proceedings which have been employed to give effect to it.

In the case of *Kistomoyee Dassce v. Prosunno Narain Chowdhry* (6 W. R., 304) it appears that one of several owners of an estate paid the Government revenue upon it, and sued his co-owner for contribution.

He obtained a decree against one of them, a Hindu widow, and put up her estate for sale in execution. The defendant became the purchaser. The question was, what passed by the sale, the widow's interest or the whole estate that had been her husband's? The Court said "She was a Hindu widow in possession, and the debt contracted was by her, and her rights and interests in the property were sold." It is added: "The decree might have declared the property itself liable for the debt."

It seems to me to be held there, that the liability—a liability to contribute to Government revenue paid by a co-owner—was a personal liability of the widow; though from the nature of the liability, arising as it did from a payment made to save the whole estate, it was also a charge upon the estate. And that case is cited with approval by the Privy Council in *Barjun Doobey v. Brij Bhokun Lal Awusti* (L. R., 2 I.A., 279). In *Mohima Chundra Roy Chowdry v. Ram Kissors Chowdry* (15 B.L.R., 142), the question, again, was

what passed by sales in execution of decrees against a widow. One of the decrees was in a suit for rent, the other in a suit on a bond given for arrears of rent, the rent in neither case being rent of the property sold. The rent had accrued after the death of the husband. COUCH, C J., and AINSLIE, J., held that only the widow's interest passed. Several reasons are given for this conclusion—amongst them, the want of proper parties to represent the estate. These reasons do not apply to the present case. But other reasons are given that do apply, having referred to two cases in which decrees had been obtained against widows for rent accrued during their husband's life, the Chief Justice says, what is laid down there is that where the suit is brought in respect of a debt due from the [846] husband, the decree against the widow, although it may be apparently a decree against her personally, is not to be considered as such, but as a decree against her as the representative of her husband's estate, and the decree may be executed as such. In the present case, the debt was not due from the husband, and if the estate of the husband is to be charged, either for the arrears of rent becoming due after his death, or for the bond which was given by his widow, it can only be upon the ground that the debts were necessarily contracted by the widow or under such circumstances as to make the whole estate liable, and not merely the interest of the person who contracted them. The suits were against the widow, and the decrees made in both were against her, and purported to be against her personally. The question whether the debts were necessarily incurred, so as to charge the estate, was not tried in either of the suits. It was not necessary for the plaintiff, in either of them, to prove that, in order to obtain a decree, he had a right to a decree against the widow, upon proving in the one case that the arrears of rent were due, and in the other that the bond was executed by her.

* This passage seems to me to show three things. First, that, in the opinion of the Court, the rent accruing due while the widow is in possession is a personal liability of the widow. secondly, that it cannot be made a debt against the whole estate without proof of necessity: thirdly, that the question, whether the rent is due, and the question, whether it is necessary to incur a debt in respect of it so as to charge the estate, are distinct questions.

In the note to that case is reported a case of *Brij Bhookun Lall Awustee v. Mahadeo Doobey* decided by LOCH and AINSLIE, JJ. In it the question was, what passed under a sale in execution of a decree against a widow for arrears of maintenance accrued due after her husband's death. It was held that the widow's interest alone passed. AINSLIE, J., in the course of the judgment says: "By the Hindu law, the claim was one to be satisfied by the holder of the property, at the time when each successive annual payment became due. I must hold that the debt was a debt incurred by Doorga Koowar (the widow) her-[847]self." He says again: "Assuming for the moment that Doorga Koowar's income from the properties of which she was tenant for life, with the right of a Hindu widow, was ample to provide for Net Koowar's allowance, as well as her own necessary expenses, it could not be asserted that there was any legal necessity sufficient to render valid an alienation by her." It is then pointed out that the maintenance, being a charge on the estate, might have been enforced against the whole estate in a suit properly framed for the purpose, and, no doubt, it might, the charge being prior to the widow's estate.

That case came on appeal before the Privy Council (L. R., 2 I. A., 275), and the judgment of this Court was affirmed. Their Lordships examine the form as well as the substance of all the proceedings. They consider, amongst

other things, the nature and incidence of the original debt, and, as it seems to me, they treat this as one of the elements in the decision of the case. They say: "This was a personal debt of the widow, and there is nothing to show that the estate of Mudden Mohun (the husband) was charged by the decree. The sale against her in discharge of her personal liability was of the interest which belonged to her, and not of the estate which belonged to her husband. It was the widow's property only that was liable to be sold, or was sold, in discharge of her personal debt." And, again, they speak of the view which their Lordships have taken of this decree, that it was a decree in a suit against the widow personally, that the decree was against her personally; that the attachment was to sell her property, that is, the interest which belonged to her in the estate and which was liable to make good her default. That judgment has been again explained by the same tribunal in the recent case of *Jogul Kisor v. Moharajah Jotendro Mohun Tagore* (No. 51 of 1881 and No. 2 of 1882, dated 13th March 1884, unrep.).

These authorities seem to me to show, that a Hindu widow in possession of her husband's estate is personally bound by the contracts she makes, and the liabilities she incurs in respect of matters properly payable out of revenue.

Secondly, that some of these charges may, from their own [848] nature, also be charges on the inheritance, and may be enforced as such in a suit properly framed for the purpose

Thirdly, that the widow cannot by any act of her's throw upon the inheritance liabilities properly her own, except in case of necessity.

Fourthly, that necessity means for this purpose not merely a necessity to make a payment, but a necessity for want of funds to pay it with, for throwing it upon the inheritance.

It is right, perhaps, to say, for the sake of caution, that I am not now dealing with the nature of the proof of necessity, or of enquiry into its existence, to be required. That subject has been dealt with by the Privy Council in *Hunnooman Persaud Panday v. Babooe Munraj Koonweree* (6 Moo. I. A., 393); *Kameshwar Pershad v. Run Bahadur Singh* (I. L. R., 6 Cal., 843).

I have not found any authority for the proposition contended for in argument that all the legitimate liabilities, incurred by a Hindu widow in the management of her estate, are incurred by her as representative of the estate.

A case was cited from Macnaghten's Precedents, chap. X, case VIII, page 283. The question referred to the Pundits was as to the liability of the reversionary heir of a deceased proprietor to pay a debt incurred by the widow of the latter while in possession of her husband's estate. The answer is, supposing the proprietor, a widow, who succeeded him, to have contracted the debt for the payment of rent due to Government or other necessary disbursement to save the estate, or for the purpose of promoting her husband's spiritual welfare, or for the support of the family, or for the due execution of any conditions made by her husband, and to have died prior to the liquidation of such debt, the proprietor's heirs, that is, his brother and brother's son are bound to discharge the debt; and if the amount was borrowed for the purpose of being appropriated to any other purposes than those specified, such debt must be satisfied by him who becomes possessed of her jewels and other moveable property. The question and answer are, as usual, brief and general in their terms. If we assume that they had to do with the case of a debt [849] necessarily incurred (and we may quite as reasonably assume this as the reverse) the law laid down is quite in accord with the more recent authorities.

A case is reported in the note to *Mohima Chunder Roy Chowdhry v. Ram Kishore Achorage Chowdhry* (15 B. L. R., 143, n; 12 W. R., 504) decided by DWARKANATH MITTER and HOBHOUSE, JJ. It has been pointed out by the Privy Council, in *Baijun Doobey v. Brij Bhookun Lal Awusti* (L. R., 2 I. A., 281), that the decision in that case has no bearing upon any such question as the present, for it was a case of the sale of a tenure. But MITTER, J., in his judgment does use the expression, "the rent due to the zamindar cannot, under any circumstances, be treated as a personal debt of the widow." COUCH, C.J., in the case already cited (15 B. L. R., 143, n; 12 W. R., 504), at pp. 158, 159, points out that if these words referred to rent accrued after the death of the husband, and if they were pressed to the fullest extent of meaning which they might seem capable of bearing, they would be inconsistent with the Privy Council decision in *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (11 Moore's I. A., 241). They would, if so pressed, certainly, I think, be inconsistent with the later Privy Council case which I have already cited.

There is another consideration which seems to me worthy of attention, namely, that the view taken by the Chief Justice of the question before us, and in which I concur, keeps the law upon this matter, strictly in harmony with the law upon the kindred subject of the widow's right to sell or mortgage.

I cannot see any principle of distinction satisfactory to my mind between the widow's power to charge the inheritance by a mortgage to meet a demand which cannot be postponed, such as Government revenue, and her power to charge the inheritance by obtaining credit in respect of a demand of a less stringent character, like the cost of materials for repairs. The view which we take places the two things on the same footing. According to the view contended for by the plaintiff they stand on quite a different footing. Necessity must be shown in the one case, and not in the other.

* [850] Another question, bearing upon this part of the case, was discussed before us. Whether given a case of necessity, an obligation incurred by a widow *ipso facto* binds the estate, or whether it is necessary further to show in some way that the estate was in fact charged at, or at least, that at the time of the transaction, the parties intended that credit should be given to the estate as distinguished from the widow and the widow's interest. Three cases were cited, which are not quite in accord *Ram Koomar Mitter v. Ichamoyi Das* (I. L. R., 6 Cal., 36); *Gudgappa Desai v. Apaji Jivandrao* (I. L. R., 3 Bom., 237), *Ramasami Mudahar v. Selattammal* (I. L. R., 4 Mad., 375). That question seems to me not necessarily to arise in this case.

For the reasons I have stated, in addition to those given by the Chief Justice, I would answer the first question referred in the negative.

The second question, whether the plaintiff has a right to enforce his claim against the rents due and uncollected at the death of Juggodumba, ought also, I think, to be answered in the negative. I apprehend we must understand the question as limited to this suit, and as asking whether the plaintiff can in this suit enforce his claim as suggested. I do not see how he can do so upon any view of the case.

If this be a debt binding the heirs, then the plaintiff is entitled to a decree for his money and can execute it against the estate in their hands. But he is not entitled to a decree charging the debt upon any particular property.

* If this is not a debt of the heirs, but of the deceased lady, and if these outstanding rents pass to the heirs simply, then I do not see how the plaintiff can succeed against them, unless he shows that his debt is charged upon these rents. But when did it become charged and how?

It was not a charge in Juggodumba's lifetime. She was free to spend those rents as she pleased and to make what arrangement she pleased for the payment of the plaintiff's debt.

A third view has been suggested, namely, that these rents are applicable in the first place to pay Juggodumba's debts of the class to which the plaintiff's belongs, and that only the [851] balance properly passes to the heirs. This view certainly has much to commend it on grounds of justice. But if it be correct, I do not see how we can give any effect to it in this suit. If these rents are liable to all or any class of the debts of Juggodumba, either in relief or in addition to the general assets of her estate, they may be made available for that purpose by a suit brought by the proper parties, that is to say, by the heirs of Juggodumba, who are charged with the administration of that estate and the payment of those debts.

It was stated during the argument, and, I think, admitted, that a decree has been made for the administration of Juggodumba's estate. If so, and if these rents are applicable to the payment of her debts or any other, they must, I think, be brought under the control of the Court in the administration suit.

And the Court can in that suit direct any such supplemental or ancillary proceedings as may be necessary for the purpose

NOTES.

[DEBTS OF THE QUALIFIED OWNER BINDING THE INHERITANCE—

In (1889) 16 Cal., 511, a decree was obtained against the holder of a life-estate for arrears of rent accruing during her lifetime. It was held by PRINSEP and WILSON, JJ., that on her death the decree could be executed only against any personal property of hers and not against the estate. The case of 10 Cal., 823, was distinguished on the ground of the contract there having been entered into under "circumstances such as were held by the majority of the Judges to bind the ancestral estate." See also 17 C. W. N., 337. In (1901) 26 Bom., 206 (F.B.). 3 Bom., L.R., 738 it was held that the trade debts, properly incurred by a widow on the credit of the assets of the business to which she has succeeded as the heiress of her deceased husband, are recoverable after her death out of the assets of the business as against the reversioners who have succeeded thereto, even in the absence of a specific charge. See also (1907) 27 A. W. N., 155.

In (1908) 32 Bom., 577 10 Bom. L.R. 927, power of alienation so as to bind the inheritance with a view merely to confer a benefit on the estate as distinguished from alienation under, or to avert, necessity, was denied. See also 10 C. L. J. 243, 10 M. L. T. 179; 35 Mad., 560; 33 All., 255.

In (1903) 31 Cal., 433 8 C. W. N. 408, it was held that the widow was not bound to pay from her income family debts not incurred by her, marriage expenses, and costs of litigation for the estate; these might be made charges on the inheritance. See also 18 I. C. 958 (Mad.), 22 I. C. 304 (Cal.); (1910) 1 M. W. N. 799

In (1910) 6 I. C., 638 (Cal.), there were both the elements laid down in GARTH, C. J.'s judgment in this case, a necessity for repairs and insufficiency of the income]

FULL BENCH REFERENCE.

The 5th June, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP,
AND MR. JUSTICE WILSON.

Ambica Pershad Singh and others.....Judgment-debtors

versus

Surdhari Lal.....Decree-holder.*

*Limitation Act XV of 1877, art. 179, (cl. 4), sch. II—Step in aid of
execution—Application for proclamation of sale.*

An application to a Court to issue a proclamation of sale in respect of property already attached in execution of a decree, is an application, within the meaning of clause 4 of art. 179, sch. II, of Act XV of 1877, "to take some steps in aid of execution of the decree "

Chunder Coomar Roy v. Bhogobatti Prosonno Roy (I. L. R., 3 Cal., 235; 1 C. L. R., 23), explained.

THIS was a reference made on the 7th February 1884 to a Full Bench by TOTTENHAM and NORRIS, JJ. The order of reference was as follows :—

This is an appeal against the order of the Subordinate Judge of Bhaugulpur by which he overruled the judgment-debtors' plea that execution of a decree against them, dated the 4th of May 1877, was barred by limitation.

[852] The application for execution was made on the 11th April 1883, a previous one having been made in due form on the 10th June 1879.

The lower Court held that limitation was saved by an application made on the 1st of May 1880, for the issue of a proclamation of sale in respect of certain property then under attachment in pursuance of the formal application of the 10th of June 1879.

The judgment-debtors contended that the attachment was no longer subsisting, and that, therefore, the application of 1st May 1880 was not one in accordance with law.

The lower Court erroneously supposed that the case was governed by the repealed Limitation Act IX of 1871, because the decree was made before that Act was repealed. But it is quite clear to us that Act XV of 1877, which came into force and repealed the former Act on and from the 1st of October 1877, must be applied to this case. The decree-holder's position, however, appears to us to be stronger under the present Act than under Act IX of 1871, so that the change in the law does not affect the correctness of the decision of the point in question. The attachment having been held to be still subsisting on the 1st of May 1880, if the application of that date for the issue of a sale-proclamation was an application to the Court to take some step in aid of execution of the decree, within the meaning of art. 179, sch. II, then undoubtedly the present application of the 11th April 1883 being within three years was in time.

* Full Bench Reference on Miscellaneous Appeal No. 283 of 1883 from a decision of the Subordinate Judge of Bhaugulpur, dated the 9th June 1883.

That this was so, we should not have had the least hesitation in holding, for our opinion is clear on the point, but for the decision, laid before us, of a Division Bench of this Court in the case of *Joobraj Singh v. Buhooria Alumbasee Koer* (7 C. L. R., 424). In that case, which was also governed by Act XV of 1877, the learned Judges held that an application to the Court to sell attached property did not fall under art. 179, but under art. 178.*

We consider it so clear that such an application does in fact ask the Court to take a step in aid of execution of the decree, and that it is a step essential to execution, that we are wholly unable [853] to assent to the ruling laid before us; and we are unable materially to distinguish the present case from that before the Court on that occasion. We think we cannot with propriety decide the case before us in a manner contrary to that which has once been declared by this Court to be correct, and which has been published as such; and we accordingly feel bound to submit the case for the decision of a Full Bench; the question being whether an application to the Court to issue a proclamation of sale in respect of property already attached in execution of the applicants' decree is an application within the meaning of art. 179, sch. II, Act XV of 1877, to the Court to take some step in aid of execution of the decree.

Mr. *Handley* (with him Mr. *Tvidale* and Baboo *Anund Gopaul Palit*) for the Appellant.

On the 11th July 1879 the property was attached, and the judgment-debtor obtained a postponement of the sale on the 22nd August for six months, the attachment remaining in force. After the expiry of the six months, the decree-holder took no steps to execute the decree until the 1st May 1880, when he applied to have the sale proclamation issued, and his present application is dated the 11th April 1883. I submit the issue of a proclamation of sale does not come within clause 4 of art. 179 of the second schedule of the Limitation Act at all. If it does come within clause 4, time runs from 1st May 1880; and, if not, time runs from the 11th July 1879, and the application therefore made on the 11th April 1883 would be out of time. The lower Appellate Court have held that limitation was saved by the application of 1st May 1880, unless Act XV of 1879 extends the meaning of art. 167 of Act IX of 1871, there is nothing to point out that such an application as the present is within the Limitation Act. The case of *Chunder Coomar Roy v. Bhogobutty Prosonno Roy* (I. L. R., 3 Cal., 235, 1 C. L. R., 23) lays down that "an application to enforce a decree" does not include applications of an incidental kind. There was no need for the judgment-creditor to have made an application for the proclamation of sale; the issuing of it should have been done by the Court as a matter of course, it being one of the ministerial duties of the Court to do so. The Code of Civil Procedure no-[854]where provides for such an application by the judgment-creditor. As to what kind of application falls within the words of the Limitation Act—see *Joobraj Singh v. Buhooria Alumbasee Koer*

* [Art. 178 :—

Description of application.	Period of limitation.	Time from which period begins to run.
Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230	Three years	When the right to apply accrues]

(7 C. L. R., 424); *Govind Chunder Goswami v. Rungunmoney* (I. L. R., 6 Cal., 61); *Kylasa Goundan v. Ramasami Ayyan* (I. L. R., 4 Mad., 172); *Vithal Janardan v. Vithojirav Putla Jirav* (I. L. R., 6 Bom., 586) lays down that the Limitation Act does not apply to application to a Court to do what it has no discretion to refuse, nor to the exercise of functions of a ministerial character. In *Ishwardas Jaggiwandis v. Dosibai* [I. L. R., 7 Bom., 316 (322)] the Judges agree with the two last cited cases. It is true that in *Radha Prosad Singh v. Sundur Lall* (I. L. R., 9 Cal., 644) the Court held that the deposit of nilamee fees was a step in aid of execution, but *Torce Mahomed v. Mahomed Mabood Bux* (I. L. R., 9 Cal., 730) lays down the contrary. In *Hem Chunder Chowdhry v. Brojo Sundari Debya* (10 C. L. R., 272) an application by a judgment-creditor to receive a sum deposited in Court is held not to be "a step in aid of execution." There is, however, a ruling to the contrary, viz., *Venkatarayalu v. Narasimha* (I. L. R., 2 Mad., 174).

Nor do the sections in the Civil Procedure Code show that the issue of such a proclamation is a necessary application at all, or is the proclamation a matter which the Court should, as a matter of course, of its own accord see done? Sections 230 and 235 are to be conformed to by the judgment-creditor. Sections 245, 248, 249, 286 and 287 are to be conformed to by the Courts; the different matters required by these last sections are the duty of the Court and not of the judgment-creditor. Not one of these sections lay down that an application for proclamation of sale shall be made by the judgment-creditor, that being so, can it therefore be said that the application made on the 1st May 1880 is "a step taken in aid of execution."

Mr. O. C. Mullick and Baboo Durga Mohun Das for the Respondents were not called upon.

The **Opinion** of the Full Bench, which was as follows, was delivered by

[855] **Garth, C.J.**—I think it clear that in this case the application made by the decree-holder on the 1st of May 1880 for the issue of a sale proclamation was an application "to take some step in aid of execution" within the meaning of clause 4 of art. 179 of the Limitation Act of 1877.

The language of that clause is somewhat more comprehensive than that of clause 4 of art. 167 of the Limitation Act of 1871, but under either Act I should consider that the application, which is the subject of the present reference, was not barred by time.

I think it very probable that the construction which was put upon the latter clause in the case of *Jooobraj Singh v. Buhoora Alumbasee Koer* (7 C. L. R., 424) may have been induced by the language of the Full Bench judgment in the case of *Chunder Coomar Roy v. Bhogobutty Prosonno Roy* (I. L. R., 3 Cal., 235; 1 C. L. R., 23).

It was said, I observe, in that judgment that the words "applying to enforce the decree" in art. 167 of the Limitation Act of 1871 meant the application (under s. 212 of the Code) *by which proceedings in execution are commenced*, but as I myself took part in that decision, and, in fact, delivered the judgment of the Court, I am enabled to say that this language was unduly narrow, and that it was used with reference to the particular point which was then under discussion.

That point was, whether the payment into Court of the costs of a proclamation of sale by *challan* within the three years, coupled with an application for sale, which was made beyond the three years, was in itself the meaning of clause 4 of art. 167 of the Act of 1871.

The Full Bench held that it was not, and it was with reference to this question that the judgment was pronounced. But there is no doubt, as I have said before, that the language of our judgment might well have been misconstrued.

I think it clear that under either Limitation Act, but certainly under the Act of 1877, an application, such as was made in the present case, is an application either "to enforce the decree" or "to take some step in aid of execution."

[886] The point that Mr. *Handley*, who appeared for the appellant in this case, did his best to impress upon us was this : that the application to issue a proclamation being unnecessary by law, was no application at all. He contended that under s. 287 of the Code, the Court itself was bound to have issued the proclamation, without any action being taken on the part of the decree-holder.

But in this, I think, he is in error, notwithstanding that the attachment had issued, the proceedings from time to time for the purpose of enforcing the sale must always be, and, as a matter of practice, always are, initiated by the decree-holder.

The Court cannot ascertain of its own motion what the wishes of the decree-holder are, or what portion of the property he desires to sell, unless an application is made for that purpose.

As the rest of the Court are also of opinion that the application is not barred, and as this appears to be the only question in the case, we think that the appeal should be dismissed with costs.

Appeal dismissed.

NOTES.

[Following this case, it was held that the following were sufficient steps in aid of execution to keep the decree alive. —

An application for the sale of property under attachment then proceeding —(1889) 17 Cal., 53, (1890) 15 Bom., 405; (see also 12 M L.J., 24).

An application for execution by arrest without a prayer to issue notice under sec. 248, C. P. C., 1882 when more than one year had elapsed from the date of the decree, (1909) 10 C. L. J., 19; 'batta memorandum' for the issue of sale proclamation, distinguishing 25 Bom., 639, where there was no application oral or written (1905) 28 Mad., 399, see also (1897) 22 Bom., 722; (1895) 23 Cal., 374; payments by Collector in whose management the estate was placed, (1894) 19 Bom., 261.

Compare with these, the following —

"In some cases, it may be possible to determine by reference merely to the nature of the step which the Court is invited to take, whether it will or will not aid the execution. For example (see 10 Cal., 851) * * * On the other hand, as observed in 20 Cal., 255, 27 Cal., 285, when a decree-holder asks the Court for the postponement of a sale, he invites the Court to take a step which, if taken, does not aid but rather retard the execution. But, there may be cases in which the step which the Court is invited to take may be of an ambiguous or neutral character, if considered apart from the surrounding circumstances, and the granting of leave to a judgment-creditor to bid at an execution sale appears to me to fall within this class of cases," *per MOOKERJEE, J.* in (1905) 3 C. L. J., 240. 10 C. W. N., 209.

An application by a decree-holder who has purchased a property in execution of his own decree, for confirmation of the sale, is not an application to take some steps in aid of execution of the decree, (1904) 31 Cal., 1011.]

[10 Cal. 556]
APPELLATE CIVIL.

The 7th June, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Ram Charan Buhardar and others.....Plaintiffs

versus

Reazuddin and others.....Defendants.*

Res judicata—Issue advisedly left undecided in former suit.

In 1878 *A*, as the auction-purchaser of a taluq, sued 35 persons for possession of a part of this taluq. In this suit the issues raised were—(1) whether *A* had purchased the whole taluq, or an eight-anna share of the right, title and interest of the judgment-debtors therein ; (2) as to the correctness of the boundaries of the taluq as given in the plaint. The Court held that *A* had purchased the right, title and interest of the judgment-debtors in the taluq, and as it appeared that some of the defendants were not judgment-debtors, and as it did not appear what portions of the taluq were held by the several defendants, the Lower Appellate Court dismissed the suit, with liberty to the plaintiff to bring a fresh suit within the proper time.

[557] In 1880 *A* brought a fresh suit against 16 of the same defendants and 19 others, for possession of a portion of the same taluq. The issues raised were—(1) whether the suit was barred under s. 13 of the Code, (2) whether *A* had purchased the whole or a portion of the taluq ; (3) whether the defendants were in possession of all the disputed land, and, if not, what portions of the taluq were held by the several defendants, (4) as to the correctness of the boundaries of the taluq.

The Munsiff held that the suit was not barred, and on the merits gave *A* a decree. The Subordinate Judge held that the suit was barred, and refused to go into the merits.

Held that the question, whether *A* had purchased the whole or only a portion of the taluq, was *res-judicata*, but that the question, as to to what lands *A* was entitled to by virtue of his purchase having been left undecided in the former suit, *A* was entitled to a decision on that point.

In 1878 one Ram Charan Buhardar, as the auction-purchaser of a certain taluq, sued 35 persons for possession of a part of this taluq, from which he had been dispossessed.

The issues framed in this suit, were—

(1) Whether the plaintiff purchased the whole taluq in suit and obtained possession of three kanis of land only, the remainder being held and possessed by the defendants without right ; or whether the plaintiff purchased an eight-anna share of the taluq, and the right, title and interest of the judgment-debtors therein ?

(2) Has the plaintiff given correct boundaries of the taluq in suit, or has he wrongly included lands of various other taluqs in his plaint ?

Evidence was taken, and the Munsiff found that the plaintiff had not purchased the tenure itself, but only the right, title, and interest of his

* Appeal from Appellate Decree No. 2517 of 1882, against the decree of F. Rees, Esq., Judge of Noakhali, dated 10th of August 1882, reversing the decree of Baboo Koruna Moy Banerji, Sudder Munsiff of Soodharam, dated the 27th of June 1881.

judgment-debtors therein; and that as the plaintiff had failed to prove the specific lands held by the judgment-debtors, he dismissed the suit "without prejudice to the plaintiff's right to bring a fresh suit for possession of the lands of the taluq in suit distinctly ascertained." The plaintiff appealed against the decision, but the judgment of the lower Court was upheld by the Subordinate Judge.

On the 13th August 1880, Ram Charan Buhardar brought a fresh suit in the same character against 30 defendants, for possession of 14 plots, which he alleged belonged to the taluq he had purchased

[858] Sixteen of these defendants contended that the suit was barred by the former suit of 1878, which had been brought against them and 19 others. The issues framed in this suit were—

- (1) Whether the suit is barred as *res judicata* ?
- (2) Whether the plaintiff has purchased the entire tenure or a portion of the taluq, and if the latter, what is the share purchased by him ?
- (3) Whether the defendants were in possession of all the disputed lands, and, if not, what portion of what plot is in whose possession ?
- (4) Whether the boundaries of the disputed land are correct ?
- (5) Whether the defendants obstructed the plaintiff in taking possession of the land ?

The Munsif found that the first suit was dismissed for "misjoinder and non-joinder," and that the subject-matter in issue had not been finally heard and determined so as to bar the second suit, and that therefore the plea of "*res judicata*" failed, and on the merits he found that the plaintiff had purchased the entire taluq, and he, therefore, gave the plaintiff a decree.

The defendants appealed to the Subordinate Judge, who held that the suit was barred under s 13 of the Civil Procedure Code, and refused to go into the other issues

The plaintiff appealed to the High Court

Baboo Chunder Madhub Ghose for the Appellant.

Baboo Ratneswar Sen for the Respondents

The Judgment of the High Court was delivered by

Garth, C.J.—In this case the plaintiff sued for possession of certain lands on the allegation that they appertained to a certain taluq, which he had purchased at an auction sale in execution. The defence raised several pleas, one of which was that the suit was barred by *res judicata*. The first Court overruled this plea and decided the case upon its merits. The lower Appellate Court, however, has held that the plea of *res judicata* is fatal, and has dismissed the suit on that ground.

The plaintiff appeals to this Court

Now, what appears to have taken place in the former suit [859] is this. In 1878 the present plaintiff framed his plaint on somewhat similar allegations to those in the present case, and the issues framed in that suit related—(1) to the extent of the rights which the plaintiff had actually acquired by his purchase; and (2) to the correctness of the description of the lands sought to be recovered. As to the first point, the Munsif decided that the plaintiff had purchased the right, title and interest of the judgment-debtors in the entire taluq. But as to the second point, inasmuch as it appeared

that some of the defendants, who were part owners of the taluq, and who were proved to be in exclusive possession of specific portions thereof, were not judgment-debtors, and as the plaintiff had not excluded the lands held by those defendants from the property described in his plaint, the Court found itself unable to give the plaintiff any relief, and accordingly dismissed the suit "without prejudice to plaintiff's bringing a fresh suit for possession of the lands of the taluq in suit distinctly ascertained."

Against this decision the plaintiff appealed, and the Subordinate Judge seems to have come to much the same conclusion as the Munsif. He found that the plaintiff could not get *khas* possession, as he had not specified the lands which were exclusively in the share of the judgment-debtors, and that he could not get a decree for joint possession with the other part owners, because he had not specified the extent of the shares of his judgment-debtors. He, therefore, dismissed the appeal with the remark: "According to the circumstances of the case the plaintiff can bring a fresh suit properly within time."

The effect of the former litigation, therefore, was this. It established the fact, as against some of the defendants in that suit, that the plaintiff had purchased the rights of his judgment-debtors in the entire taluq, and not only in an eight-anna share thereof, and so far that decision is *res judicata*. But on the further and more important point, *viz.*, as to *what lands* plaintiff was entitled to possession of by virtue of his purchase, the Courts found themselves unable to come to a decision by reason of errors of form in the frame of the suit. They, therefore, refrained from deciding that point, and left it to the plaintiff to bring a fresh suit, framed in such a manner that the Court might be able to [860] grant the relief sought. It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause, and it is clear that a question, which was advisedly left undecided in the former suit, cannot be said to have been *heard* and *finally decided* within the meaning of s. 13 of the Code.

As we understand, the plaintiff has now come into Court "with a plaint corrected according to what the Munsif had shown to be essential to his success," and the first Court has been able to give a decree upon that plaint.

The lower Appellate Court has refused to try the case upon its merits, having found the issue as to *res judicata* against the plaintiff. We think that this judgment must be set aside, and the case remanded to the lower Appellate Court for trial of the remaining issues. The costs of this appeal will follow the result.

Case remanded.

NOTES.

[See also the following cases (1889) 14 Bom., 31 (39); (1893) 3 O.C., 273 (275); (1900) 25 Bom., 115 (124); (1887) 9 All., 690; (1888) 11 All., 187.]

[10 Cal. 860]

PRIVY COUNCIL

The 21st February, 1884.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH AND SIR A. HOBHOUSE.

Gurudas Pyne and Ram Narain Sahu.

[On appeal from the High Court at Fort William in Bengal.]

Limitation Act, IX of 1871, sch. II, arts. 48, 60 and 118.

The defendant, as an agent, sold goods entrusted to him by his principal, who died after a decree had been made against him for their conversion ; and, as agent for the representative of the deceased, retained the proceeds, which the decree-holder had an equitable right to follow in the agent's hands. *Held*, that neither Art. 48* of sch II of act IX of 1871, fixing the limitation of three years to suits for moveable property acquired by dishonest misappropriation or conversion, nor art 60 † of the same schedule, fixing the limitation of three years to suits for " money payable by the defendant to the plaintiff," and to suits for " money received to the plaintiff's use," were applicable to the present suit, but that, as a suit for [861] which no period of limitation was provided elsewhere, it fell within art 118 ‡ of the same schedule, fixing for such suits the limitation of six years

APPEAL from a decree of a Divisional Bench of the High Court (4th July 1878), reversing a decree of the Subordinate Judge of the Midnapore District (12th September 1876).

The questions raised in this appeal related to the law of limitation under Act IX of 1871, to a claim for the proceeds of the sale of goods, wrongfully converted by a deceased person, against whom a decree had been obtained on that cause of suit, such proceeds being in the hands of the defendant, who held them as agent for the representative of the deceased.

* [Art. 48 -

Description of suit	Period of limitation	Time when period begins to run.
For moveable property acquired by theft, extortion, cheating or dishonest misappropriation or conversion.	Three years ..	When the property is demanded and refused]

† [Art. 60 :—

For money payable by the defendant to the plaintiff, for money received by the defendant for the plaintiff's use.	Three years ..	When the money is received.]
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‡ [Art. 118 :—

Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.]
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Mr. R. V. Doyne appeared for the Appellant, the defendant in the suit, on whose behalf he contended that the sale, having taken place in 1870, and the suit having been brought in 1876, the plaintiff's claim was barred by limitation under art. 48, or art. 60, of the second schedule of Act IX of 1871, the law of limitation then in force.

The Respondents did not appear.

Their Lordships' **Judgment** was delivered by

Sir B. Peacock.—Their Lordships are of opinion that the judgment of the High Court ought to be affirmed.

It appears that, as far back as March 1865, Modhoosoodun, who was the brother of the present appellant, had taken some 1,260 logs of timber which belonged to the plaintiffs, and converted them to his own use. Soon after that a suit No. 10 of 1865 was brought by the plaintiffs against Modhoosoodun and another for the conversion of the timber, and a decree was obtained on the 30th March 1868, for the sum of Rs 25,200, in favour of the plaintiffs. That decision was appealed from to the High Court, which, in January 1869, reversed the decree. An appeal was preferred to Her Majesty in Council, and on the 12th December 1873 the decision of the High Court was reversed, and the decree of the first Court established, namely, that the plaintiffs were to recover a sum of Rs. 25,200 from Modhoosoodun and the other defendant. In the meanwhile Modhoosoodun had died, and the decree in the Privy Council was against his widow, as his representative, that the Rs 25,200 [862] should be recovered from her. Subsequently an application was made to the District Court of Midnapore to execute the decree, and certain property was attached which the present appellant claimed as his separate property. Only a very small portion of it was held liable to the decree, and the rest was ordered to be given up. Upon that, the present suit was instituted for the purpose of trying whether the plaintiffs had not a right to execute their decree against the property mentioned in the attachment, and which had been ordered to be given up. The plaintiffs, however, did not rely merely on the fact that they had obtained the decree, and that the property was liable to be seized, but they made a further allegation, and stated that "Gurudas Pyne," the present appellant, and the defendant in the suit, "was benefited by the aforesaid timber taken by the Kurta Modhoosoodun, and, after the death of Modhoosoodun, himself sold the aforesaid timbers, and appropriated the moneys obtained by the sale of the aforesaid timbers, and regularly conducted the aforesaid case. Both the brothers are, for the reasons mentioned above, answerable under the decree we have obtained in the aforesaid case for the aforementioned acts, although the name of Modhoosoodun alone was mentioned in that decree, and therefore we are fully entitled to realize the whole amount by the sale of the properties of both the brothers." Strictly speaking, the claim was to realize the decree from the property of the defendant. The first Court held that a portion of the property which was claimed by the defendant was liable to the execution, but that a great portion of it was not. Upon that an appeal was preferred by the plaintiffs to the High Court, and notice of objections was given by the defendant. The High Court held that, notwithstanding the sale of the timber by the defendant, and his receipt of the assets which were derived from the sale, he was not liable to have his property attached and sold under the execution against his brother: but they went on, and said: "But although the plaintiffs have been ill-advised in bringing their suit in the particular form adopted by

them, and though we are unable to give them the particular form of relief desired, we think, that on the facts proved, we ought, if we can, and that we are able to grant them such relief as they [863] would have been entitled to obtain on a properly drawn plaint." It is quite clear that in this case the plaintiffs did rely in their plaint upon the fact that the defendant had sold the timber, and had received the proceeds.

That the defendant understood the plaint as intending to make him liable is clear, for in his answer he says "Afterwards the case of the plaintiffs was dismissed by the Honourable High Court, and an order being passed to release the timbers from attachment, I, according to the permission of Moti Dasi"—that is, the widow of Modhoosoodun—"sold the timbers and paid her the moneys that were realized by the sale of the timbers, and took a receipt, and she repaid me the moneys I had expended. But the plaintiffs, notwithstanding these facts, are unjustly placing upon me the liability by falsely alleging that I, as a sharer, conducted the aforesaid suit, and that I myself took the moneys realized by the sale of the timbers" He knew that the plaintiffs intended to make him liable because he had taken the moneys realized by the sale of the timbers. It is found by the first Court, that "the payment of money to Moti Dasi being disproved, it must be presumed to be in the hands of the defendant, who is the active male member of the house" Therefore, according to that finding, the money, which was the proceeds of the sale of the timber, was in the defendant's hands, and the plaintiff by his plaint showed that he intended to make the defendant responsible, because he had got the assets which were produced from the sale of the timber.

Then the judgment of the High Court proceeds thus "It is quite clear that, Modhoosoodun having misappropriated the plaintiffs' timber, the value of the same came into the hands of Gurudas, his brother, whence it ought to have passed into the hands of Moti Dasi, and from her the plaintiffs might have obtained it in execution of their decree. We find on the facts that Gurudas has retained the Rs. 22,000 received by the sale of the timber, and this money is the plaintiffs' property. If a portion of it has been invested in the lands which the plaintiffs seek to sell, then such lands belong to them in equity. Whether Gurudas has appropriated the money without the consent of Moti Dasi, or whether he has done so in collusion with her with [864] the object of defeating the plaintiffs' attempt to execute their hard-won decree, the Court ought to compel him to disgorge the amount. We, therefore, set aside the decree of the lower Court, and in lieu of it we make a decree with costs in favour of the plaintiffs against the defendants jointly and severally for the sum of Rs. 22,000, which plaintiffs will be entitled to realize in execution" They therefore, give against the two defendants, the present appellant and the widow, a decree for the Rs. 22,000, which was the amount which the defendant had received, and which they find that he held from the proceeds of the timber of the plaintiffs.

Their Lordships think that the plaintiffs had a right to follow the proceeds of their timber, and, the defendant having received the money, and not having paid it over to Moti Dasi, they have a right to recover the amount from him

Mr. *Doyle* has contended—and certainly there was a good deal of weight in his argument—that a suit to recover the amount would have been barred by limitation. He said that the timber was sold as far back as the year 1870, that this suit was brought in 1876; and that consequently nearly six years had expired. He contended that if the defendant was liable to the plaintiffs, he was liable only for money had and received to the plaintiffs' use. He relied upon art. 48, sch. II of Act IX of 1871, and also upon art. 60. Article 48 is:

"For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion." Their Lordships think that the case does not come under that article. There was no dishonest misappropriation or conversion. The defendant sold the timber on account of his brother; he held the proceeds on account of the widow; and there was no dishonest misappropriation, although the plaintiffs had a right, finding the money in his hands, to attach it and make him responsible to them.

Article No. 60 is "For money payable by the defendant to the plaintiff; for money received by the defendant for the plaintiffs' use." Mr. *Doyne* contended that in this case the money was received for the plaintiffs' use when the defendant sold the timber in May 1870; but that appears to their Lordships not to be the case. When he sold the timber he was selling it as the agent of Moti Dasi, and he received the money for her. The [866] suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount. That does not fall either within arts. No. 60 or No. 48, but comes within art. 118, as "a suit for which no period of limitation is provided elsewhere in this schedule," and for suits of that nature a period of six years is the limitation. Their Lordships think that the plaintiffs had a right at any time within six years from the time when the defendant received the money to hold him responsible to them for the amount so long as it remained in his hands; they might have given him notice not to pay it over, and held him responsible in equity if he had done so.

Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed and this appeal dismissed. As no appearance has been entered for the respondent, there will be no costs of this appeal.

• Their Lordships think it right to add a declaration that any money which may be recovered under this decree shall be treated in part satisfaction of the former decree against Modhoosoodun, or his widow, in the same way as if it had been levied under that decree, and *vice versa*.

Solicitors for the Appellant. Messrs. *Lambert, Petch, and Shakespear*.

Appeal dismissed

NOTES.

[In the following cases art. 120 was held applicable following this case.—(1912) P. R., 1. (1912) P. W. R., 33: 13 I. C., 930; (1909) 31 All., 429 2 I. C., 118, (1892) 15 Mad., 382, (1892) 20 Cal., 51 F. B.; (1891) 13 All., 368, (1886) P. R., 96, (1884) 7 All., 25.

The case of *Mahomed Wahub v Mahomed Ameer* (1905) 32 Cal., 527. 1 C. L. J., 167, contains a full discussion of the scope of art. 62 of the Limitation Act, 1908, by MOOKERJEE, J. In that case the suit was for the recovery of money which was received by the defendant as the plaintiff's co-mortgagee and this was held to fall within art. 62; the case of 10 Cal., 860, was distinguished on the ground that here the plaintiff had a mere equitable claim to follow money in the hands of the defendant which when received was not received for the plaintiffs' use.

In (1907) 30 Mad., 459. 17 M. L. J., 452, it was held that a suit by an assignor for recovery of money received by the assignee of a mortgage bond from the mortgagor under an assignment *ad insto* void was a suit for money had and received within Art. 62. This case was distinguished on the ground that here the plaintiff as the person rightfully entitled to the money was pursuing it in the hands of the defendant as the actual party in possession thereof at the time.]

[40 Cal. 865]

VICE-ADMIRALTY APPELLATE JURISDICTION.

The 23rd June, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE CUNNINGHAM.

In the matter of the British steamship or vessel "Mary Stuart."

The "Mary Stuart".....Impugnant

versus

The "Nevada"Promovent. :

Vice-Admiralty—Action in rem—Owner indirectly impleaded—Towage Contract

The "M S," a steam tug, was hired to tow the barque "N." down the Hughli, and in consequence of the negligence of the master of the tug whilst so employed, and of his wilful disobedience to the order of the pilot on board the "N.," the latter ran foul of a sailing vessel the "S. F.," considerable damage being done to both sailing vessels.

[866] The "S F" took proceedings against the "N" for the damage sustained, and an action *in rem* was brought (pending the proceedings taken by the "S. F.") by the "N." against the tug to recover damages, including any damages that the "N." might have to pay to the owners of the "S F."

The defence set up by the tug was, protection under its towage contract, which was to the effect that the proprietors of the tug should not be responsible, under any circumstances, for any loss or damage to any vessel whilst in tow of the tug, whether the same should have happened through the default of the master or other sailors, etc., of the tug, or through the incompetence or want of skill of the pilot in charge

The Court below held that the accident was due to the wilful disobedience of the master of the tug in not obeying the pilot on board the "N.," and that such misconduct was a "default" within the meaning of the clause in the towage contract, but inasmuch as the action was one *in rem*, and not against the proprietors, the clause was no answer to the suit.

Held, on appeal, that the clause was a sufficient answer; for that, although in every case of a proceeding *in rem* the suit is directly against the ship itself, still the owner of the ship must always be considered as indirectly impleaded

APPEAL against the judgment of Mr. Justice NORRIS, dated the 14th August 1883.

This was a proceeding *in rem* brought in the High Court in its Vice-Admiralty jurisdiction.

The promovent stated that on the 20th September 1882 the British barque "Nevada," of the Port of Halifax in Nova Scotia, was proceeding down the river Hughli in tow of the tug steamer "Mary Stuart," the "Nevada" being in charge of a pilot, and the "Mary Stuart" under command and in charge of her master. That about 7 P.M. on the same evening (it being bright and clear at the time) the "Mary Stuart" with the "Nevada" in tow approached the British ship "Savoir Faire" (having the "Savoir Faire" about two points on their starboard bow), which was at anchor in Diamond Harbour on the southern side of the navigable channel with her head up-stream, bearing west, the tide being about half ebb and running from three to four knots an hour.

* Appeal No. 24 of 1883 from a judgment of Mr. Justice NORRIS, dated the 14th August 1883.

That when the tug was about 150 yards from the "Savoir Faire," the master of the tug, without any order from the pilot on board the "Nevada," suddenly ported her helm, thereby turning the tug in a direction to cross the bows of the "Savoir Faire," and [867] that, thereupon, the pilot shouted out to the tug to put her helm starboard, but the tug continued on her course, and both it and the "Nevada" were consequently taken across the bows of the "Savoir Faire," the tug narrowly escaping collision with her, whilst the "Nevada" fell portside on the bows of the "Savoir Faire," carrying away the latter's jibboom and part of her headgear and doing other damage, whilst the jibboom and headgear of the "Nevada" were also carried away, her bowsprit and foremast started, and she was otherwise considerably injured.

It was further stated that the owners of the "Savoir Faire" had arrested, and preferred a claim for damages for Rs. 15,000 against the "Nevada," which was then pending, and the promovent, therefore, claimed to be entitled to recover in this action, in addition to the damages claimed for the damage done to the "Nevada" in the said collision through the negligence of the tug, any damages and costs that the promovent might have to pay to the owners of the "Savoir Faire"

The impugnant denied that there had been any mismanagement or unskilfulness of navigation on the part of the master of the tug, and stated that the pilot of the "Nevada," being aware, and having approved of the course first taken by the "Mary Stuart" to pass on the portside of the "Savoir Faire," the responsibility of the collision rested entirely with the "Nevada", it being due to the improper and unskilful conduct of the "Nevada" in putting her helm hard a-starboard when the helm of the "Mary Stuart" was hard a-port; and the amount of damages was disputed

The contract under which the "Mary Stuart" was engaged by the agents of the "Nevada" to tow out the "Nevada" from Garden Reach to the Eastern Channel Light, contained the following clause "The proprietors are not to be responsible, under any circumstances, for any loss or damage which may be sustained or occasioned by any vessel whilst it is in tow of any of their tugs, whether the same shall have happened through the act or default of the master of the tug, or any engineer or other servants or otherwise," and the impugnant claimed shelter under this clause

The Court sat with two assessors.

[868] Mr. *Phillips* and Mr. *Bonnerjee* for the Promovent

Mr. *Hill* and Mr. *Salé* for the Impugnant.

The assessors were of opinion that the collision was entirely due to the negligence of the master of the tug, and in this opinion the Judge concurred.

Mr. Justice NORRIS (after concurring with the assessors on the question of negligence), continued.—"The only question remaining for disposal in this case is, whether the impugnant is relieved from all liability in respect of the collision that happened on the 22nd September 1882, by virtue of the 22nd condition contained in the towage contract, (the learned Judge here cited the condition as set out above). Mr. *Phillips* for the promovent argued that the contract could not operate to relieve the proprietors of the tug from the consequence of an accident caused by the disobedience of the master of the tug to the lawful orders of the pilot in charge of the tow. I am of opinion that the word 'default' is wide enough to cover a case of such disobedience. Mr. *Phillips* further argued that, this being an action *in rem* and not *in personam*, the condition would not apply. A condition such as this must be construed most

strongly against those who rely upon it, and I am of opinion that, if the owners of the "Mary Stuart" wished to protect herself from the consequences of negligence or default on the part of her captain, they should have said so in express terms. I have already found that the collision was caused by the negligence of the captain of the tug: there must be judgment for the promovent with costs, and the usual reference to the Registrar as to the amount of damages."

The impugnant appealed.

Mr. Sale and Mr. Hill for the Appellant.

Mr. Sale.—According to the principle of maritime law, the ship is only responsible when, in the first instance, the master is liable. A person's property is not liable unless the owner is liable. The ship's liability attaches only through the liability of her owners—*The Druid* (1 Rob. Adm. Rep., 391), the action there was one *in rem*, and the facts were [869] very strong as against the steam tug. On p. 399, the Court says. "The liability of the ship and the responsibility of the owners (in suits which arise from circumstances occurring during the ownership of the person whose ship is proceeded against) are convertible terms; the ship is not liable if the owners are not responsible, and *vice versa*. No responsibility can attach upon the owners, if the ship is exempt and not liable to be proceeded against.

[GARTH, C.J.—That case merely says that neither the ship nor the master could be made answerable for acts which were out of the range of the employment of the master.]

The case of the *United Service* (L. R., 8 P. D. 56) is a case on a towage contract, and the words of the contract are similar to ours; it was there held that the owners of the tug were protected by notice from liability. It is true that the action was *in personam*, but I submit that this makes no difference; the liability *in rem* can only attach through the liability *in personam* in the first instance, and if the owners contract themselves out of all liability, then no liability attaches to the ship.

As to the nature of maritime liens on ships, they are inchoate at the time the lien attaches, and may be enforced by proceedings *in rem*. The *Bold Buccleugh* (7 Moo. P. C. 267) decides that in case of damage caused by collision, such damage creates a lien on the ship. I refer to this case to show what is the nature of this lien, and whether it is not competent to the parties to contract themselves out of liability. A maritime lien is defined on p. 284 as "a claim or privilege upon a thing to be carried into effect by legal process," and that process is a proceeding *in rem*. I submit (1) that no lien was created in favour of the owners of the "Nevada" in consequence of the collision, because a lien is a simple privilege given to vessels injured, and the other party may contract themselves out of it; (2) that nothing turns on the fact that the matter comes up before the Court as a proceeding *in rem*, because it is doubtful whether there can be a lien in proceedings *in rem*, because lien depends on whether the owners intended to exclude themselves from all liability.

[870] Mr. Phillips (with him Mr. Bonnerjee) for the Respondents.—In the case of *The Druid* the master was not acting as master of the ship in what he did; it would have been the same if a stranger had acted in that way. Moreover, that was not such a case as would make a vessel liable, the suit was against the ship and the ship-owner.

The liability of the ship is not treated apart from the liability of the owners, and it does not attach through the liability of the ship as Mr. Sale

has said. Mr. *Sale* also virtually asks the Court to add the words "proprietor and the tug" to the words of the contract. We have not recovered against the owner personally in the Admiralty Court, and can the Court now insert these words. The case of the *Bold Buccleugh* is not in point; it only establishes the ground of maritime liens.

If the tug had refused to take us down the river at all, the persons who had hired the tug out to us would not be liable if Mr. *Sale's* argument is correct. The case of the *United Service* was a common law action, and has no bearing therefore on our case.

I say that this being an act of disobedience, it is not one of the matters that the parties meant to guard themselves against. On the question of construction of such contracts as the present, see *Hayn, Roman and Co. v. Culliford* (L. R., 4 C. P. D., 182)

Mr. *Hill* in reply.—Disobedience is a clear default, and we say we are not liable for default. The case of *The Druid* is in point, it was an action brought against the steamer alone, the words used by Dr. LUSHINGTON in the judgment in inverted commas against the "ship and ship-owner," are only there adopted for the sake of an argument

Judgments were delivered by GARTH, C.J., and CUNNINGHAM, J.

Garth, C. J.—This is an appeal from a judgment of Mr. Justice NORRIS in a cause depending on the Original Side of this Court in its vice-admiralty jurisdiction

It was a suit *in rem*, promoted by the master of the British ship "Nevada" against the "Mary Stuart" for damages sustained by the "Nevada" under these circumstances.

[871] The "Mary Stuart" is a steam tug belonging to the Port of Calcutta, of which Captain Thomas was the master.

She was hired on the occasion in question to tow the "Nevada" down the river; and it was alleged by the promovent that in consequence of the negligence of the master of the "Mary Stuart," and of his wilful disobedience of orders, which he was bound to obey, the "Nevada" ran foul of a vessel, called the "Savoir Faire," and considerable damage was caused to both vessels.

The "Savoir Faire" took proceedings against the "Nevada" for the damages which she sustained in the collision, and this suit was brought against the "Mary Stuart" to recover those damages, as well as compensation for the injury which the "Nevada" herself had sustained.

The answer made by Mr. Sutherland, who was the owner of the "Mary Stuart," was two-fold:—

1st.—That the master of the tug had been guilty of no negligence; and

2ndly.—That the tug was protected by clause 22 of the Contract of Towage, which had been entered into by the owners of the tug with the "Nevada's" agents.

That clause was part of a general form of contract which was used by the proprietors of the "Mary Stuart" in all cases when their tugs were employed, and it was in these words:—

"The proprietors are not to be responsible, under any circumstances, for any loss or damage which may be sustained or occasioned by any vessel whilst it is in tow of any of their tugs, whether the same shall have happened through the act or default of the master of the tug, or any engineer, or other

servants, or otherwise, or through the incompetence or want of skill or care of the pilot in charge of the vessel."

The trial took place before the learned Judge and two nautical assessors, and as to the first question they decided that the collision took place through the improper conduct of the master of the tug in wilfully disobeying the orders of the pilot on board the "Nevada," which orders he was bound to obey. And with [872] regard to the other question arising upon the 22nd clause of the Contract of Towage the learned Judge decided:—

1st.—that the misconduct of the master was a *default* within the meaning of the clause, but

2ndly.—that as this was a proceeding *in rem*, and *not against the proprietors*, the clause was no answer to the suit

The Court therefore pronounced in favour of the "Nevada," and it was referred to the Registrar to ascertain the amount of damages.

From this judgment the impugnant has appealed upon the second point only, and it has been contended by Mr. Sale on his behalf that, as the proprietors would be the sufferers, if the tug were held responsible, the clause in question was intended to, and did in point of law operate to, protect them.

Having heard this point fully argued, and having taken some time to consider my judgment, I had at first arrived at a conclusion in favour of the respondent.

It seemed to me that the towage contract, which consists of certain regulations, prepared by the owners of several tugs in the Port of Calcutta, is of a very one-sided character.

I think that it should be read most strongly against the owners of the tug, and that, as regards the protective clause, with which we are dealing, its meaning and effect ought not to be extended beyond what its language strictly warrants.

Having regard to the circumstances which occurred in this case, the owners of the "Nevada," in the absence of any agreement to the contrary, would have had three remedies:—

1st.—They might have sued the master of the tug,

2ndly.—They might have sued the proprietors of the tug, and

3rdly.—They might have taken the course which they did, and sued the tug itself in a maritime Court.

That being so, it seemed to me that, according to the strict language of the clause in question, the proprietors were protected against one only of these suits.

The clause would clearly have been no answer to a suit against the master, and I was unable to see why it should afford any answer to a suit against the ship, unless the liability of the proprietors, and the liability of the ship, meant substantially the same thing.

[873] There are undoubtedly many cases of collision, where the ship would be liable, and the owners would not, as, for instance, where a ship is chartered out and out, so that not only the possession of the vessel, but the

appointment of the master and crew is vested in the charterers. No action could then be brought against the owners for damage caused through the improper management of the ship, although a suit might be brought against the charterers, or proceedings *in rem* might be taken against the ship. [See *Scott v. Scott* (2 Stark, 438) and the *Ticonderoga* (Swab. 215).]

And as a proof that the responsibility of the owners is a different thing from the responsibility of the ship, it has been held that a verdict in a Court of common law is no bar to proceedings against the ship in a maritime Court for the same collision; or, on the other hand, that a judgment *in rem*, and an actual sale of the ship in the Court of Admiralty, is no bar to an action against the owner in a Court of common law. See *Nelson v. Couch* (15 C. B. N. S., 99) and *The Bold Buccleugh* (7 Moo. P. C. C., 267).

I had, (*sic*) therefore, as I had come to the conclusion that the view taken by the learned Judge in the Court below was right, and as my learned brother and myself differed in opinion, we considered it would have been necessary that the case should be heard by a third Judge.

Mr. Justice PIGOT, however, has been kind enough to refer me to a case lately decided in England, which appears to solve the difficulty, and has satisfied me that my first impression was wrong.

It is a case of *The Parlement Belge* (L. R., 5 P. D., 197) in the Court of Admiralty in England.

The question there was, whether a ship belonging to the Belgian Government could be proceeded against for a collision in the English Court of Admiralty.

* It was admitted that the Belgian Government, who were the owners of the ship, could not be sued in an English Court, but it was concluded that, notwithstanding this, the ship itself was liable to proceedings *in rem*.

[874] Sir ROBERT PHILLIMORE in the Court of Admiralty held that the ship was liable. But on appeal to the Lords Justices his judgment was reversed. Their Lordships were of opinion that although in every case of a proceeding *in rem*, the suit is *directly* against the ship itself, still the owner of the ship must always be considered as *indirectly impleaded*. The owner, according to the rules of the Admiralty, has always notice to appear to show cause why the ship should not be liable, and their Lordships observe that, unless the owner were thus impleaded, and had an opportunity of protecting his property from the Court's decree, a judgment *in rem* would be contrary to natural justice.

Lord Justice BRETT, who delivered the judgment of the Court, proceeds to say:—

"In a claim made in respect of a collision, the property is not treated as the *delinquent per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation, if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed, not merely on the property, but also on the owner through the property. If so, the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court. It is no answer to say that if the property be sold after the maritime lien has accrued the property may be

seized and sold as against the new owner. This is a severe law, probably arising from the difficulty of otherwise enforcing any remedy in favour of an insured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien, which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit, and the same opportunity and right of appearance as the former owner would have had. He is impleaded in the same way as the former owner would have been."

[875] It seems to me that the point thus decided by the Lords Justices is precisely the same as that which we have to determine here. It was admitted in that case, as it is here, that the owners were not personally liable to be sued for the collision, and the question was whether, the owners not being liable, the ship could be made liable. Their Lordships decided that question in the negative, and I am bound to say that, irrespective of the high authority of the Lords Justices, and especially of Lord Justice BRETT, who, on such a subject, is probably the best authority we have, the extract, which I have just read from his Lordship's judgment, appears to me quite unanswerable.

I think, therefore, that the judgment of the Court below should be reversed, that this suit should be dismissed, and that the "Mary Stuart" should be released from arrest.

Having regard however to the circumstances of the case, and to the question of fact in the Court below having been found entirely in favour of the "Nevada," I think that the owners of the "Mary Stuart" ought not to be allowed any costs.

It is clear that this serious injury, which has been done both to the "Nevada" and the "Savoir Faire" is entirely due to gross disobedience of orders on the part of the master of the "Mary Stuart." It is also clear that if the "Savoir Faire" had sued the "Mary Stuart" instead of the "Nevada," the owners of the "Mary Stuart" would have had no defence to that suit, because the owners of the "Savoir Faire" were no parties to the contract, which alone has protected the "Mary Stuart" as against the "Nevada"; and lastly, it is clear, that, in consequence of the course which has been taken, the "Nevada" will have to pay for the whole damage to both ships, which has been caused entirely by the fault of the "Mary Stuart."

I consider, therefore, that each party should pay his own costs on scale 2, and that if any costs have been paid in the Court below, they should be repaid.

Cunningham, J.—The question raised in this appeal is, whether the 22nd clause in the towage contract, exempting the owners from liability, is a defence in the present action. That clause provided that the owners should "not be responsible under any [876] circumstances for any loss or damage which may be sustained or occasioned by any vessel while it is in tow of any of their tugs, whether the same shall have happened through the act or default of the master of the tug or any engineer or other servants or otherwise, or through the incompetence or want of skill or care of the pilot in charge of the vessel."

The present action is brought in respect of injuries sustained and occasioned by the "Nevada" in a collision between her and the "Savoir Faire," which collision is found to have resulted from the misconduct of the master of the "Mary Stuart." The owners of the "Nevada" now seek damages in an

action *in rem* against the "Mary Stuart," in respect of the injuries occasioned to the "Nevada" and of the damages which have been recovered from them by the owners of the "Savoir Faire"

I concur in thinking that both the injuries sustained by the "Nevada" and the damages which have been recovered from her owners by the owners of the "Savoir Faire" fall within the *loss or damage* against responsibility, for which the clause protected the owners of the "Mary Stuart;" and that the conduct of the master was *an act or default* within the meaning of the clause. Consequently I think the owners are protected from personal liability. But I am unable to agree in the view of the original Court that, though the clause secured the owners of the "Mary Stuart" against personal liability, it is not a defence in an action brought *in rem* against "Mary Stuart." The clause is one, no doubt, which ought to be construed strictly, and in case of its meaning being doubtful, rather against, than in favour of, the person whom it relieves of responsibility, but its strict legal effect must be sought. Can it then, by any reasonable rule of construction, be contended that, when the owners of the "Mary Stuart" had put an end to their own liability, as between themselves and the owners of the "Nevada," in respect of damage resulting from the misconduct of the master of the tug, the intention of the parties, or the meaning of the words in which they expressed that intention, was, that the owners of the "Nevada" should still be entitled to proceed against their tug in respect of these same damages? Such a construction seems to me in direct opposition to the clear meaning of the words employed. I think that when [877] the owners of the tug stipulated that they should not be responsible under any circumstances "for loss, damage, etc.," they must be held to have intended as between themselves and the other parties to the contract, to include not only the damages recoverable in a common law action, but the damages recoverable in an Admiralty suit by sale of their ship. It is true that there is not, since the decision of the *Bold Buccleuch* (7 Moo. P. C. C., 267), any question that by the maritime law there attaches upon a wrong doing vessel and her freight, a maritime lien to the full extent of the damage done; and that this lien relates back to the time of the damage and travels with the ship into whosoever hands she may come—1 *M. and P. on Shipping*, 619, 4th edition. But I do not see that this doctrine conflicts with the view that the parties to a contract may entirely put an end to the ordinary responsibility of the owners of a ship for any damage she may cause, and, by putting an end to that ordinary responsibility, destroy the lien by which that responsibility is enforced.

The language of Dr. LUSHINGTON in *The Druid* (Rob Adm. Rep., 391) seems to place beyond doubt the dependence of the right to proceed *in rem*, on the existing personal liability of the owners, and his dictum that the liability of the ship and the responsibility of the owners are convertible terms seems to be applicable to the present case. The observations of the Judges in *Nelson v. Couch* (15 C. B. N. S., 99) seems to me to favour this view. The Judges there treated the right of proceeding *in rem* as a lien with a right of sale, and accordingly held, that if the sale was insufficient to satisfy the lien, the plaintiff might proceed *in personam*, for the residue. BYLES, J, comparing it to the case in which a man having a debt secured by a pledge or mortgage necessarily resorts to legal proceedings to make the pledge available, and having failed to realize the whole of his debt by the sale, sues in a Common Law Court for the balance. In the present case, if we consider that the contract did not operate to exclude the action *in rem*, we must hold that the lien still exists, although, by the terms of the contract between the owners of the tug and the [878] owners of the "Nevada," no liability could arise to the

former on account of any damage done by the tug. The case to which the Chief Justice has just referred (*The Parlement Belge*) seems to show that this view would not be correct.

Appeal allowed.

Attorney for Impugnant : *Barrow & Orr.*

Attorney for Promovent : *Watkins & Watkins.*

[10 Cal. 878]

REFERENCE UNDER THE BURMAH COURTS' ACT

The 19th June, 1884.

PRESENT .

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE WILSON.

Fritz Olner.Plaintiff

versus

LavezzoDefendant

Jurisdiction—Foreign ship—Suit by sailor for wages—Mofussil Small Cause Court Act, XI of 1865, s. 8 (expl. a)—Consul to receive notice of suit.

Civil Courts have, as a general rule, jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction.

A captain of a ship, who was at the time loading or unloading his vessel within the local limits of the Small Cause Court of Rangoon, was sued by one of his sailors (who had contracted to serve on a voyage from Bremerhaven to East India), for wages in the Small Cause Court of Rangoon, *held*, that the sailor's cause of action arose within the local limits of the Small Cause Court, where the defendant was residing when the suit was brought, and that, therefore, the Small Cause Court had jurisdiction to hear the suit.

THIS was a reference under s. 54 of the Burmah Courts' Act, 1875.

On the 9th November 1882 one Fritz Olner, a British subject, engaged at Bremerhaven in Germany to serve as an able seaman on board the Italian vessel *Gentili*, whereof the captain was one Lavezzo, for the voyage from Bremerhaven to East India at the pay of £2-8 per month, and at Bremerhaven received an advance of £4-16, from that amount.

* Civil Reference No. 825 of 1884, by C. F. Egerton Allen, Esq., Officiating Recorder of Rangoon, under s. 54 of the Burmah Courts' Act, dated the 6th November 1883.

[879] It appeared that Fritz Olner entered into his contract to serve on board the ship at Bremerhaven, that he was not taken before the Italian Consul there, nor did he sign any ship's articles.

In the month of May 1883 the *Gentili* arrived at Rangoon. Whilst lying within that port, several of her sailors (amongst whom was Fritz Olner) were charged by the captain of the vessel with desertion; but the Magistrate refused to treat the men as deserters, as it was not proved to his satisfaction that the engagement with the sailors was accompanied by the necessary legal formalities.

Fritz Olner, on the 23rd May, brought a suit in the Rangoon Court of Small Causes against the Captain of the vessel for wages.

The Judge of the Small Cause Court gave a decree in favour of Fritz Olner.

On the 17th July the Government Advocate, under instructions from the local Government, applied to the Recorder of Rangoon for an order that the proceedings of the Small Cause Court might be called for, and, on this application being granted, the question as to whether the Judge of the Small Cause Court had jurisdiction to entertain the suit was fully argued; the Consul for the Kingdom of Italy having, at the request of the learned Recorder, handed in to the Court the Italian law on the subject, and certain other papers.

The Recorder, after setting out the facts, gave the following opinion.

"After hearing the Government Advocate, and considering the memorandum of the Italian Consul, I determined to send the case for the decision of the High Court of Judicature at Fort William in Bengal, and I now submit the following questions —

(1) Had the Court of Small Causes in Rangoon jurisdiction to entertain a suit for wages alleged to be due by the mariners of an Italian barque against the master, such barque being in the port of Rangoon within the local limits of the jurisdiction of the Judge of the Court of Small Causes—supposing no law applicable to the parties and no agreement between them forbade the bringing of such a suit?

(2) Had the Court jurisdiction, supposing a law applicable to the parties or an agreement between them, which forbade the bringing of such suit.

[880] It may be admitted that, whether the substantive law of Italy as alleged by the Consul forbids the bringing of such suits or not, and whether there was an agreement between the parties precluding such suits or not, no satisfactory evidence of such law or agreement was before the Judge of the Court of Small Causes.

It must be remembered that the port of Rangoon is not a port of discharge, and *prima facie* no seaman is entitled to his discharge at it, but this is only matter of sufficiency of evidence in proof of the claim, and does not affect directly the question of jurisdiction.

In giving my opinion on the questions submitted, I may say that I cannot agree with the proposition of the Government Advocate that, supposing a jurisdiction, there was in the Judge of the Court of Small Causes a discretion as to exercising it, if there was jurisdiction it seems to me he was bound to exercise it.

I do not contend that the master of an Italian barque would not be liable to the jurisdiction of the Court of Small Causes, supposing he entered into an obligation within the local limits of its jurisdiction to be discharged within such limits, nor supposing he entered into an obligation by the nature of

which the liability to discharge such obligation clearly arose within the local limits of the jurisdiction as in the case of the *Queen v. Small Cause Court, in re Williams v. Smith* (2 Taylor & Bell, 4).

But it seems to me that the question of liability for wages, not depending on what amounts to a written promise to pay within the limits of the jurisdiction, arising between the master and mariners of a foreign vessel, temporarily brought within the limits of the jurisdiction, on an obligation entered into in a foreign country, is distinguishable from the liabilities I have before mentioned.

It does not seem to me at all clear that our Courts should be open to decide questions between foreigners temporarily residing within our jurisdiction as to matters arising from arrangements entered into by them, unless it is shown in the very clearest manner that the cause of action arose within the jurisdiction.

[881] It does not seem to me at all clear, that the master of a foreign vessel coming for the purpose of trade within the jurisdiction, and there conducting his business by unloading and reloading his vessel, can be said to be residing or working for gain within the local limits, and I should be glad if the High Court would give a ruling on this point.

I am of opinion that, even according to the English view of international law, a suit may be brought by the mariners against the master of a foreign vessel for wages at a port which is not a port of discharge. Yet that such a suit would not be sustainable, if the positive law of the foreign country forbade its institution, and the authorities quoted by the Italian Consul seem to me to go far to show that the law of Italy does prohibit the bringing of such suits.

No one appeared on the reference.

The **Opinion** of the High Court was delivered by

Garth, C.J. (WILSON, J., *concurring*) — This is a reference made to the High Court by the Recorder of Rangoon under s 54 of the "Burmah Courts' Act, 1875."

The circumstances which gave rise to it are these —

The plaintiff in the suit was engaged as a mariner on board the Italian barque *Gentile* on a voyage from Bremerhaven in Germany to Rangoon; and the defendant was the master of that vessel.

On her arrival at Rangoon some of the sailors, including the plaintiff, went on shore, and were then brought up by the master (the present defendant) before the Magistrate, charged with desertion. This charge was dismissed.

Thereupon some of the men, including the present plaintiff, brought suits against the defendant in the Small Cause Court to recover their wages; and an objection was then taken on the part of the defendant that the Court had no jurisdiction to entertain those suits.

It is with one suit only, *namely*, that brought by the present plaintiff, with which we are now dealing, but the objection appears to have been taken in all the suits.

In this case the Small Cause Court Judge found the facts as follows:—

[882] "The plaintiff was a British subject. He was engaged in the defendant's ship under the Italian flag to serve as a sailor on board of her from Bremerhaven to Rangoon, where his voyage was to terminate. He was not taken before the Italian Consul at the time when he was engaged, nor did he sign any ship's articles. He worked his passage out, for which he received an advance of two months' pay, and he claimed Rs. 115-3-3, as due to him for the balance of his wages."

At the time when the suit was brought the defendant was at Rangoon, engaged, we must presume, during his stay there, in the business of the ship.

Upon these facts the Judge of the Small Cause Court overruled the plea of jurisdiction, and gave the plaintiff a decree for the amount which he claimed, and costs.

An application was then made to the Recorder of Rangoon, under s. 622 of the Civil Procedure Code to set aside the proceedings in the suit upon the ground that the Small Cause Court had no jurisdiction to try it; and the learned Recorder, having granted a rule to show cause, and entertaining some doubt upon the subject, the case has been referred to this Court with the following questions [The learned Judge here read the questions above set out and continued.]

There is no doubt whatever that by the law of this country, which is the same in that respect as the law of England, Civil Courts, as a general rule, have jurisdiction to try all civil suits against all persons of any nationality, within the local limits of their jurisdiction, and there is nothing, so far as I can see, in the nature of the present claim, or in the relative position of the parties, or in the fact of the plaintiff having contracted to serve on board an Italian ship, which would in any way affect the jurisdiction of a Civil Court in British Burmah to try this suit.

I think it clear, therefore, that both questions above referred to us should be answered in the affirmative.

But there is a further question of a different kind, which is also submitted to us by the Recorder in a subsequent passage of the reference, which appears to me to present more difficulty.

The Small Cause Court of Rangoon, which is constituted [883] under Act XI of 1865, has only power to try any suits "if the defendant at the time of the commencement of the suit shall dwell, or personally work for gain, or carry on business, within the local limits of the jurisdiction of the Court," and the further question which we are asked by the Recorder is, whether the defendant who was temporarily residing within the local limits of the Small Cause Court at Rangoon at the time when this suit was brought, for the purpose of unloading and reloading his vessel, could be said to be "residing or working for gain within such local limits?"

I think that this question must be answered with reference to explanation (a) of s. 8 of Act XI of 1865.

That explanation is as follows -

"Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to dwell at both places in respect of any cause of action arising at the place, where he has such temporary lodging." Now it seems to me that the present case comes within both the language and the meaning of that explanation.

The defendant, when the suit was brought, was dwelling at Rangoon for a temporary purpose only, but the plaintiff's cause of action, as found by the Judge of the Small Cause Court, was complete when the ship arrived at Rangoon. The plaintiff contracted to serve as a sailor on board the ship from Bremerhaven to Rangoon, and we must assume, I think, from the judgment of the Small Cause Court Judge, that he considered that the plaintiff had fulfilled his contract.

His contract was made on board the ship, and his right to sue upon that contract did not accrue till the ship arrived at Rangoon. I think, therefore,

that his cause of action arose within the local limits of the Court, where the defendant was dwelling at the time when the suit was brought; and I think also that, so far as this point depended upon a question of fact, the Judge of the Small Cause Court must be considered as having found it in the plaintiff's favour.

This disposes of all the points of law, which have been submitted to us by the Recorder.

[884] I now proceed, out of respect to the Consul for the kingdom of Italy, whose memorandum I have carefully perused, to explain one or two other points, upon which, as it seems to me, he is under some misapprehension.

In the first place I would observe, that there is no connection whatever between the Magistrate's Court at Rangoon, which is a *Criminal Court*, and the Small Cause Court, which is a *Civil one*. These two Courts are constituted for very different purposes, and even if it were a fact, that one of them had made a mistake in exercising a jurisdiction which it did not possess, that would in no way affect the powers or duties of the other.

The reference, which has been made by the Recorder, has nothing to do with the decision of the Magistrate. All that we have had to consider under that reference is, whether the Small Cause Court had any jurisdiction to entertain the suit brought by Fritz Olnier against the master of the *Gentili*. I think it due to the learned Consul to explain this, although probably any remarks which I have made may be equally applicable to the proceedings in the Magistrate's Court.

Then, again, I should observe, that I think it extremely probable (indeed I will assume for my present purpose), that the Consul has stated the Italian law with perfect accuracy, both as to the nature of the contract made by a sailor when he engages to serve on board an Italian ship, and as to the obligation which the law of Italy imposes upon him to enforce that contract in no other Courts than those of a maritime nature, or of the Italian Consul.

But assuming this to be so, the contract thus entered into by the sailor can only be a *personal obligation*. It is an obligation created by the combined effect of the contract which he makes on the one hand, and of the law of Italy on the other. It in no way affects the jurisdiction of British Courts, but only the relative rights of the contracting parties.

If a sailor bound by these obligations sues the master of his ship for wages in a British Court, as the plaintiff has done in the case before us, it is necessary for the defendant, if he wishes to avail himself of the plaintiff's obligation as a defence to the suit, [885] to allege and prove it in due course of law, as he would any other defence.

The Judge of a British Court cannot take judicial cognizance either of the Italian law, or of the nature of the contracts entered into by sailors on board Italian ships. If he were so bound, he would be equally bound to take judicial notice of the laws of all nations, and of all contracts made by sailors of every nationality.

The law of Italy and the contracts made by sailors on board Italian ships are facts which must be proved like any other facts; and unless they are so proved in Court in the regular way, the Judge has no means of giving effect to them.

The case of *Guenar v. Meyer* (H. B. R., Vol. 2, p. 603) affords a clear illustration of this rule. That suit was brought by a Dutch seaman for wages in the Court of Common Pleas in England, and at the trial the defendant put in evidence the ship's articles, by which the plaintiff and the rest of the crew

had bound themselves to bring no suit against the master in any Court, except in Holland. Upon this evidence being given, Lord Chief Justice EYRE and the rest of the Judges considered that this contract was a defence to the suit. This was not because the Court had no jurisdiction to try the case, because the suit was regularly tried and decided in the English Court; but because the contract made by the plaintiff, when duly proved in Court, was considered to be a valid ground of defence.

And there is a decision to the same effect by LORD ELLENBOROUGH in the case of *Johnson v. Machielsne* (3 Camp. 44).

In the case now before us, if the defendant in the Small Cause Court had brought forward proper evidence to prove the contract made by the plaintiff and also the Italian law bearing upon the question, he would probably have resisted the claim successfully. But no evidence of the kind was given. The only evidence appears to have been that of the plaintiff himself, and the Court was bound to decide the case upon the evidence before it.

I suppose there would have been no difficulty in bringing forward the necessary proof if the case had been properly conducted. The Consul himself, being learned in the law, would, [886] at any rate, with the assistance of his books, have been a competent witness, and it is only to be regretted that the defendant, when the trial came on, was not better advised.

In the Admiralty Court in England a rule has been in force for a great many years, "that when a suit is brought by a sailor for wages against a foreign vessel, notice of the institution of the suit is always to be given to the Consul of the State to which the vessel belongs, if there be a Consul resident in England." This, of course, is to enable the Consul to take any steps that he may think proper for defending the suit. But whatever the nationality of the vessel, there is no doubt as to the jurisdiction of the Court to entertain the suit. See the case of *La Blache v. Rangel* (L. R., 2 P. C., 43).

There is no such rule in force in the Civil Courts of this country; but it would undoubtedly be only right, as a matter of courtesy and propriety, for any Court here, in which a claim for wages may be made hereafter by a foreign seaman, to give the Consul of the nation to which the ship belongs, a notice that the suit has been instituted.

NOTES

[See the commentaries of Messrs Woodroffe and Ince on section 9, C.P.C., 1908, of *Hukm Chand*, Sec 11, C. P. C., 1882]

[887] PRIVY COUNCIL.

The 16th February, 1884.

PRESENT :

LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Rao Bahadur Singh.....Plaintiff

versus

Jowahir Kuar and Phul Kuar, widows of Balwant Singh.....Defendants

[On appeal from the Court of the Commissioner of Ajmere]

Claim by istemrardar to resume a subordinate tenure.

A custom was alleged, entitling a Patwi Thakur, or Chief, belonging to the Rathor clan of Rajputs, who was the istemrardar of an ancient and impartible taluq in Ajmere, to resume land formerly part of it but granted some generations back, as a subordinate estate, to a collateral relation of the chief. The ground of the resumption claimed was that the last successor to the estate so granted had died without issue and without adopting. *Held*, that the Commissioner's judgment, which was that a right of resumption, exerciseable merely on the above ground, had not been established, was correct, being supported, to some extent certainly, by answers received by the Chief Commissioner on inquiry from the neighbouring durbars of Rajputana chiefs, and, on the whole, by the balance of the evidence.

APPEAL from a decree (16th February 1884) of the Commissioner of Ajmere, reversing a decree (14th June 1877) of the Assistant Commissioner, Ajmere..

In the suit out of which this appeal arose, the appellant, styled in the proceedings, at times, the Rao, also the Patwi, and the istemrardar, was the recorded proprietor of the impartible taluq of Masuda in the Ajmere District. The respondents were the childless widows of the appellant's collateral relation, Balwant Singh, who died in 1876.

The suit was for the purpose of having declared the right of the istemrardar to resume a mouzah, named Nandwara, which at one time formed part of taluq Masuda, and had been granted about a century ago to an ancestor of Balwant Singh. In the plaint was claimed a customary right, on the part of the istemrardar of Masuda, to resume at will, all grants made, as it was alleged that this had been made, for the maintenance of the younger branches of the family, on making other provision for their maintenance, which was offered. The widows at first [888] alleged, but afterwards failed to prove, an adoption. They also affirmed that Nandwara had been given to an ancestor of their husband on a partition of estates in the family of the chief.

The Courts concurred in finding that the grant of Nandwara was an ordinary grant, locally known as a "gras," or "hawala," tenure, by which was made an assignment of land to a junior member of the family of a Rajput chief.

An issue framed to raise the question of the right of the chief to resume was decided as follows by the Assistant Commissioner —

"I feel bound to decide this issue in the affirmative, and to decide that the Thakur of Nandwara, having died without a legitimate heir of the body, the chief of Masuda is entitled to resume the village, making proper provision for the maintenance of the widows, and if there be any daughters, then of the

daughters also of the deceased. The evidence before the Court goes to show that confiscations have occurred frequently in former times, sometimes because the minor chief died childless, sometimes because he could not pay his revenue punctually, sometimes because he opposed his chief in the field. In the case of Lorri the minor chief is shown to have voluntarily resigned his position, and to have become a yeoman farmer instead of a Thakur, and a similar change in the status of the minor branches of the Masuda house has been, from different causes, of constant occurrence. They are still on the spot, these descendants of former chiefs, but they are now only zamindars, or in service, while all the actually existing Thakurs are scions or offshoots of quite a late date."

On the appeal to the Commissioner of Ajmere, a reference under rule 36 of the Ajmere Court Rules, on 15th February 1878, was made to the Chief Commissioner, who referred to four durbars, *viz*, those of Meywar, Marwar Jaipur, and Kishengarh, a statement of the case with the question, among others, whether the resumption was in accordance with the custom of other Rathor Patwi Thakurs in the surrounding Native States. On receipt of replies, the Chief Commissioner, Colonel E. R. C. Bradford, gave the following opinion on the 23rd January 1879 :—

"After a careful perusal of the file, I am of opinion that there [889] is only one point of those referred which is essential to the disposal of this particular case. I refer to the point whether the resumption of Nandwara is according to the custom of other Rathor Patwi Thakurs in the surrounding Native States ?

"In Rajputana no positive rule of law exists on the matter, but there is no doubt that the Patwi Thakur is not entitled to resume an estate held as Nandwara was held, merely because the holder died without adopting an heir. To lay down that he is so entitled would be to establish the doctrine of lapse by default of heirs, whenever an estate-holder dies without adopting, and this would not be a valid ruling for Rajputana, while the consequences might be as prejudicial to the superior as to the inferior Rajput landholders. Such a doctrine has never prevailed and it would certainly be contrary to the feelings and traditions of Rajput clans in regard to the tenure of their lands.

"On the other hand, there can be no doubt whatever that the decease of a landholder, before he has adopted an heir, is universally held to give his superior a right to interfere in the succession, to superintend the devolution of the estate, sometimes even to dictate it, and to choose an heir, but he cannot annex the land to his own estate except under special circumstances.

"What these circumstances are I do not consider it necessary to define precisely, as they are absent in the present case, and are not therefore material to an adequate consideration of it."

The Commissioner of Ajmere, Mr. L. Saunders, on the above answer to the reference being made, gave judgment as follows :—

"In this case the Chief Commissioner has, under a reference made to him under s. 36 of the Ajmere Courts Regulations, found that the Patwi Thakur is not, under the circumstances set forth in the reference made under date of 13th February 1878, entitled to annex the land to his own estate, merely because the holder died without adopting an heir, except under special circumstances, and that such special circumstances are in the present case absent. accordingly this Court, under s. 37 of Courts Regulation, must dispose of the case in conformity with the ruling of the Chief Commissioner, and

consequently this Court accepts the appeal and reverses the order of the lower Court. The plain-[890]tiff will pay the costs of the litigation from the commencement to the end."

On this appeal,—

Mr. J. F. Leith, Q. C., and Mr. R. V. Doyne appeared for the Appellant.

The Respondent did not appear.

For the appellant it was contended that the Court of First Instance had rightly decided that the grant of Nandwara was resumable, on provision being made by the grantor, or his representatives, for the maintenance of the successors of the grantees. The real issue was, whether the plaintiff had not established his right, by the custom of his family, as istemrardar of the ancient zamindari of Masuda, to resume, under the circumstances, a village found by the Courts below to have been assigned for maintenance. The reply given by the State of Jaipur was the one on which the appellant relied, it being to the effect, that in such a matter as this, of a disputed right to resume, the custom of the particular chiefship should be regarded.

Their Lordships' **Judgment** was delivered by

Sir R. P. Collier.—This is an action by the Rao of Masuda, in the Rajputana district, for the purpose of recovering possession of a subordinate estate within the taluq of Masuda, consisting of the village of Nandwara with two or three hamlets appurtenant to it, against the widows of the last owner, Balwant Singh, who died without natural issue. The plaint avers that—"The subject-matter of the claim is that the plaintiff is the proprietor of the taluq of Masuda, and by old-established custom, like his predecessors, enjoys the right to resume at any time any village assigned to any of his brethren for maintenance, and to provide for them in some other way." His case is that this sub-taluq, as it may be called (though it is sometimes called a jaghir), had been granted, some hundred years ago, to an ancestor of Balwant, the last owner, for maintenance, and that he is entitled at any time to resume it upon providing pecuniary maintenance for the tenants for the time being. This contention has scarcely been attempted to be supported. The plaintiff, therefore, falls back upon the circumstances of this case and a more limited [891] right; namely, a right to resume upon the death of the tenant without issue. The question is, whether he has established this right.

In the suit a question was raised as to whether the widows had adopted a son in pursuance of alleged directions of their husband and further whether, assuming that no such directions had been proved, the Rao had by his conduct recognized the adoption. These questions have been found against the defendant by the lower Court; and that finding, though not in terms affirmed, appears in substance to have been adopted by the Court above, and it is in favour of the appellant.

The defendants denied that the grant was for the purpose of maintenance, alleging it to have been made in pursuance of some family arrangement or partition, and they denied the right claimed by the Rao and most of the allegations in the plaint. The case came, in the first instance, before the Assistant Commissioner of Ajmere, who gave an elaborate judgment upon a number of issues which have become immaterial. The material finding is upon issue 13, viz., "whether the Rao of Masuda, as head of the family, has the right to confiscate the tenure of Nandwara—(a) in spite of a legal adoption?"—that may be put aside. (b) in spite of the existence and presence of a

natural heir?" Here it may be stated that there is no dispute that Ram Singh, who was alleged to be adopted, would be the next heir to Balwant in the ordinary course of descent.

The finding of the Assistant Commissioner is in these terms: "I feel bound to decide this issue in the affirmative, and to decide that the Thakur of Nandwara, having died without a legitimate heir of the body, the chief of Masuda is entitled to resume the village, making proper provision for the maintenance of the widows, and if there be any daughters, then of the daughters also, of the deceased. The evidence before the Court goes to show that confiscations have occurred frequently in former times, sometimes because the minor chief died childless." The case went on appeal to the Commissioner of Ajmere. The Commissioner, not himself deciding the suit in the first instance, stated a case for the consideration of the Chief Commissioner. The Chief Commissioner directed various [892] inquiries to be made of certain durbars of native princes. They reported to him; and, after considering their reports, he expressed his opinion that the judgment of the Assistant Commissioner should be reversed, and found that no such custom and no such right as that which the Rao claimed existed. The Commissioner, acting on this opinion, reversed the judgment of the Assistant Commissioner. This appeal is preferred from the judgment of the Commissioner.

Documentary and oral evidence have been given, to which it is unnecessary to refer at great length. The first important evidence consists of certain depositions which appear to have been taken before Mr. Cavendish in the year 1829, Mr. Cavendish being then Superintendent of Ajmere, and apparently charged with the duty of obtaining information with respect to tenures in Ajmere for the use of the Government. Various depositions have been put in which were used before him. One or two of those depositions, which are very short, go the length of supporting the contention of the plaintiff, but that is by no means their uniform tenor. There are others which qualify his right. There are some which state that, although he has a right to resume an estate, it must be upon substituting for it another estate. It is to be observed that Bahadar Mal, who probably represented him on that occasion, because he speaks of him as his client, being asked, "What powers does your client (the istemrardar of Masuda) have with regard to the ejectment of the jaghirdars?" answers, "In case of disloyalty, insurrection, and impropriety of conduct on the part of any jaghirdar, my client can turn him out of the village, but if he show no disobedience he may be allowed to continue in possession of his village as usual, or at his request my client may exchange his village for another, or fix a cash allowance." So it appears that the person who represented the Rao on that occasion claimed no such right as that on which he bases his present suit, but simply a right of resumption for cause. Further, it would appear that all these depositions are given upon the hypothesis of its being shown that the grant originally made to the jaghirdar was a grant merely for maintenance; but that appears to their Lordships not to be established, the finding of the Assistant Commissioner on that subject being at least ambiguous, *viz.*, that the grant of Nandwara to the ancestor of the deceased Thakur was an ordinary grant in 'gras,' or 'hawala,' tenure: no evidence has been produced to rebut this natural presumption. The word *bahai-bat* has not been exactly defined or interpreted by the defence, and is a term which is vague in its meaning." Such a finding does not appear to show that the grants were necessarily grants for maintenance, neither of these terms necessarily importing maintenance. If that be so, the evidence does not directly

bear upon the question. However, assuming that the grant was made for maintenance, still these depositions do not, as a whole, amount to proof of the right claimed.

The next documentary evidence relates to a proceeding in 1853 before Colonel Dixon, which arose in this way: The tenant of Jamola, one of the dependent jaghirdars, had refused to pay road cess, and had in other ways offended the Rao. The Rao thereupon claimed to resume possession of Jamola; and, in order to establish his case, he applied to various other jaghirdars,—among others, he applied to the father of Balwant,—to give a deposition or statement in his favour. He wrote to them this letter: "You need not entertain any apprehension on account of the letter which I got you to write in the Jamola case. The signature formerly attached (to certain writings) by Bhopal Singh (the grandfather of the present Thakur of Shergarh), both at the time of the dispute regarding Ramgarh and the assessment made by the Honourable R. Cavendish, shall be respected. Moreover, you will be put to no inconvenience whatever; don't think it otherwise. I am at one with you. Should I act otherwise, God is between us, *i.e.*, between yourself and myself." The substance of this letter, which is spoken to by one of the witnesses, rather points to this, that the Rao asked these persons, who were to a certain extent dependent upon him, to sign a paper on the understanding that it would be of advantage to him and no detriment to themselves. Under those circumstances they did sign a paper, which is to this effect—"After usual compliments. By the grace of God we are all well, and trust that, by the blessing of God, this will also find you in good health. You are (our) master. You ask for our opinion in the matter of the [894] application filed by the Thakur of Jamola. We accordingly beg to state that we are all members of your family, and look to you for our support. We have no (adverse) intention as regards the villages which you may confiscate, if you intend to do so, as you are our master. What we ask is only bread, you may confiscate the villages if you like." This and the letter which has just been read are nearly contemporaneous. Their Lordships, under the circumstances, do not attach any great importance to this declaration.

A great deal of verbal evidence also has been adduced, but it is by no means of a uniform character, or all of it supporting the contention of the plaintiff. The first witness, a zamindar, who seems to be a man of position, aged 60 years, gives this view of the right claimed. "For fault shown, the Masuda Patwi has power to resume villages given as hawala. I cannot say what power the Patwi has to so resume in the absence of fault."

Without going through all this evidence, it appears to their Lordships that, although several cases of what is called confiscation or resumption are shown, they have been, in almost every instance, from some fault or other. There is one instance indeed in which a jaghir is resumed upon the owner dying without issue, but in that case it happened that the Rao was the nearest heir.

There appears to their Lordships no sufficient evidence to support the finding of the Assistant Commissioner that the Rao had the right in the first of the three cases which he puts, namely, in the case of the minor chief dying childless, to confiscate or resume the estate. The opinions of the durbars, which were taken by the Chief Commissioner, are, on the whole, adverse to any such right: two are distinctly adverse to it, and two are equivocal. Their Lordships, having regard to the opinion of the Chief Commissioner, who states that "in Rajputana no positive rule of law exists on the matter, but there is

no doubt that the Patwi Thakur is not entitled to resume an estate held as Nandwara was held merely because the holder died without adopting an heir,"—supported as that finding is, to some extent certainly, by the answers which were received from the neighbouring durbars, and, on the whole, by the balance of evidence in the case,—are [893] of opinion that the judgment of the Commissioner of Ajmere should be affirmed.

They will, therefore, humbly advise Her Majesty that that judgment be affirmed, and that this appeal be dismissed.

Appeal dismissed.

Solicitors for the Appellant : Messrs. W. & A. Ranken Ford.

[10 Cal. 895]

PRIVY COUNCIL.

The 22nd February, 1884

PRESENT .

LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE

Alimuddi and others.....Defendants

versus

Kali Krishna Tagore... ..Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

*Measurement of land subject to alluvion and diluvion according to agreement —
Effect of error as distinguished from fraud.*

A superior owner of chur land, and his tenants, who held it in "hawaladari" tenure, agreed, with reference to alluvion and diluvion, that the chur should be measured from time to time, on notice, and that unless the tenants should give a separate "daul kabuliyat" for the land found to be accreted, the superior owner should take possession of it.

A measurement by the superior owner was made on notice to the tenants, and *bond fide*; but it was incorrectly made, the tenants, however, raising no objection at the time. They, afterwards, when a suit was brought against them by the superior owner for possession of alleged accreted land, set up the defence that the measurement had been made in their absence, and was incorrect.

Held, that the tenants could not defeat the suit, merely on the ground of the incorrectness of the measurement, there being no fraud; but that they were entitled to ask the Court to decide what the amount of the property was which the plaintiff was entitled to recover.

APPEAL from a decree (2nd February 1881) of a Divisional Bench of the High Court, reversing a decree (16th June 1879) of the Second Subordinate Judge of Backergunj.

The question raised by this appeal was as to the right of the plaintiff to obtain khas possession of land that had accreted to a chur, of which the defendants were tenants as hawaladars* [896] and of which the plaintiff was superior owner, there being an agreement between the parties relating to alluvion.

In 1859 a kabuliyat, of which the material portions are set forth in their Lordships' judgment, was executed by the defendants to the plaintiff; and the latter having on measuring the chur, after due notice, found that accretion had taken place, claimed the above right, in pursuance of the defendants' agreement with him. The measurement, however, was incorrect.

The Court of First Instance dismissed the suit, holding that, as the quantity of the excess land had not been correctly ascertained, in pursuance of the agreement between the parties, the cause of action had not been established.

On appeal, a Divisional Bench of the High Court (McDONELL and FIELD, JJ.) found that, the land having been measured by the amin of the District Court, there was upon the evidence no doubt as to the quantity of the accretion, and holding that the defendants had failed to carry out their part of the contract, decreed to the plaintiff the possession of land accreted to the chur, according to the amin's map on the file.

On the appeal of the Defendants—

Mr. J. Graham, Q.C., and Mr. J. D. Mayne appeared for the Appellants. .

Mr. T. H. Cowie, Q.C., and Mr. R. V. Doyne for the Respondent.

Their Lordships' Judgment was delivered by

Sir R. P. Collier.—In this case the plaintiff, who may be conveniently hereafter called the landlord, was the superior owner of certain chur land which was held by the defendants in *hawaladari* tenure. The rights of the parties are determined by a pottah and kabuliyat which were executed in 1859. It may be stated generally that the plaintiff's claim is to recover khas possession of certain land which, since that pottah and kabuliyat were executed, have accreted to the chur of the defendants. The kabuliyat, in the first place, fixes a certain rent for the land then in existence—a rent variable according to the nature of the property and the extent to which it is cultivated or culturable, and gradually rising to a maximum of five rupees, and after a certain number of years amounting [897] in the whole to a sum of Rs. 2,993. The part of it more immediately material in this case is as follows:—"At the interval of every three years, in the month of Magh of the fourth year, we will take a measurement amin from the principal office appointed by you, cause the land of the said chur and the whole *hawala* to be measured with the prevailing rod of eight cubits and eight fingers, and record our presence on the measurement chitta. And of the land which, according to that chitta, is found to have accreted in excess of the settled land of the said *hawala*, we shall get a deduction of an area of land equal to one-sixth of each of these descriptions of excess land, i.e., assessed

* "Hawaladari," a local term for a tenure (hawala being literally "an entrusting") in the district, where zamindars and taluqdars, with a view to reclaiming land, made it over to tenants, giving them a permanent and transferable interest therein.—*Hunter's Statistical Account of Bengal*, Vol. V, p. 372.

land, culturable land, and *dhali chur* land, and after executing a separate *daul kabuliyat* for the remaining quantity of land with a *kustbundi* similar to the present one, stating the rents which will be due, *i.e.*, the rent of the assessed land at the permanent rate of Company's Rs. 5-6-6 pies from the year succeeding that of the measurement, that of culturable *potit* land after being rent-free for three years, and for the next three years paying rent at the progressive rate"; and then the rent is stated to rise in the succeeding years. Then it goes on: "If by that measurement the quantity of land now given be found to be diminished by reason of diluvion, after deducting an area at the same rate from the falling off in the quantity of land, we will get a deduction from the year succeeding that of the measurement of an amount which will be due at the rate of Rs. 5-6-6 pies per kani for the falling off in the quantity of the talabi land, and separate deeds shall be executed and delivered, and we will pay rent accordingly. And until the whole of the above *chur* land is settled according to rules, you will continue to receive separate rent for the *heli* and *hogla* growing on the said *chur*. If at the stated time we do not take an *amin* and cause measurement, you will appoint an *amin* and cause the entire land of the said *chur* to be measured. And no objection shall be entertained that we have not recorded our presence on the *chitta* of such measurement. And if for the excess land, after deducting the settled land covered by our *daul* from the lands stated herein, we do not duly file a separate *daul kabuliyat*, then we shall be deprived of our right of obtaining a settlement of such excess land, and of the land which will [898] accrete in future; they shall become your *khas* property." It is under this clause of the *kabuliyat* that the plaintiff claims. He alleges that the defendants have not duly filed a *daul kabuliyat*, as they ought to have done, and that therefore the land has become his.

The facts, so far as material, are these. No measurement was made by either party until the year 1875. Nothing would appear to turn upon that, because neither party appears to have required the other to do it, and possibly there was no necessity for it. In 1875 the plaintiff caused a measurement to be made. He gave the defendants notice to attend. They did attend for a day or two; but subsequently they attended no more. He appears to have taken no steps upon that until December 1876, when he gave them a notice, whereby, after recording the terms of the *kabuliyat*, he goes on to say: "Then, as you did not take an *amin* and cause measurement at the stated time, an *amin* appointed by me measured the lands of the said *chur* and drones: 65 drones 9 kanis 2 gundahs of land have been ascertained to be in your possession; and after deducting the said quantity of settled land therefrom, 24 drones 1 kani of excess land has been found. Deducting from the said excess land an area (*rokba*) equal to one-sixth thereof, *i.e.*, 4 drones 3 kanis 1 gundah and 1 *krant*, according to the stipulations of the *kabuliyat*, rent and *salami* must be received according to the terms of the *kabuliyat* and *pottah* dated 8th of *Chey*t 1265 for the remaining 20 drones, 16 kanis 2 gundahs 2 *krants* of talabi land, *i.e.*, 12 drones, 2 kanis 12 gundahs 2½ *krants* of assessed land, 2 drones 1½ kanis 5 gundahs 1 *cowri* of culturable *potit* land, and 5 drones 2 kanis 18 gundahs 3 *cowris* 2½ *krants* of *dhali potit* land"—which is to a great degree waste land. "Therefore, by this notice you are directed that within fifteen days from the service of this notice you shall appear before the principal officer of my *cutchery* at *Kayurhyia*, and according to the terms of the said *pottah* and *kabuliyat*, give *salami*, and file a *kabuliyat* with a *kustbundi*, in respect of the rent of the excess land found on measurement. If you fail herein, *i.e.*, if you do not appear within the term stated in this notice, give *salami*, and file a *kabuliyat* by complying with the covenants as [899]

stated, you shall be ejected from the said excess land, according to the terms of the said pottah and kabuliyat, and it shall be taken under my possession in khas right."

Of that the defendant took no notice whatever, and they did nothing. About twelve months afterwards the plaintiff brings this action, in which he seeks to obtain khas possession of the land which he had mentioned in this notice; but he also prays for a further inquiry, if necessary, and further demarcation of boundaries. "It is prayed that after demarcating the boundaries of 4 drones 1 kani 82 gundahs of land settled with the defendants, or the settled lands, with any portion of the land covered by the pottah which may be found on mofussil investigation to have diluviated from the land covered by the boundaries given below, you will be pleased to give me khas possession of the excess land, according to what is stated in the schedule."

The case coming before the Court, the defendants filed a number of pleas, which gave rise to a number of issues, which were found against them. But upon the last issue, which is in these terms, "what is the quantity of the accreted land; and whether, under all the circumstances, the plaintiff is entitled to khas possession thereof" the Subordinate Judge dismissed the suit of the plaintiff, upon the ground that the measurement which the plaintiff had made, and which is referred to in his notice of the 6th December 1867, was in many respects defective. There can be no question that it was defective, inasmuch as an amin of the Court was deputed to make a further inquiry; and his report, which differs from that of the plaintiff's amin, is adopted by both Courts. The Subordinate Judge appears to have thought that the making of a substantially correct measurement, and giving a substantially correct notice in pursuance of it, was a condition precedent to the plaintiff's right to insist upon the defendant's filing the daul. That judgment was reversed by the High Court, and the effect of the High Court's judgment is, that although the measurement of the plaintiff, was in some material respects defective and wrong, nevertheless that the conduct of the defendants was such that they must be deemed to have been in default in not filing a daul kabuliyat, as they ought to have done; and that they, having made no objection at the time, or indeed until the action was brought, to the measurements of the plaintiff, could not then be allowed to defeat his action on the ground of the measurement being defective, although they were unable to show what the correct measurements were—measurements on which the Court would act. That is the ground of decision of the High Court, in which their Lordships concur. It appears to their Lordships that the defendants were in default, that the plaintiff having made a measurement which is not impeached on the ground of fraud,—if it had been, the case would have been different,—but a *bond fide* measurement, in pursuance, as he believed and intended, of the agreement between the parties, it was the duty of the defendants, if they objected to it, to have stated their objection, but they having made no objection at the time, or indeed until the action was brought, it is too late for them to say that he had no cause of action, although they are entitled to ask the Court to decide what the amount of the property is which the plaintiff is entitled to recover.

On these grounds, their Lordships are of opinion that the judgment of the High Court is right, and they are of opinion that it should be affirmed subject to a slight modification. The High Court direct that a line be drawn on the map from a station marked 12, and so on. It appears to their Lordships that it would be more correct, instead of the Court drawing the line itself, to refer it back to the Subordinate Court to set out so much of the accreted land as, having regard to the nature, quality, and situation, ought to be taken to replace the

asli land which has been diluviated since the date of the kabuliyat of the 21st March 1859, so that the defendants may continue to hold the 41 drones 8 kanis 2 bigahs of land, according to the terms of that kabuliyat.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment, should be affirmed, subject to this slight variation; the appellant must pay the costs of the appeal.

Solicitors for the Appellants : Messrs. *Barrow & Rogers*.

Solicitor for the Respondent · Mr. *T. L. Wilson*.

NOTES.

[MEASUREMENT—

Where measurement is made *without notice* to the tenant at all, it is not binding on him :—14 Cal., 99 : 13 I A , 116.]

[901] PRIVY COUNCIL.

The 6th and 7th February and 1st March, 1884.

PRESENT :

LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH
AND SIR A. HOBHOUSE.

Jonmenjoy Coondoo.....Defendant

versus

George Alder Watson... ..Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Construction of power-of-attorney—Power to “ negotiate ” Government notes.

An agent, with whom were deposited Government notes for safe custody, was authorized by power-of-attorney to negotiate, make sale, dispose of, assign, and transfer, or cause to be assigned, and transferred, at his discretion, all or any of them, and on the principal's behalf from time to time, at his discretion, to contract for, and purchase, Government notes, and accept the transfer thereof, into the principal's name ; “ and for the purposes aforesaid to sign for him in his name, and in his behalf, any and every contract, agreement, acceptance, or other document.”

The agent, purporting to act as attorney, endorsed one of the notes, and borrowed money thereon for himself, and in fraud of his principal.

Held that, with regard to the general objects of the power, the agent had under it no authority to pledge, and that the lender of the money acquired no title to the note as against the principal.

The power-of-attorney was not in the same form as that in the *Bank of Bengal v. Macleod* (5 Moo. I. A., 1), and the *Bank of Bengal v. Fagan* (5 Moo. I. A., 27), not containing in express words, power to indorse. Had it done so, the question would have been whether there was anything to prevent it from being a power, in the discretion of the donee of it, to indorse the note, and convert it into one payable to bearer, whenever he thought fit to do so for any purpose.

It was not laid down in the judgment on those cases that the words used in a power-of-attorney, to express its objects, are always to be construed disjunctively, though they may be so construed; and there is no reason why a rule of construction, intended to aid in arriving at the meaning of the parties, should not be applied in construing a power-of-attorney as much as any other document.

APPEAL from a decree (I. L. R., 8 Cal., 934) of a Divisional Bench of the High Court (4th May 1882), reversing a decree of the same Court in its Original Civil Jurisdiction (22nd December 1881).

The question raised on this appeal related to the authority of an agent, who, having received a power-of-attorney in reference [902] to Government notes deposited with him, had pledged one of them, having endorsed it in the name of his principal.

The respondent deposited, with other Government notes, one note for Rs. 20,000, in the custody of his agents, Messrs. Nicholls and Co. (W. Nicholls and G. A. Thompson), to whom he executed the power-of-attorney, which is set forth in their Lordships' judgment. This note was afterwards pledged by Thompson in fraud of his principal, having been endorsed by Thompson, and delivered to the appellant, with whom it remained as security for a loan of Rs. 19,000 made by him to Thompson as agent, nominally, for the respondent. Nicholls and Co. became insolvent.

On the 25th February 1881, Watson, through his solicitors, [903] demanded the note, stating that it had been fraudulently pledged, without his authority. The appellant, refusing to give up the note, called upon the respondent to redeem it.

The suit which resulted was dismissed by the Court of original jurisdiction, on the ground that the property in the note had passed to the defendant by indorsement, authorized by the power-of-attorney, the defendant, also, being the *bona fide* holder of the note for value.

* The following was the form of the note —

Promissory Note for Government Rupees 20,000 bearing interest, payable half-yearly at the rate of Four-and-a-half Rupees per centum per annum.

The Governor-General of India in Council does hereby acknowledge to have received from Surgeon-Major Geo. A. Watson, the sum of Government Rupees Twenty thousand as a loan to the Secretary of State in Council for India, and does hereby promise, for and on behalf of the said Secretary of State in Council, on demand, three months after notice of repayment, published by order of the Governor-General of India in Council in the *Gazette of India*, to repay the said loan of Rupees Twenty thousand to the said Geo. A. Watson, his executors, administrators or assigns, or his or their order, in Calcutta, with interest from the 15th day of March 1879 (seventy-nine), to the date appointed for discharge, at the rate of Four-and-a-half per centum per annum, and such notice as aforesaid shall be equivalent to a tender of repayment at the period therein appointed for the discharge of this Note. And the Governor-General in Council hereby promises, on and after each succeeding fifteenth day of the months of September and March until the expiration of three months after notice of repayment as aforesaid (when all further interest will cease) on demand, to pay to the said Geo. A. Watson, his executors, administrators or assigns, or his or their order, in Calcutta, interest on the said sum of Government Rupees Twenty thousand for half-a-year at the rate of Four-and-a-half per centum per annum. The Governor-General in Council hereby further engages that notice of repayment as aforesaid shall not be given before the fifteenth day of June 1893, and that this Note shall not be discharged before the 15th day of September 1893.

Rs. 20,000, dated the 15th day of March 1879, No. 016588.

This decree, on appeal, was reversed by a Divisional Bench of the High Court (GARTH, C.J., and WHITE, J.) and the plaintiff was held entitled to recover the note. The ground of this judgment, briefly stated, was that the pledge was not authorized by the terms of the power-of-attorney. The Court was also of opinion that, the borrowing having been unauthorized by the principal and a fraud upon him, the lender could not, in equity, be held entitled to retain the note as security for a loan, as against the principal, who had neither authorized the borrowing nor received the money.

The judgments, having been printed in the report of the appeal to the High Court in I. L. R. 8 Cal. 934, are here omitted.

On this appeal,—

Mr. J. Rigby, Q.C., and Mr. E. Rolland appeared for the Appellant.

Mr. A. Cohen, Q.C., and Mr. J. T. Woodroffe appeared for the Respondent.

For the appellant it was argued that the decree of the Court of First Instance was correct, because (a) the indorsement and transfer of the Government note was within the authority conferred by the power-of-attorney; and (b) because the appellant, having had no notice of fraud, and having acted *bona fide*, took a title to the note not affected by the conduct of the agent. If the power-of-attorney, in effect, contained the power to indorse, this appeal must succeed. On this point reference was made to the principles of construction recognized in the *Bank of Bengal v. Macleod* (5 Moo. I. A., 1) and the *Bank of Bengal v. Fagan* (5 Moo. I. A., 27). The words [904] of the power-of-attorney, on which reliance was placed, were "to negotiate" and "to dispose of", these being words, it was contended, of signification no less comprehensive than "to indorse" and "to assign," the latter words having been held sufficient to authorize a transfer of Government paper by the agent, in the above cases. Power to negotiate included the power to indorse, and when the latter power was established, the absence of intention on the part of the principal to transfer the security, in the way in which it had been transferred, was immaterial. Reference was made to part of the judgment of Lord BROUGHAM on the above cases (5 Moo. I. A., at p. 40), viz., "though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act, under the power." This disposed of the argument, whereon the judgment of the Court below, to a great extent, proceeded, viz., that the fraud, on the part of the agent, prevented the appellant from making a title to the note. That argument left out of account the nature of the powers given by the written authority, and that of the property pledged. Mere negligence on the part of the holder of the note, unless it was so great as to negative his being the *bona fide* holder of it, could not deprive him of his title. If then the power to indorse was established, the converse of the case which occurred in *De Bouchout v. Goldsmid* (5 Ves. Jun. 211) presented itself here. One of the objects of the power, which in construing it should be considered, might be that the principal, or agent, should be put in funds with a view to the purchase of other notes. And if the parties to this power had wished to include the raising money, as an act authorized, they might have used such words as had been used. The accumulated expressions should receive effect; and such an instrument should be read *fortius contra proferentem* with due regard to the language used in mercantile parlance in such matters. Storey on Agency, chap. VI, was referred to. *Woolley v. Pole* (4 B. & A., 1).

For the respondent it was argued—First, that the pledge of the Government note, an act distinct from "to negotiate," or [905] "to dispose

of," was not authorized by the power-of-attorney. In a decision upon the Factors' Act, 6 Geo. IV, c 94, *Taylor v. Kymer* (3 B. and Ad., 320), it had been held that powers of sale and disposition did not include the power to pledge. The latter power was neither given in terms, nor was there any contemplation of the borrowing money as part of the means whereby the agency was to be carried on. Reference was made to Storey on Agency, paragraphs 68, 69, 74, and 77. The absence of written authority to indorse the note was what distinguished this case from that of *The Bank of Bengal v. Macleod* (5 Moo. I. A., 1), and *The Bank of Bengal v. Fagan* (5 Moo. I. A., 27). In those cases the agent having indorsed the note, having authority expressed in his power-of-attorney to indorse, the question was as to the effect of his indorsement, and delivery to the holder. But here the decision must rest on the agent's want of authority to indorse. In *Attwood v. Munnings* (7 B. and C., 278), the power-of-attorney not authorizing acceptance of a will by an agent, who nevertheless did accept "per proc.," it was held that the holder could not treat it as an acceptance by the principal.

Secondly, it was argued that the Government note was not negotiable, and had not acquired the incidents of the class of instruments known to the law-merchant as negotiable. From this it resulted that the appellant did not acquire from the agent, by reason of the nature of what was pledged, a better or higher title than the agent himself had. The exception from the general rule as to transfers, other than those in market overt, where the title in the person transferring was defective, established in the case of negotiable instruments, did not apply to an instrument of the class now in question. Setting aside statutory enactment, an instrument payable to order could not be made negotiable, save by established custom. No doubt certain written promises to pay a sum to the holder, proved to be usually passed in the English market by delivery, *Goodwin v. Roberts* (L. R., 1 App. Cas., 476), had been held by the Courts to be legally dealt with as negotiable instruments. The paper of certain Governments, as regards transfer, [906] see *Gorquier v. Merville* (3 B. and C., 45), *Attorney-General v. Bouwens* (4 M. and W., 171), *Glyn v. Baker* (13 East, 509), had been placed on the same footing with bills or notes payable to bearer or indorsed in blank or with Exchequer bills, *Wookey v. Pole* (4 B. and A., 1). But no customary recognition of the notes of the Government of India loan, 1879, as negotiable instruments, having been proved, it could not be held that by them was given a floating right of suit to any holder into whose hands they might come. See the judgment in *Dixon v. Bovill* (3 Mac. H. L. Cas., 1). They rather fell within the principle of the decision in *Crouch v. The Credit Foncier* (L. R., 8 Q. B., 374). Another obstacle to the notes being dealt with as a negotiable instrument (if this question should arise) would be found in the position of the Government as a State acting in sovereign rights. On this was cited *Nobinchunder Dey v. The Secretary of State for India* (I. L. R., 1 Cal., 11), *The Bank of Bengal v. The United Company* (Bignall's Reports, Supreme Court, Calcutta, 1830-31, p. 87), *The Peninsular and Oriental Company v. The Secretary of State for India* (Bourke, Pt. VII, 166, at pp. 188, 189). Another, in the relation of the indorser to the holder, on which reference was made to "The Indian Securities Act," III of 1811, s. 5.

Mr. J. Rigby replied, contending that the power-of-attorney sufficiently authorized indorsement by the agent, and that the title to the note had passed to the appellant.

On a subsequent day, 1st March, their Lordships' Judgment was delivered by

Sir R. Couch.—The respondent in this appeal, George Alder Watson, is a Surgeon-Major in Her Majesty's Indian Army, and the appellant is a merchant at Calcutta. On or about the 18th of October 1878 the respondent deposited with Messrs. Nicholls & Co., described in the plaint as a firm carrying on business as bankers and financial agents in Calcutta, promissory notes of the Government of India amounting to Rs. 37,500, for which a receipt was given to him by Nicholls & Co., headed "Safe custody receipt." [907] One of those notes was for Rs. 20,000. This note was payable to Watson, his executors, administrators, or assigns, or his or their order, and was subsequently exchanged by Nicholls & Co. for a similar note, apparently that the interest might be received at Calcutta instead of Peshawur, where the interest on the former note was payable, but no question arises upon this.

On the 18th of October 1878 Watson executed and gave to Nicholls & Co. a power-of-attorney in the following terms:—

"Know all men by these presents, that I, George Alder Watson, Surgeon-Major, 19th Regiment Bengal Lancers, do make, constitute, and appoint William Nicholls and George Augustus Thompson, of Messrs Nicholls & Co., financial agents, Calcutta, jointly and severally to be my true and lawful attorneys and attorney, for me and in my name, and on my behalf, from time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes, or other Government paper, bank shares, or shares in any public Company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in my name, or belonging to me, or any part or parts thereof respectively. And also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name or name of any Government promissory notes or other Government paper, bank shares, or shares in any public Company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in the names of, or belonging to, any other person or persons. And also to receive all interest and dividends due, or to accrue due, on all or any of such stocks, funds, and securities. And for the purposes aforesaid, or any of them, to sign for me and in my name, and in my behalf, any and every contract or agreement, acceptance, or other document. And to sign, seal and deliver for me, and as my act and deed, any and every deed which they or he may think expedient."

This power-of-attorney, when produced in evidence, had on the back of it a seal of the Public Debt Office, Bank of Bengal, showing that it had been registered there, and the new note had on the back two like seals, with the same register number, showing that a power-of-attorney had been registered for the receipt of interest and for sale. Watson never gave to Nicholls & Co. any authority to deal with the notes except the power-of-attorney. The note when produced bore two indorsements, "G. A. Watson, by his attorney G. Aug. Thompson," "G. A. Watson, by his attorney G. Aug. Thompson." The former of these indorse-[908]ments appeared to apply to a receipt for a half year's interest, which was indorsed on the note.

In December 1880 a broker named Goberdhone, employed by Nicholls & Co., applied to the gomastah of the appellant for a loan to Watson of Rs. 19,000, on the pledge of a Government Security for Rs. 20,000, and subsequently bought the note for Rs. 20,000. Being asked by the gomastah under what authority the name of Watson was signed by Thompson, he said there were two seals on the paper, and from the two seals it appeared that Mr. Thompson had authority to draw interest and sell the paper, so he had full authority. The gomastah then sent the money by one Koylash Chunder Roy to the office of Nicholls & Co., telling him to inquire whether the paper

was actually signed by Thompson. What then took place is stated by Koylash Chunder Roy thus:—"In the office the broker took the paper from Ameer Singh's durwan, and gave it to Mr. Thompson. Mr. Thompson gave that paper to me, and said he wanted money on that paper. I asked him if the signature on the paper was his signature, and if he had pledged the paper with Ameer Singh Shumar Mull. He said, 'Yes' I told him 'The paper stands in the name of Mr. Watson, why do you want money on this paper, and what authority have you to sign for Mr. Watson?' Mr. Thompson said 'I have got a power-of-attorney. If you wish to see the power-of-attorney I can show it to you' He said he had a power-of-attorney from Watson to manage all his business, and he had authority to receive money on that paper. Then he executed a promissory note, in which he signed for Mr. Watson, gave the promissory note to me with the Government promissory note, and took the money from me." In the account books of the appellant the transaction was entered as a payment of Rs. 19,000, on account of pledge of Company's paper. Nicholls & Co., having failed, the respondent brought a suit in the High Court at Calcutta, praying that the appellant might be decreed to endorse and deliver up the promissory note for Rs. 20,000 to him, and to pay him all such interest as the appellant might have received thereon, and that the appellant might, if necessary, be restrained from parting with it.

The Judge, before whom the case came on for disposal, dismissed [909] the suit with costs. On appeal to the High Court in its Appellate Jurisdiction, this decision was reversed, and a decree was made in the respondent's favour, from which there is this appeal to Her Majesty in Council.

It was properly admitted by the learned counsel for the appellant in the argument before their Lordships that the appellant, having notice that the indorsement was under a power-of-attorney, was in the same position as if the power-of-attorney had been perused, and if that power did not authorize the indorsement he must fail. But counsel contended that it gave an authority to pledge the Government note, and relied upon the case of the *Bank of Bengal v. Macleod* (5 Moo I A, 1, 7 Moo, P. C., 36) It is necessary to look at the facts and argument and judgment in this case somewhat minutely.

The action was one of detinue and debt brought by James William Macleod against the Bank of Bengal. In 1841 the plaintiff sent from England a power-of-attorney, constituting and appointing Alexander Donald Macleod (his brother), and Christopher Fagan, carrying on business in Calcutta as agents under the firm of Macleod, Fagan & Co., his attorneys, jointly and separately in their individual names, or the name of the firm, and on his behalf, "to sell, endorse, and assign, or to receive payment of the principal, according to the course of the treasury, of all or any of the securities of the East India Company for shares in their public loans," to which he was entitled. A. D. Macleod applied to the Bank of Bengal for a loan upon his own account, and offered as a security Company's paper, No. 13397, for Rs. 5,000. This note bore the following endorsement—"Pay to G. J. Gordon, Esq., Secretary, Union Bank, or order, J. W. Macleod, by his attorney, A. D. Macleod." "Pay to A. D. Macleod, attorney to J. W. Macleod, or order, G. J. Gordon, Secretary, Union Bank. J. W. Macleod, by his attorney, A. D. Macleod." The Secretary of the Bank, upon inspection of the note and the last endorsement, requested to see the power-of-attorney, which was shown to him. The Bank then took a further endorsement on the note from A. D. Macleod in these words: "Pay to the Bank of Bengal, [910] or order, A. D. Macleod," and the required loan was then made by the Bank in the ordinary

course of business. Two days afterwards a further loan of Rs. 17,100 was made by the Bank to A. D. Macleod, upon his depositing two other notes and endorsing them, and his statement that they were his own property.

A verdict was found for the plaintiff, and a rule, which was granted to show cause why that should not be set aside and a nonsuit entered, or why a verdict should not be entered for the defendants, or new trial granted, having been discharged, the defendants appealed to Her Majesty in Council. The difference between this case and that before their Lordships may be here noticed. The power-of-attorney contained the word "endorse." The loan was made to A. D. Macleod on his own account, and the Bank took an endorsement on the note from him on his own account, and not as attorney for J. J. W. Macleod. In this case, and in the similar case of *The Bank of Bengal v. Fagan* (the judgment being given in both cases) it was argued for the appellants that A. D. Macleod had power to endorse the notes; that "sell, endorse, and assign" might be read either distributively or conjunctively, and the power to endorse was not auxiliary only, but was the real object of the power. For the respondent it was argued that the endorsement mentioned in the power-of-attorney was for the purpose of authorizing A. D. Macleod as agent for the purposes of a sale, and a power to sell did not give a power to pledge, that the word endorse was controlled by the context, and the words must be taken collectively. The following passages from the judgment delivered by Lord BROUGHMAN show the ground of the decision:—

"Thus, the main and fundamental question is, had Macleod & Co authority to endorse under the power-of-attorney, which is in the same words in both cases. It is 'to sell, endorse, and assign, or to receive payment of the principal according to the course of the treasury, and to receive the consideration money and give a receipt for the same.' It is contended for the respondent that the words 'sell, endorse, and assign' used conjunctively cannot be used in the disjunctive, but that the only power given to endorse is one ancillary to sale, and that we are to read it as if it were power to sell, and for the purposes of selling to endorse. This construction is endeavoured to be supported by referring to the variation [911] of 'or' for 'and' immediately following 'or to receive the money at the treasury.' We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. . . . Shall we then say that a power to 'sell, endorse, and assign' does not mean a power to sell a power to endorse and a power to assign, and would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction we must hold that these words not only give no powers to endorse without selling, but also that they give a power to sell without endorsing, and we must suppose an agent acting under such a power to be entirely crippled. . . . It appears to us that the rational and the natural construction is the one which represents a power to 'sell, endorse, and assign' as a power to sell, a power to endorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally."

It seems to have been thought by two of the learned Judges of the High Court that it was laid down in this case, as a rule of construction, that words used in a power-of-attorney to express the objects of the power are always to be construed disjunctively. Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively, but they do not see any reason why the rule laid down by Lord BACON, *Copulatio verborum indicat acceptationem in eodem sensu*, which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power-of-attorney as much as any other instrument.

The power-of-attorney in the present case is not in the same form as that in *The Bank of Bengal v. Macleod*. It does not contain in express words a

power to "endorse." If it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to endorse the note, and so convert it into one payable to bearer whenever he thought fit to do so for any purpose. But in this power the endorsement is not authorized in express words, but is authorized if it comes within the meaning of the words, "And for the purposes aforesaid to sign for me, and in my name and on my behalf, any and every contract or agreement, acceptance, or other document." The "purposes aforesaid" are these—

"From time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred [there seems to be mistake in words here, but it does not make any difference in the meaning], at their or his discretion, all or any of the Government [912] promissory notes or other Government paper, etc., and also for me, and in my name and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any Government promissory notes or other Government paper, etc."

The appellant's counsel relied mainly upon the word "negotiate," and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for Watson Government promissory notes and other securities, not to borrow or lend money upon them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it. Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the appellant gives to it, and, for the same reason, "dispose of" cannot have that effect.

It did not appear when the endorsement by Thompson as Watson's attorney was made, but Nicholls & Co. did not deal with the note as having themselves become the holders of it by endorsement, as was the case in *The Bank of Bengal v. Macleod*. They borrowed the money on behalf of Watson, giving a promissory note for it signed by Thompson as his attorney, and pledged the Government promissory note as Watson's. As they had not authority to do this, the authority to sell not giving an authority to pledge, the appellant acquired no title to the note by its delivery to him, and the High Court has properly made a decree in the plaintiff's favour.

Their Lordships will humbly advise Her Majesty to affirm that decree and to dismiss this appeal, and the costs of it will be paid by the appellant.

Solicitors for the Appellant. Messrs. *Watkins and Lattey*

Solicitors for the Respondent. Messrs. *Vallance and Vallance*.

NOTES.

[STRICT CONSTRUCTION OF POWERS OF ATTORNEY—

Powers have to be construed strictly:—*Bryant v. La Banque du Peuple* (1893) A. C., 170. Any act in excess of the power when so limited does not bind the principal.—*Jacobs v. Morris* (1902) 1 Ch., 816, *Russo-Chinese Bank v. Li Yan Sam* (1910) A. C., 174.

Power to pledge is not implied in the power to manage *Lewis v. Ramsdale* (1886) 55 L. T., 179 or to *dispose*, (1890) 14 Bom., 590.

Power to sign mortgage deeds does not authorize entering into a mortgage transaction.—(1907) 6 C.L.J., 490.

See also (1905) 33 Cal., 343.

In *Lewis v. Ramsdale* (1886) 55 L. T., 179 (180), it was held similarly that the *Bank of Bengal v. Fagan*, 5 M. I. A., 1, 17 did not lay down any general rule of disjunctive construction and that powers of attorney like other instruments should be construed in accordance with the intention of the parties.

The motives or the purposes of the agent are immaterial, when his acts with reference to third parties are within the power, so long as they have no notice of those motives or purposes:—*Hambro v. Burnand* (1904) 2 K. B., 10 reversing (1903) 2 K. B., 399, see also *Cuthbert v. Roberts Lubbock & Co.* (1909) 2 ch., 226.

It has been held that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent: it is not necessary that the fraud should be committed for the benefit of the principal.—*Lloyd v. Grace Smith & Co.* (1912) A. C., 716

Note.—This case is referred to in 11 C. L. J. 2 at pp. 11, 12, as an authority for the proposition that the devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created or the usage of each particular institution where no express trust deed exists. This reference appears to be wrong, as this case does not deal with this question.]

[913] APPELLATE CIVIL.

The 6th June, 1884

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE TOTTENHAM.

Saroda Pershad Ganguli and another..... ..Plaintiffs

versus

Pahali Mahanti and another.... . . .Defendants

Period of limitation, Computation of—Section 32, Act X of 1859—Section 29, Beng. Act VIII of 1859.

In reckoning the period of limitation, the word "months" in s. 32 of Act X of 1859 should be computed according to the English calendar

THIS was a suit to recover rent at an enhanced rate from one Dinobandhu Mahanti who held 19 mans 2 gunths 1 biswa of land in Pahye Jote in Orissa. The Deputy Collector decreed the plaintiffs' claim. On appeal, the District Judge set aside the decree, on the ground that the plaintiffs, not having brought their suit within three months from the end of the Willayutee year, which is prevalent in Orissa, were barred by limitation. Thereupon the plaintiffs appealed to the High Court, and it was contended on their behalf that the suit was within time, inasmuch as the "three months" referred to in s. 32 of Act X of 1859 should be reckoned according to the Urya and not the English calendar.

Baboo Sreenath Dutt and Baboo Taruk Nath Dutt for the Appellants.

Baboo Amarendra Nath Chatterjee for the Respondents.

The Judgment of the Court (WILSON and TOTTENHAM, JJ.) was delivered by

* Appeal from Appellate Decree No. 1018 of 1883, against the decree of J. B. Morgan, Esq., Officiating Judge of Cuttack, dated 31st of January 1883, reversing the decree of J. S. Davidson, Esq., Deputy Collector of Cuttack, dated 4th of January 1882.

Wilson, J.—The question raised in this appeal is, whether in s. 32 of Act X of 1859, where it is said, "the suit shall be instituted within three months from the end of the Bengal year or of the month of Jeyt of the Fusli or Willayutee year on account of which such enhanced rent is claimed," the word "months" [914] means months of the English calendar, or in Orissa months of the Willayutee year.

It has been held by this Court that in the corresponding section, s. 29 of the Bengal Act VIII of 1869, English calendar months are meant. See *Mahomed Elahee Buksh v. Brojo Kishore Sen* (I. L. R., 4 Cal., 497) and the cases there cited. The construction of that Act, however, is governed by the Bengal General Clauses Act, Bengal Act V of 1867. The Act now in question is unaffected either by that Act or by the similar Act of the Governor-General in Council, I of 1868. But the rule we have to construe is one of limitation; and in Limitation Acts the periods of limitation are reckoned according to the English calendar unless a different intention is expressed—*Maharajah Joy Mungul Singh v. Lall Rung Pal Singh* (13 W. R., 183, 4 B. L. R., Ap. 53). In the present Act there are many sections in which periods of limitation are given, as for instance, the very next section, s. 33, and ss 90 and 93. In these there is nothing to indicate that any calendar other than the English is intended. The section now in question must, we think, be construed in the same way, unless there are clear reasons for adopting another construction. It is true that in this section, the Bengal, Fush, and Willayutee years and months are mentioned and used for fixing the commencement of the three years' period of limitation in the first part of the section, and of three months in the second. But we do not think this a sufficient reason for reading the words of limitation themselves in a different sense from those which bear like words in other parts of this Act, and in other enactments of similar scope.

The appeal is dismissed with costs.

Appeal dismissed

[915] APPELLATE CIVIL.

The 11th June, 1884

PRESENT

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD

Loburi Domini and others.....Petitioners

versus

The Assam Railway and Trading Co., Ltd., and the Secretary of State
for India in Council.....Opposite Parties.*

*Transfer of suits—Judge exercising executive functions, Disqualification of—
Bengal Civil Courts' Act (VI of 1871), s. 25.—Act XIV of 1882, s. 25.*

An officer who exercises executive and judicial functions having himself dealt with a certain matter and formed and expressed an opinion upon its merits in his executive capacity, and having further advised and directed litigation in support of this view, is, in consequence,

* Civil Rules Nos. 488, 489 and 490 of 1884 for transfer of appeals from the file of Mr. Ward, the Judge of the Assam Valley Districts.

disqualified from dealing as a Judge with this same question when it comes into Court and has to be dealt with judicially.

THIS was an application under s. 25 of the Civil Procedure Code for the transfer of certain appeals. The petitioner had instituted a suit against the Assam Railway and Trading Company in the Munsif's Court at Debrugurh for the recovery of certain lands. On the objection of the Railway Company, the Secretary of State was also added as a defendant in the suit. The Munsif decreed the claim. From that decree separate appeals were preferred in the Court of the Deputy Commissioner of Luckimpore, but were afterwards transferred for final decision to the Court of the District Judge of the Assam Valley Districts. Thereupon the plaintiff (respondent) applied to the High Court for the transfer of the appeals, on the ground that the presiding Judge, who was also Commissioner, had taken an active part in defending the suit in the Munsif's Court. A rule was issued on the other side (notice being also given to the Judge of the Assam Valley Districts) to show cause why the application for the transfer of the appeals should not be granted.

Baboo Bhobani Churn Dutt in support of the rule.

The Senior Government Pleader (*Baboo Annoda Pershad Bannerjee*) to show cause against the rule.

The facts disclosed on the affidavits are sufficiently stated in the **Judgment** of the High Court (MCDONELL and FIELD, JJ.) which was delivered by

[1916] **Field, J.**—In these three cases the Court granted a rule to show cause why certain appeals should not be transferred for hearing from the Court of the Judge of the Assam Valley Districts to some other competent tribunal. The ground upon which this application for transfer was made was that Mr. Ward, who was the Judge of the Assam Valley Districts, had, in his executive capacity as Commissioner, taken an active part in directing and preparing the defence in these suits before the Court of First Instance, and had expressed a strong opinion upon the merits of the question involved. We think that, if nothing had occurred to alter the status of the Assam tribunal as it existed when we granted these rules, we should now have to make them absolute. But that something has occurred to alter that status, appears from an affidavit which has been read before us to-day. The first paragraph of this affidavit is as follows:—

"The present Judge of the Assam Valley Districts, before whom the appeal will come in the ordinary course, is Mr. Luttman-Johnson, an officer who has been in no way connected either directly or indirectly with the preparation of the case for the appellants in his executive capacity as Commissioner. Mr. Johnson returned from furlough and assumed charge of the office of Judge and Commissioner of the Assam Valley Districts only on the 5th of May 1884, his previous service had been in the capacity of Deputy Commissioner of Sylhet, and it was impossible for him to have had any cognizance that this suit was pending until after his arrival in India in the last week of March 1884. These circumstances effectually remove any objection that might be taken to Mr. Johnson's jurisdiction on the ground of the union of executive and judicial functions in his person." This affidavit is not as exact as it might and should have been. It does not set out, as it ought to have set out, the dates upon which Mr. Luttman-Johnson proceeded upon furlough, and returned from furlough, and it also does not set out the length of time during which Mr. Luttman-Johnson was Deputy Commissioner of Sylhet. But we think that, notwithstanding these defects, there is enough in the affidavit to show that Mr. Luttman-Johnson personally is free from any such disqualification to hear and decide these cases, as existed in the case

of Mr. Ward. We think, therefore, that no cause now exists, [917] so far as appears from the matter before us, for removing these appeals from the Court of the Judge of the Assam Valley Districts. The affidavit further proceeds as follows: "But even apart from this consideration, I (that is, the Officiating Secretary to the Chief Commissioner of Assam), on behalf of the aforesaid opposite party, affirm and say, that it is an advantage that suits like the present suit should be heard and decided in the local Courts, where the principles of the local land law are more familiar, more easily ascertainable, and can be argued upon with greater wealth of illustration, than in the High Court, placed at a distance from the province, and among the associations of the very different land law of Bengal." We do not concur in this argument when applied to the matter before us, and to the action of an appellate tribunal. Carried to its extreme possible limits, it would be an argument for disallowing to the people of this country the right of appeal to the Privy Council—a privilege which has always been much valued by them, and which has produced the best effects upon the administration of justice in India. But this argument, in fact, overlooks the essential question in the case, which is, whether an officer, who exercises executive and judicial functions, having himself dealt with a certain matter, and formed and expressed an opinion upon its merits in his executive capacity, and having further advised and directed litigation in support of this view is, in consequence, disqualified from dealing as a Judge with this same question when it comes into Court, and has to be dealt with judicially. It may be necessary, for reasons to which we need not advert on the present occasion, that in certain parts of this country executive and judicial functions should be united in the person of the same individual; but this union of duties is an abnormal state of things, and experience of its operation is not wanting in instances to show that, in the interests of justice, the discharge of judicial duties by an officer who also exercises executive functions cannot be too carefully watched. The jealousy of the law which forbids any Judge to try a cause in which he is a party or personally interested, or to adjudicate upon any proceeding connected with or arising out of such cause (*see* s 25 of Act VI of 1871, which embodies this principle) does not rightly reflect any unworthy suspicion [918] upon an individual Judge, while it secures and upholds one of the great pillars of judicial purity. In *Dimes v. The Proprietors of the Grand Junction Canal* [3 H. L. R., 759 (793)] the Lord Chancellor of England (Lord COTTENHAM) had affirmed on appeal an order of the Vice-Chancellor, but because Lord COTTENHAM had an interest as a shareholder in the Canal Company to the amount of some thousand pounds, it was held, by the House of Lords, that he was disqualified from sitting as a Judge in the cause, Lord CAMPBELL said "No one can suppose that Lord COTTENHAM could be, in the remotest degree, influenced by the interest that he had in this concern, but, my Lords, it is of the last importance, that the maxim, that no man is to be a Judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of the Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of *England* had an interest, considered that his decree was, on that account, a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In this case the interest was a pecuniary interest. But the same principle applies where the interest, though not a pecuniary one, is such as to create a real bias. In the case of the *Queen v. Rand* [L. R., 1 Q. B., 230 (233)] BLACKBURN, J., said: "Wherever there is a real likelihood that the Judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act." In the case of the *Queen v. Meyer* (L. R., 1 Q. B. D., 173) one *H* entered into an agreement with a Local Board of Health to receive sewage and dispose of it over his farm. *H* having had differences [919] with the Local Board, diverted the sewage into a neighbouring river, and for this he was prosecuted by the Lee Conservancy. Upon the hearing of the summons, *Meyer*, who was the Chairman of the Local Board of Health, and had taken an active part in its proceedings, sat on the Bench with three other Justices. *H* objected to *Meyer* sitting as a Justice, but he remained notwithstanding. It was held that the fact of *Meyer* having taken an active part in the proceedings of the Local Board created a real bias, and that he was therefore disqualified from sitting as a Judge in a matter which arose out of those proceedings. In the case of *Queen v. Milledge* (L. R., 4 Q. B. D., 332) complaint was made to the Local Board of a nuisance upon premises belonging to *B* in the borough of *W*. The Board communicated with the Town Council of *W*, who were the urban sanitary authority under the Public Health Act of 1875, and required them to abate the nuisance. The Council, having made enquiries, passed a resolution that steps should be taken to remove the nuisance and took out a summons against *B*. The fact that two Justices were present as members of the Town Council when this resolution was passed, was held to create such an interest as would give them a bias in the matters, and they were therefore held disqualified to sit to hear the summons. In *Queen v. Gibbon* (L. R., 6 Q. B. D., 168) a summons, to answer an offence under a Local Act for the improvement of the borough, was issued by a Justice who was a member of the Corporation and came on for hearing before other Justices, none of whom were connected with the Corporation; but it was held, that such other Justices were debarred from hearing the summons, because having been issued by a Justice who was a member of the Corporation, it had been issued by one who was virtually a prosecutor. These cases are strong to show that the law will presume an interest creating a bias, when a person, in the *bond fide* discharge of public duties has formed an opinion upon a matter and has acted upon that opinion, or sought to give effect to it as an agent on behalf of a public body which has become a litigant party in a cause. We think there is a very strong analogy between such a person and an executive officer of Government in this country, who has had [920] to form an opinion in the course of his executive duties and to give effect to that opinion upon his own authority, though subject to control from the Local Government.

In the present case, although we shall not now make these rules absolute, yet we feel bound to say that, under the circumstances, the petitioners were justified in applying to this Court, and in this view we think they are entitled to some costs. We allow them a gold mohur in each case and discharge the rules.

Rules discharged.

NOTES.

[The disqualification by reason of personal interest is expressly provided for in Bengal Civil Courts Act, XII of 1887, s. 38, Madras Civil Courts Act, III of 1873, sec. 17, etc. A decree passed by such a Judge is voidable, not void; (1894) 19 Bom., 608. See also 19 Bom., 608, as regards what constitutes personal interest.]

[10 Cal. 920]
APPELLATE CIVIL.

The 18th June, 1884.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE BEVERLEY.

Assanullah.....Plaintiff

versus

Bussarat Ali Chowdry (Lunatic), by his Guardian Prankristo

Dass.....Defendant.

*Enhancement of rent, Liability of land comprised in a zamindari to—
Burden of proof in respect thereof—Dependent taluq—Resumed
lakhiraj—Regulation XIX of 1793.*

In a suit for enhancement of rent in respect of land which the defendant claimed to hold as a dependent *talug* held, the *onus* was upon the zamindar to show that the land was included in the zamindari at the time of the permanent settlement

A ZAMINDAR, who was a purchaser from Government, brought certain suits for enhancement and arrears of rents in respect of some land comprised in his estate. The Munsiff dismissed the suits, on the ground that as the predecessors of the defendants had held the land in question as *lakhiraj*, and Government whilst in *khas* possession had resumed the land upon the terms and under the provisions of ss. 8 and 9 of Regulation XIX of 1793, the land must be considered as a dependent *talug* and was, as such, exempted from enhancement of rent. The Subordinate Judge confirmed the judgment of the first Court. The plaintiff (zamindar) then preferred an appeal to the High Court.

Baboo *Rashbehari Ghose*, for the Appellant, contended, *inter alia*, (a) that the resumption in question was in reality made [921] under s. 10, Regulation XIX of 1793, and the land was settled with defendant according to the provisions of s. 5, Regulation IX of 1825, and consequently the defendant could not claim exemption from enhancement.

(b) That the *onus* of proof was entirely upon the defendant to prove distinctly that the tenure held by him was not liable to enhancement, and that he had wholly failed to discharge it.

The Senior Government Pleader (Baboo *Annoda Pershad Bannerjee*) for the Respondent.

The Judgment of the Court (FIELD and BEVERLEY, JJ.) was delivered by

Field, J.—This was a suit for enhancement. The plaintiff is a purchaser from Government. The Subordinate Judge has found that the plaintiff is not entitled to enhance the rent, because the land in respect of which the suit has been brought was resumed *lakhiraj* such as is referred to in s. 9 of Regulation XIX of 1793, in other words, that it was a resumed grant which had been made before 1790, and that, according to the last clause of the section just recited, the defendant, after resumption and settlement, was entitled to hold the land as a dependent *talug* subject to the payment of a revenue fixed for ever. The

* Appeals from Appellate Decrees Nos. 479 and 1373 of 1883, against the decrees of Baboo Roma Nath Seal, Second Subordinate Judge of Tipperah, dated the 2nd of February and 14th of March, respectively, affirming the decrees of Baboo Janakjee Nath Dutt, Munsiff of Comillah, dated 26th of January and 19th of May 1882.

learned vakil for the appellant has addressed to us a long argument, in the course of which he has referred to a large number of cases bearing upon the intricate questions of *lakhuraj* land and resumption. There are really two points in this argument which require our consideration. The *first* point contended for is, that the burden of showing that the land formed a grant created before 1790 was upon the defendant, and the *second* point is, that the defendant has failed to discharge the burden of proof which ought to be placed upon him. As to the *first* point we think that the burden of proof was not upon the defendant but upon the plaintiff. The plaintiff seeks to enhance. The defendant contends that the land is not liable to enhancement because it constituted a grant created before 1790. In this state of the pleadings it is evident that, if no evidence were given on either side, the defendant must succeed. Therefore, according to the ordinary rule, the burden [922] of proof is upon the plaintiff. But it is said, that there is a *presumption* that the zamindar is entitled to enhance the rents of all the lands situated within his zamindari, and that the effect of this presumption, is to cast upon the defendant the burden of showing that the land held by him is an exception to that general rule. No doubt there is, as decided by the Privy Council, a presumption that a zamindar is entitled to enhance the rents of all lands situated within his zamindari; in other words, which would be more precise, of all lands which formed an integral portion of his zamindari at the time of the permanent settlement. But that principle can have application only, when it is admitted, or proved, that lands were included within a zamindari at the time of the permanent settlement. and it assumes this to have been admitted. In the present case the whole question is, whether the lands in dispute did form a part of the zamindari, that is, whether they were included within the zamindari at the time when the permanent settlement was made. In cases of *lakhuraj* grants antecedent to 1790, it is well-known law that these lands were not included within the settlement, and did not form a part of the assets upon which the calculation for the permanent settlement was made. In the case of grants made after 1790, the converse of this proposition is true. Now, there is no presumption in the case of lands which are admittedly *lakhuraj* one way or the other, no presumption, that is, that the grant was antecedent to 1790 or subsequent thereto. This is matter of evidence. It is clear, therefore, that the presumption as to the right to enhance cannot apply to a case of this kind. Before the presumption can apply, it must be admitted, or proved, that the lands to which it is sought to apply it, were included in the zamindari at the time of the permanent settlement. This is not admitted, it is denied in the present case. It must, therefore, be proved. The plaintiff cannot succeed unless he proves it, and the burden of proof is therefore on him. But although we are of opinion that the burden of proof was upon the plaintiff to show that these lands were lands forming a portion of a grant made subsequent to 1790, and therefore lands the rents of which he was entitled to enhance, we will assume, for the purposes of argu-[923]ment, that this was not so, and that it lay upon the defendant to prove that this particular grant was a grant antecedent to 1790. Even in this view of the case, we think, there is enough upon the resumption proceedings to show that the grant was antecedent to 1790. It may be observed that there is no direct evidence as to the period when the *lakhuraj* grant was created, and that all information in the shape of evidence is to be derived from the resumption proceedings. The Subordinate Judge says in his judgment: "It is clear from the resumption proceedings, that Government did not consider it as an invalid grant made subsequent to 1st December 1790, nor resume it according to the provisions of s. 10 of Regulation XIX of 1793." This is rather a

negative observation, but, we think there are two facts to be discovered from the resumption proceedings, which are strong to show that the invalid grant so resumed was a grant antecedent to 1790. The first of these facts is, that a settlement was made with the *ex-lakhraddar* at half rates.

This is in accordance with the provisions of s. 5 of Regulation XIX of 1793, and it is clear upon the regulations, that in cases of land forming part of a grant invalid by reason of having been made subsequent to 1790, the settlement must have been at full rent. The fact, therefore, that the settlement was made at half rate, is strong evidence to show that the revenue authorities dealt with the grant as one antecedent to 1790.

The other fact is concerned with the quantity of land. It appears, that the Deputy Collector first proposed to release the land, because, being less than ten bighas, it came within the purview of clause 4 of s. 3 of Regulation XIX of 1793. Now, that clause is an exception to the general rule applicable to grants made after 1765 and before 1790, and the very fact that the Deputy Collector regarded this particular land as coming within the exception, assumes the application of the rule itself—a rule, which applies only in the case of grants antecedent to 1790. It is true that the authority superior to the Deputy Collector took a different view, and was of opinion that this particular land did not come within the exception, but there is nothing to show that in considering that the exception did not apply, the superior revenue authority further considered that the grant [924] did not come within the purview of the rule applicable to grants made antecedent to 1790. We think, therefore, that even assuming that the burden of proof lay upon the defendant, there is enough in the resumption proceedings to show that this grant was an invalid grant executed antecedent to 1790, and that after resumption and settlement, it became a dependent *taluk*, to be held at a fixed rate of rent for ever, and therefore protected from enhancement. These appeals must therefore be dismissed with costs.

Appeals dismissed.

[10 Cal. 925]

APPELLATE CIVIL.

The 26th June, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY

Nobin Chandra Roy.....Plaintiff

versus

Magantara Dassya and another.....Defendants.*

Hindu law—Joint owners—Suit against one sharer—Decree against property—Claim by other co-sharer allowed—Suit against both sharers—Res-judicata.

Through ignorance of the position of affairs, one only of two persons, joint owners in a property, was sued for a debt for which the property had been pledged by the person sued, and a decree was obtained and execution issued against the property, and in such execution proceedings the other sharer put in a claim, and obtained an order releasing her share of the property from attachment. A second suit was then brought by the judgment-creditor against both sharers, for the purpose of making the share of the co-sharer, who had not been previously sued, available to satisfy the debt, and praying that the order releasing the property from attachment might be set aside *held* that such a suit would lie, and would not be barred as *res-judicata*.

In December 1880 one Nobin Chandra Roy brought a suit against one Chunilal, who had executed a *karbarnama* dated the 25th Srabun 1285 B.S., in the plaintiff's favour, under which certain properties had been given as security for a loan account, which was opened for the purposes of Chunilal's business. Nobin Chandra Roy, in August 1880, obtained a decree against Chunilal, making the property secured under the *karbarnama* liable, and in execution this property was attached.

[925] On the 20th Pous 1287, one Magantara applied in the execution proceedings to have an eight-anna share in this property released from attachment, stating that she was the widow of one Ram Chand Saha who had been a trader, and that the properties attached had been acquired by him when carrying on his business; that Ram Chand Saha on his death left him surviving herself (his widow), and two minor sons, Chunilal and Ananda; that the business of Ram Chand after his death was carried on by a gomasta, on behalf of his two sons; that one of these sons Ananda, died unmarried, and that his share in the business and in the properties acquired thereby thereupon devolved on her, the claimant; and that the gomasta carried on the business on her behalf, and on that of Chunilal, until Chunilal took upon himself the management, and on this statement she asked that her eight-anna share might be released from attachment.

The Subordinate Judge found that after the death of Ram Chand, his family continued joint, and that on Chunilal attaining his majority he took upon himself the management of his own affairs, and increased the business, by lending out money and other means. But he also found that the claim put

*Appeal from Original Decree No. 321 of 1884, against the order of Babu Motilal Sarker Roy Bahadur, Subordinate Judge of Rungpore, dated the 18th of September 1882.

forward by Magantara was not made against any of the properties acquired by Chunilal after he obtained majority, and inasmuch as she had not been made a party to the suit brought by Nobin Chandra Roy, he allowed her claim.

On the 2nd May 1882, Nobin Chandra then brought this present suit against Chunilal and Magantara, stating that they were joint in food and property, and that Chunilal was the manager of the joint family, and that he, as manager, executed the *karbarnama* of Srabun 1285 B.S., as security for advances made to him, and that at the time he brought the former suit against Chunilal, he was unaware that he had any co-sharer, and he asked (1) that it might be declared that Magantara and sixteen annas of the properties in dispute were liable for the advances made; (2) that the order of the Subordinate Judge, setting aside the attachment on the application of Magantara, might be set aside, and that the property formerly attached might be sold.

The defendant, Magantara, contended that she was not liable on account of the *karbarnama* executed by Chunilal, that her husband's [926] business consisted of the sale of spices and pepper, and that the property which his minor sons had acquired, was acquired in such business, and that Chunilal had opened out a large business on his own account, and had borrowed the money sued for on account of such business, and that she had no share in such business, and had given no authority to Chunilal to mortgage her interest in the properties settled under the *karbarnama*.

The Subordinate Judge dismissed the suit, on the ground that it was barred by s. 13 of the Civil Procedure Code, the former suit having been brought on the same *karbarnama*, and, further, that it was barred by s. 43 of the Procedure Code, as the plaintiff might have sought in the former suit the remedy which he now sought in this suit.

The plaintiff appealed to the High Court.

Mr. *Evans* (with him *Baboo Mokunda Nath Roy*) for the Appellant contended that the former judgment did not bar the present suit, inasmuch as Magantara was no party to the former suit, and the question of the present liability of her share was not tried therein, that neither was it barred by s. 43, because that section has reference to the subject-matter of the claim, and not to the persons against whom it is made. No part of my cause of action was omitted in my previous suit. My suit then was on the *kurbarnama* executed by Chunilal alone, and I did not know of any other co-sharers. My cause of action now is a perfectly distinct one, it is on the *karbarnama* as signed by Chunilal as manager on behalf of himself and his co-sharer.

Baboo Okhil Chunder Sen for the Respondent.

The Judgment of the Court (GARTH, C.J., and BEVERLEY, J.) was delivered by **Garth, C.J.**

The facts of this case are as follows. —

One Ram Chand Saha, a trader in Rungpore, died some years ago, leaving a widow (the defendant No. 1), and two minor sons, Chunilal (the defendant No. 2) and one Ananda, who died during his minority.

Ram Chand in his lifetime carried on a family business, which was admittedly continued for a time after his death by a gomasta; but on Chunilal's attaining his majority, he took the management [927] into his own hands, and carried on that, or a different business, or both. The nature of the business which he did carry on is one of the questions of fact raised in the case.

On the 25th of Srabun 1285, Chunilal executed a *karbarnama* in the plaintiff's favour, mortgaging certain property as security for a loan account, which was opened for the purposes of his business. The plaintiff having sued upon this account, obtained a decree against the mortgaged property, but on proceeding to a sale, he was met by an objection on the part of the defendant No. 1, who claimed a half share in the property, as the heir of her deceased minor son, Ananda. Her claim having been allowed in the execution proceedings, the plaintiff brought the present suit for the purpose of enforcing his decree against the widow's share in the mortgaged property. The lower Court has dismissed the suit on a preliminary ground, holding that it is barred by ss. 13 and 43 of the Code of Civil Procedure. The Subordinate Judge considers that the suit is barred by s. 13, because it is based on the same cause of action as the former suit against Chunilal; and by s. 43, because the plaintiff might have included in the former suit the claim which he makes in this suit.

We think that this view of the Subordinate Judge proceeds upon a misunderstanding of the law. As regards s. 13, the case may be disposed of in a few words. In order that a subsequent suit may be barred under that section, it is necessary not only that the parties should be the same, but that the subject-matter of the suit should have been directly and substantially in issue in the former suit. Now, the defendant No. 1 in the present case, was no party to the former suit, and the question of her personal liability, or of the liability of her share in the mortgaged property to answer for the debt of the defendant No. 2, was not in issue in the former suit. The former judgment, therefore, is not a bar to this suit under the provisions of s. 13.

Nor is the suit open to objection under s. 43, because that section has reference to the *subject-matter* of the claim, and *not to the persons* against whom it may be made. It is true, that if the only object of the suit had been to charge the defendant No. 1 with the same liability as was charged upon the defendant [928] No. 2 by the former decree, it would have been open to the objection upon which the case of *Kendall v. Hamilton* (L. R., 4 App. Cas., 504) and the other cases which were cited during the argument were decided.

But it was by no means the only object of the suit to fix the defendant No. 1 with that liability. That undoubtedly is the subject of the first prayer in the plaint. But the second prayer is that the order of the 3rd of May 1881 (in the execution proceedings) may be set aside, and that the whole of the mortgaged property may be declared liable to be sold in execution of the former decree obtained against the defendant No. 2. This claim (except so far as it seeks to set aside the order of the 3rd of May), is a perfectly legitimate one, and is not open to the objection, which is fatal to the first claim.

The Subordinate Judge seems hardly to have realised the nature of this second prayer, and none of the issues which have been framed (except the first which is in a general form) are calculated to raise the question involved in that prayer.

Of course, if in point of fact the defendant No. 1 is right in her contention, that she had nothing to do with the business carried on by the defendant No. 2, and that the defendant No. 2 had no authority, express or implied, to mortgage her share of the property, the suit of the plaintiff must be dismissed upon the merits.

But if, on the other hand, the defendant No. 1 was a partner in the business carried on by the defendant No. 2, or if not being a partner, she consented, expressly or impliedly, to the mortgage being made, or even, if she knowingly stood by and allowed the defendant No. 2 to pledge the whole

property to the plaintiff without objection, the claim made by the plaintiff in the second prayer of his plaint might prove to be well-founded. Whether it is so or not, appears to be a question of fact, which the Subordinate Judge will have to decide, when the case goes back for trial upon the merits.

But, as a matter of law, there seems no objection to the claim thus made by the plaintiff. It is one of a totally different nature from that which is made in the first prayer; and it is in [929] fact the only means open to the plaintiff of correcting the error, if it is one, which has been made in the execution proceedings.

It is clear, that if two out of three partners are sued for a debt due from the partnership, and a decree is obtained against those two, and execution issues against the partnership property, if the third partner should apply successfully in the execution proceedings to have his share in the property released, the plaintiff's only remedy would be a regular suit, not for the purpose of making the third partner *personally liable* for the debt, but for the purpose of making the share of the third partner available to satisfy the decree.

The case will be remanded to be tried upon its merits, and the lower Court will frame, if necessary, an additional issue or issues. The appellant will have the costs of this appeal.

Case remanded.

NOTES.

[The applicability of the rule in *King v. Hoare* to cases in India has been much discussed and is still unsettled. The following cases may be referred to—23 Cal., 302 (309); 26 Cal., 677 (689); 16 Mad., 449 (450), 30 Mad., 495, 25 Mad., 300, 12 C W N., 107, 22 All., 307, 25 Bom., 378.]

ORIGINAL CIVIL JURISDICTION.

The 23rd July, 1884.

PRESENT.

MR. JUSTICE PIGOT.

Remfry

versus

DePenning and another.

Indian Succession Act (X of 1865), s. 282—Judgment-creditor—Execution of Decree—Priority—Executor—Administrator—Administrator-General's Act (II of 1874), s. 35

A decree for money was obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator-General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator-General.

Held, that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate. IN this case, a decree was obtained on the 2nd of May 1879 against Peter DePenning and John Biddle for Rs. 5,500 and costs. John Biddle died on the

12th of August 1883, and on the 7th of March 1884 the Administrator-General of Bengal obtained letters of administration to his estate. On the 10th of June 1884 the plaintiff obtained a rule, calling upon the Administrator-General of Bengal, as administrator of the estate of John Biddle, to show cause why the decree should not be executed against him. It was admitted that Biddle was domiciled in British India at his death.

[930] Mr. *Trevelyan* showed cause on an affidavit of the Administrator-General, which stated that Biddle's estate was of about the value of Rs. 4,127, that claims against that estate to the amount of Rs. 12,400 (excluding the plaintiff's claim) had been sent in to him; that one of the creditors claimed a lien on the assets of the estate; and submitted that under the circumstances the plaintiff had no priority over the other creditors. Counsel relied on ss. 282 and 283 of the Indian Succession Act, X of 1865, and distinguished the case of *Nilkomul Shaw v. Reed* (12 B. L. R., 287) on the ground that there the decree had been obtained against the Administrator.

Mr. *Bonnerjee* in support of the rule.—The words of s. 282 of the Succession Act, namely, "no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal, or on any other account," do not stand in the plaintiff's way. The words, "on any other account," must be read as applying to matters *ejusdem generis* with what precedes. In the *Alliance Bank of Simla v Hoff*, decided by Mr. Justice CUNNINGHAM on the 15th of January 1884, execution was ordered to issue against the executor of a judgment-debtor for the full amount of the decree, though the testator's estate was not sufficient to pay all his debts. That order was made on the authority of *Nilkomul Shaw v. Reed* (12 B. L. R., 287). There is nothing in the Administrator-General's Act to place him in a higher position than any ordinary administrator as far as the present case is concerned. This cannot be considered as a suit against the Administrator-General. See *Hannabalu Sannappa v. Cook* (6 Mad. H. C. R., 346).

Judgment of the Court was delivered by

Pigot, J.—In this case execution must issue; s. 35 of the Administrator-General's Act is limited to the express purpose for which it was enacted, and there is nothing in that Act or in the Civil Procedure Code to change the position of the Administrator General, or to put him in a better position than any ordinary suitor. I must follow the course pursued in the suit of the *Alliance Bank v. Hoff* (Unrep), and execution must issue.

Rule made absolute.

Attorneys for the Plaintiff: *Watkins & Co.*

Attorneys for the Defendants. *Harris & Simmons.*

NOTES

[See also the following cases, (1892) 17 Bom., 637 (643); (1897) 25 Cal., 54 (62); (1904) 29 Bom., 96 (99). 6 Bom., L. R., 853.]

[931] CRIMINAL REFERENCE.

The 26th June, 1884.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Queen-Empress

versus

Dhananjoi Chaudhuri and others. *

Witnesses—Summoning and attendance of witnesses—Compelling attendance of witnesses—Evidence—Criminal Procedure Code (Act X of 1882), s. 257.

Certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing, or to issue fresh processes for the attendance of the defendant's witnesses, on the ground that they were all friends of the accused who would come to Court if the accused desired it. The prisoners were convicted.

Held, the conviction must be set aside, the Magistrate having once granted processes he was bound to assist the accused in enforcing the attendance of his witnesses

THIS was a reference under s. 438 of the Code of Criminal Procedure, from the Sessions Judge of the 24-Pergunnahs who recommended that the order passed by the Deputy Magistrate in this case should be quashed as illegal. The facts of the case sufficiently appears in the judgment of the Court.

No one appeared on the reference.

The **Judgment** of the Court (PRINSEP and MACPHERSON, JJ.) was as follows :—

The Deputy Magistrate in this case has convicted the accused without examining certain witnesses who had been summoned for the defence. It appears that on the day of trial these witnesses were not present and the accused asked for fresh processes. The Deputy Magistrate refused to postpone the trial or to issue fresh processes on the following ground.—

“The witnesses are all friends of the accused, and could have been produced to-day even if they did not receive the summonses. I therefore decline to grant this petition.” Having once granted the processes for the attendance of these witnesses, this was not sufficient ground for the refusal to assist the accused in obtaining [932] their evidence. If the Deputy Magistrate in the first instance considered, under s. 257 of the Code of Criminal Procedure, that the application for summons for these witnesses was made for purposes of vexation or delay, or for defeating the ends of justice, he might have refused to summon them at all. But having once granted the processes, he was bound to assist the accused in enforcing the attendance of the witnesses. The conviction and sentence must therefore be set aside, and the trial must proceed, processes being issued for the attendance of these witnesses.

Conviction quashed.

NOTES.

[See Ratanlal, 594.]

* Criminal Reference No. 80 of 1884, from an order of the Deputy Magistrate of Basirhat, dated the 31st May 1884.

APPELLATE CIVIL.

The 30th June, 1884.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE PIGOT.

Assanullah.....Defendant

versus

Hafiz Mahomed Ali.....Plaintiff *

Judgment of the Appellate Court, Contents of—The Code of Civil Procedure (Act XIV of 1882), s. 574—Remand under ss. 566 and 587.

Where the lower Appellate Court omits to give reasons for its decision, the High Court will retain the case in second appeal, and either require the Judge to state his reasons, or, in the event of his absence, refer the questions to his successor for fresh trial.

ONE Hafiz Mahomed Ali brought this suit to recover possession of a share in certain lands of mouzah Atrap, which had been washed away in 1275; but of which, since their re-formation in 1276, the plaintiff had possession until the Bengal year 1282. The defendant claimed the lands as his sole and undivided property, denied they were re-formation on the original site of mouzah Atrap, and stated that the lands in question commenced to accrete in 1269, of which the plaintiff or his predecessors had never been in possession.

The following issues were framed. (1) Whether the boundaries were incorrect, (2) whether the claim was barred by limitation, (3) whether the allegation of possession and subsequent dispossession was [933] false, (4) when the disputed land commenced to accrete, and when it became fit for cultivation, (5) was the land in suit a re-formation on the original site of the plaintiff's mouzah Atrap, or re-formation on the original site of the defendant's mouzah Jhulkai.

On these issues the Subordinate Judge held that the plaintiff's right to the disputed land as the land of Atrap, and his possession within twelve years had been proved, and decreed the claim.

Various grounds, which are enumerated in the judgment of the High Court, were taken in appeal to the District Judge, who dismissed the appeal with these remarks: "The plaintiff sued for possession with mesne profits of certain lands, on the allegation that they were re-formation on the original site of village Atrap within the 5 annas 1 gunda 1 cowrie 1 krant share of pergunnah Attia belonging to plaintiff and defendant No. 1. Defendant No. 2, Nawab Assanullah, pleaded that the lands were re-formation on the original site of, and alluvial accretion to, mouzah Jhulkai within his zamindari. Atrap and Jhulkai are contiguous, and the Subordinate Judge found that the disputed land was a re-formation on the original site of mouzah Atrap; that plaintiff

* Appeal from Appellate Decree No. 2231 of 1882, against the decree of T. M. Kirkwood, Esq., District Judge of Mymensingh, dated the 3rd of August 1882, affirming a decree of Baboo Nobin Chunder Ghose, Roy Bahadur, Subordinate Judge of that District, dated the 28th of July 1881.

and defendant No. 1 were down to the diluviation in possession of 9 annas and 7 annas, respectively; and that subsequently to the re-formation, down to 1280, they were in possession. He therefore gave the plaintiff a decree. There is no ground whatever for appeal. The lands belong to Atrap, and the plaintiff is not barred."

It was contended on appeal to the High Court that the decision passed by the learned Judge was opposed to the provision of s 574 of the Code of Civil Procedure, and that the lower Appellate Court had assigned no reasons for its conclusion.

Baboo Chunder Madhub Ghose and Baboo Sreenath Banerjee for the Appellant.

Baboo Jogesh Chunder Roy for the Respondent.

The **Judgment** of the Court (FIELD and PIGOT, JJ.) was delivered by

Field, J.—In this case the plaintiff sued to recover possession [934] of certain lands, alleging that they were re-formations on the original site of mouzah Atrap, which belonged to him and the defendants jointly, in the respective shares of 9 annas and 7 annas.

The defendants pleaded limitation, and, amongst other matters, alleged that the lands were re-formations, not on the original site of mouzah Atrap, but upon the original site of mouzah Jhulkai, which was, and is, in the exclusive possession of the defendants themselves. A number of questions were raised in the pleadings, which were embodied in the six issues raised by the Subordinate Judge who tried the case.

The Subordinate Judge gave the plaintiff a decree. Against that decree an appeal was preferred, and the following, amongst other objections, were taken in the grounds of appeal. *First*, an objection as to the boundaries of the two mouzahs, *secondly*, that the plaintiff had not proved his possession within twelve years of any portion of the land in dispute, and that he was, therefore, barred by limitation, and that the finding of the Subordinate Judge on this point was against the weight of evidence, *thirdly*, that the evidence as to the plaintiff's alleged possession was worthless and not reliable, *fourthly*, that the *ijarah pottah* filed by the plaintiff was collusive and not proved, and even assuming that it had been proved, there was no evidence that the lands in dispute were part and parcel of the lands specified in the *pottah*, *fifthly*, that a copy of the *kabuliat* had been improperly admitted as evidence, and that the original *kabuliat* itself had not been proved, *sixthly*, that the plaintiff's witnesses were his dependants and were not reliable, *seventhly*, that according to the weight of evidence re-formation had commenced in 1269, and had been completed in 1272, in which case the plaintiff would be barred, and that the Subordinate Judge had found against the weight of evidence that the re-formation commenced in 1273, and the land became fit for use and cultivation in 1275; *eighthly*, that the identification of the land by the *ameen* was imperfect and erroneous, and the *ameen* ought to have been called and examined as a witness; *ninthly*, that upon the evidence, the proper finding should have been that the land belonged to the defendant's mouzah Jhulkai, [935] and that the defendants had been in possession of the disputed lands for more than twelve years before the institution of the suit.

These were substantial grounds of appeal, which it was incumbent on the Judge of the Court below to decide. He has, however, disposed of the appeal in a very perfunctory manner. After referring to some of the points dealt with by the Subordinate Judge, he says: "There is no ground whatever for appeal. The lands belong to Atrap, and the plaintiff is not barred. The

appeal is dismissed." There can be no doubt that a judgment of this kind is not sufficient compliance with the requirements of the Code of Civil Procedure, s. 574 of which provides as follows: "The judgment of the Appellate Court shall state (a) the points for determination; (b) the decision thereupon; (c) the reasons for the decision; and (d) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled." An Appellate Court is required to record these particulars in its judgment for the purpose of affording the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise, if they see fit, and are so advised, the right of second appeal conferred by s. 584 of the Code. If a District Judge could dispose of appeals coming before him in a judgment of this kind, the right of second appeal might be altogether neutralized. We think that, under the circumstances, we ought not in the present state of the record, to deal with the appeal now before us, and that the best course will be to remand the case to the present District Judge of Mymensingh, in order that, having heard the points taken in the petition of appeal argued, he may determine the questions raised thereby, and submit his finding thereupon to this Court. In the case of *Doolee Chand v. Mussumut Oomda Begum* (18 W. R., 473), the state of the record was somewhat similar, and COUCH, C. J., said: "The proper course, it seems to us, would be, not to reverse the decree, but to require the Judge of the Appellate Court to state the reasons. The Court would retain the case in special appeal, but it would return the proceedings to the lower Court and require the Judge to state the reasons. There may be cases where that could not be done, in [936] consequence of the death of the Judge or of his removal; but where it can be done, that is the course which ought to be adopted." In the present instance we are informed that Mr. KIRKWOOD, whose decree is now under appeal, is no longer the Judge of Mymensingh. The course suggested in the passage just cited is therefore not open to us. We think, however, that the course which we take is warranted by the provisions of s. 566 read with s. 587 of the Code of Civil Procedure. The lower Appellate Court has, in our opinion, omitted to determine certain questions, namely, the questions raised in the petition of appeal to that Court, which appear to us essential to the right decision of the case; and we therefore now refer these questions for trial to the Court of the District Judge of Mymensingh. The case will remain on our file, and on receipt of the District Judge's findings, we shall proceed to dispose of the appeal. It will be open to the appellant, within seven days after the receipt by this Court of those findings, to amend his grounds of appeal, and to the respondents to take any grounds of cross-appeal which they may be advised.

Case remanded.

NOTES

[For a similar case see (1885) 12 Cal., 199; where the lower Appellate Court does not sufficiently consider important matters, *e g* sufficiency of notice or question of nature of a tenure, the finding of the lower Appellate Court will be set aside:—13 C. W. N., 143; 177; 949. See also (1885) 7 All., 649 at 654.]

[10 Cal. 936]
CRIMINAL REVISION.

The 1st July, 1884.

PRESENT ·

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Queen-Empress
versus
Sadhee Kasal and others.*

*Pardon—Criminal Procedure Code (Act X of 1882, s. 337, read with s. 338)
—Offences not exclusively triable by the Court of Sessions.*

A Sessions Judge cannot tender a pardon to an accused under s. 338 of the Criminal Procedure Code, where the offence for which he has been committed is not " triable exclusively by the Court of Sessions."

ON inspection of the statement of the Criminal Session of the Judge of Gya for the months of April and May, the High Court, under s. 435 of the Criminal Procedure Code, called for the record of the above-mentioned case, in which Chowri Kasal and Sadhee Kasal had been charged under s. 411 of the Penal Code with dishonestly receiving and retaining certain stolen property, [937] knowing it to be stolen. It appeared that in the Sessions Court Chowri Kasal had been granted a pardon under s. 338 of the Criminal Procedure Code and released, and Sadhee Kasal was found by both assessors to be guilty under s. 411 of the Penal Code, and was sentenced to rigorous imprisonment for two years by the Sessions Judge. After perusing the record, the Court (PRINSEP and MACPHERSON, JJ.) passed the following order :—

As the case is now presented to us, on review of the Sessions Judge's statement, and on perusal of the record, we think it sufficient to point out to the Sessions Judge that the offences under trial not being exclusively within the jurisdiction of the Court of Sessions, the Sessions Judge was not competent to tender pardon, under s. 338 of the Criminal Procedure Code, to Chowri Kasal.

* Criminal Mettion 201 of 1884 from a decision of A. Smith, Esq., Judge of Gya, dated 17th May 1884.

[10 Cal. 937]

CRIMINAL REVISION.

The 28th April and 7th July, 1884.

PRESENT :

MR. JUSTICE WILSON, MR. JUSTICE TOTTENHAM AND
MR. JUSTICE NORRIS.

Habibullah.....Accused

versus

Queen-EmpressComplainant.*

Alternative charge and conviction—False evidence—Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act X of 1882), ss. 233, 554 and sch. 5, XXVIII, II, (4).

A prisoner was convicted on an alternative charge in the form provided by sch. 5, XXVIII, II, (4) of the Criminal Procedure Code (Act X of 1882) of having given false evidence, such evidence consisting of contradictory statements contained in *one* deposition while he was under cross-examination and re-examination as a witness in a judicial proceeding. There was no finding as to which of the contradictory statements was false.

Held, (NORRIS, J., *dissenting*) that s. 233 of the Criminal Procedure Code did not affect the matter and that the conviction was good.

Semble per WILSON, J.—The decision in *The Queen v. Bedoo Noshyo* (12 W R., Cr. 11) though a guide to the discretion of Courts in framing and dealing with charges, was not intended to, and does not, affect the law applicable to the matter

THIS was a rule to show cause why the conviction of the petitioner under s. 193 of the Indian Penal Code before the Joint [938] Magistrate of Dacca, affirmed on appeal by the Sessions Judge, should not be set aside as bad in law.

The facts of the case were as follows :—

The petitioner was charged in the alternative with having committed perjury in a deposition given by him during the hearing of certain suits in the Court of the Second Subordinate Judge of Dacca. He was examined as a witness on behalf of the defendants in those suits, and during his cross-examination, which commenced on the 12th September, he admitted that certain entries in account books and certain letters were in his handwriting. On the 13th September he was re-examined (his cross-examination having terminated late on the evening of the 12th), and on his re-examination he contradicted his statements as to the entries and the letters, and swore positively that they were not in his handwriting. It was in respect of these contradictory statements that sanction to prosecute was given and that the charge was brought. The Joint Magistrate, finding that he had a strong motive for contradicting his first statement, and that it was not a mistake made through inadvertence, without deciding as to which of the statements was false, convicted the accused upon two similar charges, one in respect of the statement as to the entries in the account books and the other in respect of the statement as to the letters, and sentenced him to a year's rigorous imprisonment on each charge.

This decision was upheld on appeal by the Sessions Judge.

* Rule No. 66 of 1884 against the order of E. Staley, Esq., Officiating Joint Magistrate of Dacca, dated the 10th day of December 1883, affirmed by T. Smith, Esq., the Sessions Judge of Dacca, dated the 14th January 1884.

The petitioner then applied to the High Court, in the exercise of its revisional powers, to send for the record with a view of quashing the Magistrate's order, on the ground, that an alternative charge of giving false evidence under s. 193 of the Indian Penal Code would not lie, when the charge was based upon contradictory statements contained in one and the same deposition.

On the hearing of the application, Mr. Pugh and Mr. M. P. Gasper appeared on behalf of the Petitioner, and the Court issued the present rule.

The rule came on to be heard before a Division Bench of the High Court consisting of TOTTENHAM and NORRIS, JJ.

Mr. Pugh, Mr. M. P. Gasper, Baboo Durga Mohun Dass and Baboo Umbica Churn Bose for the Petitioner.

[839] The Advocate-General (Mr. G. C. Paul) and Baboo Chunder Madhub Ghose for the Opposite Party

The Advocate-General in showing cause against the rule cited *The Queen v. Mussamut Zumcerun* (6 W.R., Cr 65, B. L. R., F B. 521) and *The Queen v. Mahomed Humayoon Shah* (21 W. R., Cr 72, 13 B L R., 324).

Mr. Pugh in support of the rule referred to *Empress of India v. Niaz Ali* (I. L. R., 5 All., 17, p. 22), the judgment of JACKSON, J., in *The Queen v. Mahomed Humayoon Shah* (21 W. R., Cr 72, 13 B L R., 324), and upon the question of the effect of illustrations to an Act, to *Koylash Chunder Ghose v. Sonatun Chung Barooie* (I. L. R., 7 Cal., 132, p. 135). He also referred to *Taylor on Evidence*, 7th edition, 708, *Roscoe on Evidence*, 825, and *Peake's Nisi Prius*, 52.

The nature of the arguments appears sufficiently from the judgments of the Division Bench, which were as follows.—

TOTTENHAM, J.—This is a rule to show cause why the conviction of the petitioner under s. 193 of the Indian Penal Code before the Joint Magistrate of Dacca, affirmed by the Sessions Judge on appeal, should not be set aside as bad in law.

The charge upon which the petitioner was convicted was in the alternative form, of which an example is given in the 5th schedule of the Code of Criminal Procedure, and in respect of two contradictory statements made by the petitioner in the course of one and the same deposition, the one being made one day in cross-examination, and the other the following day in re-examination.

The ground on which we have been asked to interfere, and set aside the conviction, is, that a charge, in the alternative form, of intentionally giving false evidence by making contradictory statements, cannot legally be framed where the statements in question are contained in one single deposition. but is allowable only in case the statements are contained in distinct separate depositions.

The particular form given in the schedule to the Code clearly refers to separate depositions made on distinct occasions, viz, in an enquiry before a Magistrate, and at the subsequent trial in the Sessions Court. It is contended that there is no warrant **[940]** in law, except in this form and in s. 554 which authorizes its use, for a single alternative charge of giving false evidence, and it is submitted, that the law should not be stretched in this direction so as to have a charge in the alternative made in respect of contradictory statements made in the course of one deposition. And it is argued that, if such a charge is good in law, no witness could safely correct an erroneous statement once made: for by so doing, he would render himself liable to prosecution, and if prosecuted, his conviction would inevitably follow should there be no obligation on the prosecution to prove which of the two statements was false.

After giving the matter the most careful consideration in my power, I am of opinion that there is nothing illegal in the charge before us ; and that the conviction had upon it is good in law. In this country it has more than once been held that a conviction for intentionally giving false evidence may be had upon a charge in an alternative form, and without any finding as to which statement is false. The Full Bench cases, *Queen v. Mussamut Zumeerun* (6. W. R., Cr. 65; B. L. R., F. B., 521) and *Queen v. Mahomed Humayoon Shah* (21 W. R., Cr. 72 ; 13 B. L. R., 324) establish this proposition, and the present Code of Criminal Procedure, by providing a form for such a charge, has continued the state of the law previously existing. And there seems to be no authority for holding the contrary view or for confining that view to cases in which two distinct proceedings are in question, and little reason except supposed expediency. The argument that, because the form given as an example in the schedule to the Code deals with a case in which the two statements were made in distinct proceedings, therefore no similar form may be used in respect of statements made in one and the same proceeding, appears to me not entitled to any weight.

For s. 554, which prescribes the use of the forms in the schedule, expressly provides for such modifications in the forms as the circumstances of cases may require. A witness may, and sometimes does, make as flagrantly contradictory statements in the same proceeding as he may make in two distinct proceedings, [941] and it may be as difficult in one case as the other to determine which is false. I see no reason to suppose that the Legislature intended to give immunity in the one case, but to allow a prosecution in the other. It seems to me only reasonable to suppose that it was intended that the same peril should attend the witness in either case.

And as to the argument, that this view of the law renders it unsafe for a witness even to correct or alter a statement which he has once made, I do not think that an honest witness has any reasonable ground for apprehension. He cannot be prosecuted unless the Court before which he has deposed, or a superior Court, sanctions a prosecution after such enquiry as may be necessary ; and no Court would sanction the prosecution of a witness, unless satisfied that he had deliberately and intentionally made the two contradictory statements, not merely by way of *bond fide* correction of a mistake, but intending in one or other instance to state what he knew to be untrue or did not know to be true. And further even when prosecuted, the witness cannot be convicted on an alternative charge for correcting an error, but can be convicted only upon the Court being satisfied that in one or other of the instances charged the accused did *intentionally* give false evidence. The essence of the offence is the *intention*, and that may exist where the contradiction is in various stages of a single deposition, as well as where it is manifested in two distinct proceedings. I come, therefore, to the conclusion that the law permits the charge upon which the petitioner has been convicted, and I see no particular hardship in that state of the law to a person who wilfully gives false evidence.

I would discharge this rule, and would order the petitioner to undergo the sentence passed upon him.

NORRIS, J.—The petitioner in this case was examined as a witness on behalf of the defendants at the hearing of the suits, which were tried together, by the Second Subordinate Judge of Dacca. The petitioner's examination-in-chief and cross-examination took place on the 12th September 1883 ; the cross-examination was not concluded until a late hour and the re-examination was postponed until the following day. In his cross-examination the petitioner admitted that certain entries in certain account books, which were shown

[942] to him, were in his handwriting, and that a letter, in which he admitted that he had been guilty of embezzlement, was also in his handwriting; in his re-examination he contradicted his previous statements with regard to the entries and the letter, and positively denied that any or either of them were in his handwriting. Sanction having been obtained from the Judge for the institution of a prosecution against the petitioner, he was brought before the Officiating Joint Magistrate of Dacca who, after taking evidence, framed the following charge: "I hereby charge you, Khajieh Habibullah, as follows: That you on or about the 12th day of September 1883, at Dacca, in a stage of a judicial proceeding, viz., in the trial of suits Nos. 88 and 93 of 1882 in the Court of the Second Subordinate Judge being a witness cited by the defendants in those, the jointly tried, suits, on solemn affirmation stated 'Exhibit IX is in my handwriting and the signature is mine,' and on the 13th day of September, in the same judicial proceeding, stated 'Exhibit IX is not in my handwriting,' and whereas one of those statements you either knew or believed to be false or did not believe to be true, you thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of this Court, and thereby direct that you be tried by this Court on this said charge." The Magistrate also framed a second charge with reference to the petitioner's statements regarding the entries in the account books. The Joint Magistrate convicted the petitioner, and sentenced him to two years' rigorous imprisonment, one year on each charge. The petitioner appealed to the Sessions Judge, who confirmed the conviction, he then applied to us, in the exercise of our revisional powers, to send for the record with a view of quashing the Magistrate's order, on the ground that an alternative charge of committing an offence under s. 193 of the Indian Penal Code was bad where such charge was based upon alleged contradictory statements made in the same deposition.

We granted a rule to show cause why the conviction should not be set aside. On the argument of the rule, the *Advocate-General* appeared to show cause, Mr. Pugh and Mr. Gasper supported the rule. I regret that after the best consideration I have been able to bestow upon the case, I find myself unable to agree with my brother TOTENHAM in the conclusion at which he has arrived.

[943] I am of opinion that the rule should be made absolute. The *Advocate-General* urged that the point was concluded by authority, and he referred us to two cases, *Reg. v. Mussamut Zumeerun* and *Reg. v. Mahomed Humayoon Shah*. These were both Full Bench decisions, the first was a decision upon the provisions of the Code of Criminal Procedure of 1861 with regard to alternative charges, the second was a decision upon the provisions of the Code of 1872 with reference to such charges.

I am undoubtedly bound by these decisions, unless I can distinguish the facts upon which those decisions were based from the facts of this case. I trust, however, that I shall not be considered presumptuous, if I respectfully say that I share in the doubts expressed by NORMAN and CAMPBELL, J.J., in the first case, and that the judgment of JACKSON, J., in the second case, and the reasoning by which he arrived at his conclusion, commend themselves to my judgment. There appears to me, however, to be an essential distinction between the cases above cited and this case. In both the cited cases the alleged contradictory statements were made in two separate depositions taken on two distinct occasions. In *Reg. v. Mussamut Zumeerun* the first statement was made before a Magistrate on the 14th October 1865, and the second statement before a Sessions Judge on the 18th December 1865.

In the case of *Reg. v. Humayoon Shah*, the charge against the prisoner was "that he did on or about the 23rd January 1873, at Alipore, in the course of the trial of Tulsī Dass Dutt and Mahomed Latif on a charge of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate of Alipore, that, &c., &c., and that he did on or about the 13th February 1873, in the course of the trial of I. R. Belilias, Tulsī Dass Dutt and Mahomed Latif in the same case of cheating state in evidence before Moulvi Abdul Latif, Deputy Magistrate of Alipore, that, &c., &c."

Now, it is plain that though it is called "the same case of cheating" it could not have been strictly speaking "the same case." The case on the 23rd January was a case against two persons only, Tulsī Dass Dutt and Mahomed Latif; the case on the 13th February was one against three persons, I. R. Belilias, Tulsī Dass Dutt and Mahomed Latif. I. R. Belilias had clearly been added as a defendant between 23rd January and 13th February, the pri-[944]soner's evidence against the two defendants on 23rd January could not have been used against the added defendant on 13th February without his having been re-sworn. There would thus be two depositions on two distinct occasions on two different charges.

In this case, though a night elapsed between the cross-examination and the re-examination of the petitioner, the alleged contradictory statements were made in one and the same deposition, on the hearing of one case.

I think it would be a very dangerous thing to extend the principle of the Full Bench cases to such a case as this, it would render it unsafe for a witness to correct the deposition. I am of opinion, upon the ground of the distinction I have pointed out, that the Full Bench cases are not in point, and that the rule should be made absolute.

The Judges having disagreed, the case was referred to Mr. Justice WILSON and re-argued before him.

The same counsel appeared as at the previous hearing, with the exception of Mr. Pugh—Mr. M. P. Gasper arguing the case in support of the rule.

The following **Judgment** was delivered by

Wilson, J.—This case has been referred to me in consequence of a difference of opinion between TOTTENHAM and NORRIS, JJ.

The accused has been charged with, and convicted of, offences under s. 193 of the Penal Code. Each charge followed the form given in schedule V, XXVIII, II, (4) to the Code of Criminal Procedure and charged him with having, in the course of a judicial proceeding, made, as a witness, two contradictory statements, one or other of which he knew to be false or did not believe to be true. The conviction is in accordance with the charge without any express finding which of two contradictory statements was false.

Mr. Gasper, who appeared for the accused, raised these points. First he argued that, under the present law, a charge and conviction of this nature is in no case good. The validity of such charges has twice come before Full Benches of this Court.

In the *Queen v. Mussamut Zumeerun* such a charge seems [948] to have been regarded as an alternative charge of perjury committed either on the one occasion or on the other, and to have been held good on that ground under the Procedure Code then in force. If the matter be viewed in that light, it would be very difficult to reconcile such a charge with s. 452 of the Code of 1872 or

with s. 233 of the present Code, which requires that each offence shall be the subject of a separate charge, except in the particular cases (of which this is not one) in which alternative charges are expressly allowed.

But in the subsequent Full Bench case of *The Queen v. Mahomed Humayoon Shah*, COUCH, C. J., with whom KEMP, J., concurred, expressly lays down that such a charge is not a charge of two offences in the alternative, but of one offence. And I think the judgments of MORRIS, J., with whom BIRCH, J., concurred, and of AINSLIE, J., embody the same view. The other two Judges who made up the majority of the Court did not give their reasons. I think I am bound to accept this view of the law, though, if it were not framed by authority, it is not a view that I should myself have taken.

If this be so, s. 233 does not affect the matter. And the form of charge given in the schedule, which is sanctioned by s. 554 and has been followed in this case, is legitimate and may be followed by a corresponding conviction. I think, therefore, that Mr. Gasper's first contention fails

Secondly, he argued that a charge and conviction in the present form can only properly be used in a case in which it is impossible to find, upon the evidence obtainable, which of the two inconsistent statements is true, and for this he cited *The Queen v. Bedoo Noshyo*. As a guide to the discretion of Courts in framing charges and in dealing with them, I think what is there said is of great importance. But it cannot affect, and was not, I think, intended to affect, the law applicable to the matter.

Thirdly, Mr. Gasper argued that the rule which has been laid down does not apply in a case where, as here, the two inconsistent statements have been made in the course of the same deposition. It is no doubt very important that a witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge. And charges arising out of [946] alleged inconsistent statements in a deposition may well require, and I think they so require, to be watched with special care. But I can see no sufficient distinction in principle between such contradiction in one deposition and in two. If it is an offence under s 193 to make two contradictory statements, one or other of which must be false, and to do so with a guilty intention, on two distinct occasions, I think it must be equally an offence to make them on one occasion.

I, therefore, agree with the view of TOTTENHAM, J., upon the matter referred to me.

Wilson, J. (TOTTENHAM, J., *concurring*).—The rule must be discharged, but the period during which the rigorous portion of the sentence was suspended will count as part of the original sentence.

Rule discharged and conviction affirmed.

NOTES.

[This case was fully discussed by Sir V. BHASHYAM AYYANGAR, J in (1902) 26 Mad., 55 with reference also to the charge in the Criminal Procedure Code 1898 ; but the conviction there was held legal by BENSON nad MOORE, JJ.]

[10 Cal. 946]

REFERENCE UNDER THE BURMAH COURTS' ACT.

The 7th July, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Mahomed Hossein.Plaintiff

versus

Inodeen.....Defendant.*

*Limitation for second appeals under Burmah Courts' Act—Act XVII of
1875, s. 27.*

A second appeal under s. 27 of the Burmah Courts' Act is not subject to the limitation of time prescribed for an appeal to a High Court under the Limitation Act of 1877.

IN this case, which was one for the specific performance of a contract, the plaintiff obtained a decree in the Court of the Extra Assistant Commissioner of Toungo.

The defendant appealed to the Deputy Commissioner who, on the 6th December 1883, reversed the decision of the lower Court.

On the 14th March 1884 (at which date more than 90 days had passed from the date of the decree of the lower Appellate Court), the plaintiff presented his appeal to the Judicial Commissioner

[947] Mr. *Gillbanks*, for the Appellant, contended that second appeals under s. 27 of the Burmah Courts' Act were not appeals under the Civil Procedure Code, but were proceedings which ss. 3 and 4 of that Code left to the rules of the local Act, that under the Burmah Courts' Act there was no limit laid down in which appeals were to be presented; and that the 90 days allowed under art. 156, sch. II of the Limitation Act did not apply. The Judicial Commissioner entertained a doubt as to the point raised, and referred the question—Whether a second appeal under s. 27 of the Burmah Courts' Act is subject to the limitation of time prescribed for appeals to the High Court under art. 156 † of sch. II of the Limitation Act, 1877, or to any other period of limitation?—to the High Court with the following expression of opinion:—

“This appeal is presented under s. 27 of the Burmah Courts' Act XVII of 1875. It has been the practice of this Court, when sitting with the powers of a High Court, to apply to appeals made under the above section the term of limitation of 90 days prescribed by art. 156 of the second schedule of the Limitation Act to appeals made to a High Court under the Code of Civil

* Reference under the Burmah Courts' Act of 1875, made by T. Jardine, Esq., Judicial Commissioner of British Burmah.

† [Art. 156 :—

Description of appeal.	Period of limitation	Time from which period begins to run.
Under the Code of Civil Procedure to a High Court, except in the cases provided for by No. 151 and No. 153.	Ninety days	The date of the decree or order appealed against.]

Procedure. It has been assumed that s. 96 of the Burmah Courts' Act justified this practice. The Special Court of British Burmah in the case of *Meo Myoke v. Uga Lo* in construing the words of s. 29 'period prescribed by law for petitions of appeal' held that this period of limitation applied."

"But s. 29 relates to cases where the lower Court of appeal has confirmed the original decision."

"Another difference to be noted is that equivalent words to those quoted from s. 29 are not found in s. 27."

"Moreover, in s. 22 we find a special rule of limitation, and in ss. 37 and 83, where the Limitation Act is applied to certain appeals and applications, express words were evidently deemed necessary by the Legislature."

"The discretion allowed to the Court of the Judicial Commissioner in admitting a second appeal under s. 27 of the local Act is not limited by the rules found in ss. 584, 585 and 586 of the Code of Civil Procedure, and it may be contended that the Legislature did not mean that the judicial discretion conferred should [948] be limited by specified periods of time, as such limitations might be inconsistent with the doing of the justice for which this jurisdiction is created."

"The differences to which I have referred are the basis of Mr. *Gullbanks'* argument that the second appeal under s. 27 of the local Act is not an appeal under the Code of Civil Procedure, but a proceeding which ss. 3 and 4 of that Code leave to the rules of the local Act."

"I can find no other limitation applicable except that of the period of 90 days under the Limitation Act, and if it be held that this period is not applicable, there will be no express period of limitation, but the Court will have to consider the delay in making second appeal, and the consequences of such delay, only as it considers other circumstances alleged to guide its discretion."

"I incline to this opinion, but as I entertain doubts, and as the practice of applying the period of 90 days has existed for some years, I determine to refer the questions of limitation of second appeals under s. 27 of the Burmah Courts' Act to the High Court."

No one appeared on the reference

The **Opinion** of the Court (GARTH, C. J., and BEVERLEY, J.) was given by

Garth, C. J.—This is a reference from the Judicial Commissioner of British Burmah under s. 31 of the Burmah Courts' Act XVII of 1875.

The question referred for the decision of this Court appears to be this: Whether a second appeal under s. 27 of the Burmah Courts' Act is subject to the limitation of time prescribed for appeals to the High Court under the Indian Limitation Act, or, in fact, to any limitation whatever?

The Judicial Commissioner states that "it has been the practice of this Court, when sitting with the powers of a High Court, to apply to appeals made under the above section, the term of limitation of 90 days prescribed by art. 156 of the second schedule of the Indian Limitation Act, for appeals made to a High Court under the Code of Civil Procedure." The question has been raised, however, whether the Limitation Act applies to a second appeal under s. 27 of the Burmah Courts' Act.

[949] The rules as to second appeals under the Burmah Courts' Act are contained in ss. 27—29 of that Act.

In the first place, s. 27 deals with cases in which the Deputy Commissioner or Commissioner on appeal has *reversed or modified* the decision of the Court of First Instance. In such cases the Judicial Commissioner *may receive a second appeal* if, on a perusal of the grounds of appeal and of copies of the judgments of the subordinate Courts, a further consideration of the case appears to him to be requisite for the ends of justice.

The reception of the appeal is a matter for his discretion.

Then the Act goes on to deal with cases in which the Appellate Court has *confirmed the decision of the Court of First Instance*. In these cases, if the question is one of *fact only*, the decision by s. 28 is final. If, on the other hand, the question was one of law, then by s. 29 the party aggrieved by such decision may either (1) apply to the Court to state a case for the opinion of the Judicial Commissioner, or (2) ask for leave to appeal to the Judicial Commissioner.

In either of these cases the application (1) or the appeal (2) must be made within the period prescribed by law for petitions of appeal.

Then s. 34 deals with cases where the first Appellate Court has refused to state a case, or to give leave to appeal under s. 29.

And in those cases also the Judicial Commissioner may, if he pleases, call for the record of the case, and proceed to try it as if it had been preferred in due course under s. 29.

The general question, whether the provisions of the Limitation Act were intended to apply to *appeals* as of right under the Burmah Courts' Act, is not now before us. It is possible that the Legislature intended to make them applicable, though whether it has done so is another matter. It seems to us, however, that there is a distinction between appeals, which may *be preferred as a matter of right*, and such appeals as are referred to in ss. 27 and 34, and that this distinction is of the utmost importance in the consideration of the question now referred to us.

In cases of first appeal, and in cases under s. 29 when an application to state a case, or for leave to appeal, is made to the *first Appellate Court*, provision is made for a period of [950] limitation within which such appeal or application should be preferred. But in cases falling under s. 27 or s. 34, when the application is made direct to the Judicial Commissioner, and when the reception of the appeal is left to his discretion, there is no provision made in regard to limitation. We cannot but consider that distinction is intentional. We think it must have been intended, that while a period of limitation is prescribed for appeals which may be preferred as a matter of right and *which the Appellate Court is bound to entertain*, cases under s. 27 or s. 34 of the Act should be left to the unfettered discretion of the Judicial Commissioner. It is discretionary with him to receive the appeal, and in the same way we think that the period within which he may receive it is also left to his discretion.

No doubt the Judicial Commissioner, in the exercise of this discretion, would do well to consider whether the application to him has been made within a reasonable time, and he would probably refuse to interfere, if the applicant had been guilty of undue delay, but this is a matter for his discretion only, and no rule of limitation has been laid down which would prevent his interference, if at any time he thought it right to rehear or reconsider the case.

It is possible, that any application made to him to rehear or reconsider the case, would be subject to the general rule of limitation contained in art. 178 of the Limitation Act, and that consequently it must be made within three years from the time when the right to apply accrued. That question however, does not arise in the present case.

We think, therefore, that the view taken by the Judicial Commissioner is correct.

NOTES.

[An appeal from the Court of the Recorder of Rangoon to the High Court at Calcutta should be made within the time prescribed by Art. 156 of the Limitation Act (1886) 13 Cal. 221.]

[951] APPELLATE CIVIL.

The 8th July, 1884.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY,

Eugene Pogose (a minor) by her next friend, P. N. Pogose.Plaintiff
versus

The Delhi and London Banking Co, Ld Defendant.*

*Ante-nuptial settlement—Wife, a minor—Settlement made by guardian—
Fraud of guardian*

Where a wife (a minor) sought to enforce an ante-nuptial settlement as against the creditors of her husband, the settlement having been made and negotiated on her behalf by her father as her guardian, and the father, under such circumstances, had made a contract for her which was void as against third persons, on the ground of public policy, *held*, that such a contract could no more be enforced by the minor against those third persons, than it could be enforced by her, had she been an adult and made the contract herself.

It is unnecessary, in order to avoid an ante-nuptial settlement as against a minor wife and her children, where the conduct of the father who brought about the marriage has been shown to be fraudulent, to show that the minor was a party to the fraud.

ON the 15th June 1877, the Delhi and London Bank obtained a decree against P. N. Pogose for a sum of Rs 11,076.

On the 21st June 1877, P. N. Pogose entered into an agreement with the Manager of the Delhi and London Bank, whereby in consideration of the Bank's refraining from attaching the person of P. N. Pogose, and refraining from immediately selling up any of his immoveable property which might be attached under the decree of the 15th June 1877, he agreed to pay to the Bank Rs. 2,000 quarterly until the whole of his debt, principal and interest, had been liquidated, and further agreed to assist the Bank, when called upon to do so, in obtaining an attachment over all his share and interest in certain

* Appeal from Original Decree No 149 of 1882, against a decree of Baboo Parbati Charan Mitter, Second Subordinate Judge of Mymensingh, dated the 29th March 1882.

properties set out in a schedule referred to in this agreement, and to make no objection to any sale in execution of the decree, should he fail in the payment of the quarterly instalments. And in this agreement he expressly stated that his share and interest in the properties men-[952]tioned were free from all encumbrances, save as to a mortgage for Rs. 4,000 to Messrs. Chauntrell, Knowles and Roberts, attorneys.

On the 25th June 1877, P. N. Pogose wrote to the Manager of the Delhi and London Bank in reference to this agreement, stating that any attachment made would affect the *salam* to a considerable extent and cause the ryots to refuse to pay their rents, and he, reiterating his promise to pay the instalments regularly, begged that no attachment should be made.

On the 26th August 1877, P. N. Pogose again wrote to the Manager of the Bank, stating that he found it difficult to collect the money for the first instalment until January 1878, and asking for forbearance.

On the 7th September 1877, 3rd October 1877, 2nd February 1878 and 25th February 1878, P. N. Pogose paid certain sums to the Bank, which, in all, amounted to Rs. 4,000.

On failure to pay any further instalment, the Bank applied for execution and attached through the Mymensingh Court so much of the properties as were in the Mymensingh district, and which were set out in the schedule to the agreement above mentioned.

P. N. Pogose, on the 24th June 1880, on these properties being attached, put in a claim, stating that he had, on the 5th November 1877, the day previous to his marriage with Miss Manook who was a minor, executed an antenuptial settlement, settling the properties, which had been attached and other properties, on the lady for her life, and after her decease on her children by him, the deed containing a clause to the effect that the intended wife should support P. N. Pogose for his life, and concluding with these words "and that henceforth all my rights to the same shall cease to exist" The petition on which the claim was founded then stated that P. N. Pogose, on the 6th November 1877, had been married to Miss Manook, who was then an infant, and that he had, on the 3rd June, taken out a certificate, under Act XL of 1858, to manage these properties on behalf of his wife. This claim was, however, dismissed by Mr. Kirkwood, on the 30th December 1880, who held that the gift under the settlement was "no more than a mere ostensible transfer, carrying with it no change of ownership, and that the alienation was void as against the Bank." It appeared that in 1877, one C. N. Stephen had previously [953] attached these very properties in execution of three decrees in his favour, but P. N. Pogose had put in a claim and had succeeded in getting the properties released from attachment.

On this claim being dismissed, by the order, dated the 30th December 1880, Mrs. Pogose, by her next friend and guardian P. N. Pogose, filed a suit against the Bank, praying (1) that her title to the properties included in the settlement might be declared, and (2) that the properties might be released from attachment, and an injunction granted restraining the Bank from putting up to sale the properties included in the settlement.

The Bank contended that the settlement set up by the plaintiff was executed with a view to defraud the creditors of P. N. Pogose, and that the judgment-debtor, his father-in-law Mr. Manook, and friends had collusively got up the deed, with the object of protecting the properties of P. N. Pogose.

The evidence in the case given as to the value of the real property settled was of a very unsatisfactory character, and showed that there was some personal property also settled, that neither Mr. or Mrs. Manook (the plaintiff's father and mother) were aware of the debt to the Bank at the time the settlement was made; neither P. N. Pogose or his wife were examined by commission, or otherwise, and it appeared from the heading of the plaint that at the time the suit was brought, P. N. Pogose was residing in England; but there was nothing to show where the plaintiff Mrs. Pogose was at the hearing of the suit.

The Subordinate Judge found that execution of the settlement was proved, but that P. N. Pogose had made the settlement with a view to defraud his creditors; that although there was no direct evidence to show that Mrs. Pogose was aware of the fraud committed by her husband, yet, that it was probable that Mrs. Pogose and her parents were aware of the insolvent state of P. N. Pogose when executing the settlement, and that, if they were not, they had ample means of informing themselves of this had they made any enquiries, that the fact that P. N. Pogose had conveyed the property charging it with his maintenance, tended to show that the settlement was made under the cloak of marriage with a view to defraud his creditors, he, therefore, held that the settlement was void as against the Bank.

[954] The plaintiff appealed to the High Court.

Mr. *Evans*, Mr. *Gasper* and Baboo *Jogesh Chunder Roy* for the Appellant.

Mr. *Evans*.—In arguing this case, it must be remembered that arrangements for the marriage were entered into by the parents, that, as a general rule, an infant has no power to contract, the only exception being in that of marriage; and this powerlessness to contract has been carried so far that an attorney cannot even sue an infant for drawing up a marriage settlement, he can only claim for such work on the ground that a settlement is necessary for an infant, and that he is entitled to be re-imbursed. Also when considering that a conveyance for the purpose of defrauding creditors is void as against them, the rule as regards *adults* is, that if the conveyance be for consideration, such as marriage, it will be necessary, before setting it aside, to show that the woman was a party to the fraud, but in the case of a minor can the same rule be applied? Up to the year 1810 no case has occurred in which an ante-nuptial settlement has been set aside in fraud of creditors, and the few later cases in which the contrary has been held, all hold that a settlement is bad only in the case where the woman is affected with notice of the fraud. There can in this case be no reason to suppose that P. N. Pogose informed the father, or mother, or the girl herself, that he had entered into an agreement with the Bank, and was about to make a settlement to defraud the Bank, in fact the evidence of the father and mother is directly to the contrary. Nor, is there anything to show that any one connected with the girl had knowledge of the agreement with the Bank, there is no reason to suppose the minor had notice.

The deed of settlement is a gift of the properties to her and her heirs, and either gives an estate of inheritance to her, or an estate for life, with remainder to her children. It was drawn up in Bengalee, and taking it as a Bengalee instrument, it would give an estate for life to her, and not an estate of inheritance; and if she died in the lifetime of her husband without issue, there would be no taker, and there would therefore be a resulting trust to the donor. The words "henceforth all my rights to [955] the same shall cease to exist" do not necessarily militate against this.

The following cases will show how difficult it is to set aside an ante-nuptial settlement:—

Campion v. Cotton (17 Ves., 263) decided in 1810 shows that the consideration of marriage will support a settlement against creditors, and that neither the joint possession of moveables, nor the fact that the wife knew that the settlor was indebted at the time, will affect the settlement.

Fraser v. Thomson (1 Giff., 49) in which *Campion v. Cotton* was followed.

Colombine v. Penhall (1 Sm. & G., 228) was the case of a trader subject to the Bankruptcy Laws, and the settlor being subject to those laws, made it impossible to sustain the consideration of marriage. In our case Mr. Pogose is not a trader, and it is shown that he was not insolvent from the evidence of Mrs. Manook.

In ex-parte Mayor (1 Mont., 294) the wife was aware of her husband being an insolvent, and even there the settlement was held good.

Bulwer v. Hunter (L. R., 8 Eq., 46) in which all the above cases are recognized, was held to come within *Colombine v. Penhall*, Vice-Chancellor MALINS held; that a marriage got up for the purpose of defrauding a man's creditors, where the intended wife is a party to the fraud, cannot be supported. It has not been shown that Mrs. Pogose was a party to the fraud. As regards the question of notice it generally arises with regard to a particular right, which is not strictly an equity, which some third person has, and in this case it would only apply to the actual right which, as against Mr. Pogose, the Bank had, to insist on the help of Pogose in realizing its debt. The question of notice does not, however, arise, as it has not been shown that Mrs. Pogose knew of this agreement. Actual knowledge of general indebtedness, without specific knowledge of the agreement, would not effect the conscience of the infant so as to annul the settlement. There must be either actual or constructive notice, and no person can say that the infant could be put [956] upon enquiry; as to the existence of such an agreement, s. 229 of the Contract Act clearly shows that an infant cannot have an agent, and she could not be said to have been effected by the knowledge of her attorney, if any such knowledge had been proved. Constructive notice cannot be applied except as to a particular right which is being infringed. There is no case under which an infant is liable for any fraud, but his own fraud, and it cannot be held that the fraud of the infant's guardian, had such fraud been proved, could effect the infant.

In *Twyne's case* (Sm. L. C., 1) the question of setting aside documents for fraud is fully gone into. The law with regard to the Statute of Elizabeth is summed up in *Storey's Eq. Jurisprudence*, s. 372a, and from it, it will be seen that there are no more modern cases which go further than those I have cited. See also *Seton on Decrees*, p. 1372 last edition.

The fact that P. N. Pogose having only this debt to the Bank deprived himself of his property for all time, clearly points that the object of the conveyance under the settlement was not to defraud his creditors, but was to obtain the girl in marriage.

Mr. Allen (with him Baboo Girish Chunder Chowdhry) for the Respondent.
—P. N. Pogose is the person really seeking the aid of the Court, not his wife.

*[Sec. 229.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.]

Consequences of notice given to agent.

The principles of the Statute of Elizabeth have been held to apply to this country. See *Abdul Hye v. Mir Mohammed Mozaffar Hossein* (I. L. R., 10 Cal., 616; L. R., 11 I. A., 10).

The rule to be applied in this case is the rule of justice, equity and good conscience. The cases cited by Mr. *Evans* do not apply to India; the status of married persons in England and India differs greatly, in England all the wife's choses in action vest in the husband on marriage, here it is not so, at all events since 1865. It lay upon the other side to show that the settlement was a *bona fide* document and was not a scheme to defraud creditors. *Vane v. Vane* (L. R., 8 Ch. App., 383) clearly decides that notice to an agent is notice to the principal.

[957] I submit that anything that would put the husband on enquiry, would bind the wife.

The principle under which such a claim as the present is made out, is the principle of being a *bona fide* purchaser for value without notice, and this principle has been set up by parties claiming under a settlement made previous to, and in consideration of, marriage. See *Hardey v Green* (12 Beav., 182) and *Vane v. Vane* (L. R., 8 Ch App., 383) The position of this case is the reverse, the suit was one really to establish a document, for the properties were under attachment. The plaintiff was bound in the Court below to establish the *bona fides* of the document, we put it in issue, they omitted to do this, and did not examine either Mr or Mrs Pogose, which they might have done on commission.

Mr *Evans*, in reply —The decision of the lower Court is valueless as a decision on facts, owing to error of law. The lower Court thought, that if a wife knew of the insolvent condition of the intended husband, that would be fraud against creditors and would invalidate the settlement. But the only thing here constituting fraud would be if she knew of his agreement with the Bank. There is absolutely no evidence of this, there is the sworn testimony of the father and mother to the contrary un rebutted. There is no evidence on the other side, and there is no precedent for setting aside an ante-nuptial settlement upon mere suspicion in the teeth of sworn testimony all one way. Proposals for marriage had been made by Mr Pogose some time before. But this is no reason to believe that they had been accepted by the father and mother. until Mr. Pogose offered to settle his property, nor is there any ground in the evidence for saying that the proposals would have been accepted had not the settlement been made. It is impossible to find that the agreement with the Bank was known to the minor, and there is good ground for concluding it was unknown to the parents, as besides their sworn testimony there is the improbability that the suitor for the daughter's hand would inform the parents of a fact, which might probably lead to the rejection of the proposal. There is nothing strange in the management of a wife's property by the husband.

[958] Judgment of the Court was delivered by .

Garth, C. J.—This suit was brought by Mrs. Eugene Pogose, the wife of Mr. Peter Nicholas Pogose, to establish her title to certain property in the district of Mymensingh, which had been attached by the respondents, the Delhi Bank, in execution of a decree against the plaintiff's husband.

The plaintiff made a claim to this property in the execution proceedings; but that claim, having been rejected by the Court, she has brought this suit to obtain a declaration of her rights. *

Her case is, that this property (together with four other properties in the district of Backergunge) was settled upon her and her children by a marriage settlement, dated the 5th November 1877, corresponding with the 21st Kartik 1284; the marriage having been solemnized on the following day.

The execution of this deed by the plaintiff's husband on the date in question is not denied, but the defendant's case is, that, having regard to the circumstances under which it was executed, the settlement was void as against them, having been made for the express purpose of defrauding Mr. Pogose's creditors.

The facts are these —

On the 15th of June 1877 the Delhi and London Bank, who had lent money to Mr. Pogose, obtained a decree against him for the sum of Rs. 11,076-10-8 and costs Rs. 1,026-5-6; total Rs. 12,103.

They were about to take steps to enforce this decree by attachment of Mr. Pogose's property; but he begged them not to do so, upon the ground, that he was collecting *salam* from the tenants, and that any attachment upon either his person or property would be sure to reduce his *salam* very seriously.

This led to communications between the solicitors on both sides, and on the 21st of June Mr. Pogose signed an agreement, by which, in consideration of the Bank's refraining from the immediate attachment of his person or property as threatened, he stipulated to pay them a sum of Rs. 2,000 quarterly, and in default, to assist the Bank in attaching his properties, a schedule of which was annexed to the agreement. This schedule was supplied by Mr. Pogose's solicitors, who, it was expressly stated, had a mortgage upon the property for Rs. 4,000.

[959] In pursuance of this agreement Mr. Pogose paid the Bank --

On 7th September 1877	... Rs. 1,000
„ 3rd October „	.. Rs. 1,000
„ 22nd February 1878	.. Rs. 1,510
„ 25th February 1878	.. Rs. 490

Total ... Rs. 4,000

Meanwhile, as we have seen, Mr. Pogose was married to the plaintiff on the 6th of November 1877; and immediately after the last of the above payments, he and the plaintiff went off to England, and no further payments have since been made.

The Bank having waited some time, took out execution of their decree in the early part of 1880, and this Mymensingh property was attached. The claim was made on the part of Mrs. Eugene Pogose on the 24th June 1880, but the Court found that the settlement was invalid against creditors on the ground of fraud. The Judge, certainly, on that occasion does not seem to have quite understood the law upon the subject, or to have recognized the difference between an ante-nuptial and a post-nuptial settlement; but upon the facts he was clearly of opinion that the settlement was a gross fraud.

The Subordinate Judge in the present case has, in our opinion, taken a more correct view of the law, and he also has come to the conclusion, that the settlement is void as against the defendants, on the ground of fraud.

He says: "At the time when Mr. Pogose was hopelessly in debt, he contracted a marriage, in consideration of which he settled whatever property he had upon his wife and children, subject to his maintenance, and a debt which had previously been charged on the property in dispute. The circumstances

under which the deed was executed, as well as the nature of the transaction, tend to show that the conveyance was made with a view to screen the property from the creditors "

And again: "There is no direct evidence to show that plaintiff was aware of the fraud committed by Mr. Pogose, and it is difficult to have any direct evidence on the point. Before the marriage between plaintiff and Mr. Pogose, they had been related to each other, and it is probable that plaintiff and her [960] parents were aware of the insolvent state of Mr. Pogose, when the conveyance was executed, or at least they would be informed of it, if they had taken the trouble of making any enquiry about it, and it can by no means be said that they acted *bona fide* in the case. The fact that Mr. Pogose conveyed all his property charging it with his maintenance and the payment of the mortgage debt only, in consideration of his marriage with plaintiff, who did not in return advance any sum to, or place any property at the disposal of, Mr. Pogose, clearly tends to show that the settlement was made under the cloak of marriage with a view to defraud creditors. If such a settlement were given effect to, a premium would be held out to fraud, and a Court of Equity, which is jealous in protecting the interests of creditors, ought to set aside the transaction as void against creditors "

Against this judgment the plaintiff has appealed, and her case has been very ably argued before us by Mr. *Evans*. He contends that before an ante-nuptial settlement can be set aside, it must be proved—1st, that the husband was insolvent, or, at any rate, hopelessly indebted at the time of the marriage, 2nd, that the marriage itself was a fraudulent contrivance for defrauding the husband's creditors, and, 3rd, that the wife not only knew of her husband's indebtedness, but was herself privy to the fraud.

And he has further urged upon us, that the knowledge of a minor wife's parents or guardians cannot, for this purpose, be taken to be her own knowledge, and that, in order to avoid the deed, actual notice of the fraud must be brought home to the plaintiff herself, inasmuch as having been a minor at the time of the marriage, she was entitled to the special protection of the law.

In support of these propositions he has referred to several authorities, and amongst them the following which, in our opinion, having regard to what we find to be the facts of the case, do not avail his client. *Campion v. Cotton* (17 Ves., 263), *Fraser v. Thomson* (1 Giff., 49), *Colombine v. Penhall* (1 Sm. & G., 228), *Ex-parte Mayor* (1 Mont., 292), *Bulwer v. Hunter* (L. R., 8 Eq., 46), *Kewan v. Crawford* (L. R., 6 Ch D., 29).

[961] It is true that in *Colombine v. Penhall* (1 Sm. & G., 228) and *Bulwer v. Hunter* (L. R., 8 Eq., 46) the settlements were held to be void upon the ground that *the marriage itself*, as well as the settlements, was part of the scheme for defrauding the creditors. But we do not understand that in either of those cases the Court intended to say that, unless the marriage itself was part of the fraud, the settlement could not be avoided.

If any such opinion had been expressed by the Court in either of those cases, it would certainly have been unnecessary for the purposes of the decision, because in both, there had been previous cohabitation between the husband and wife, and it was found as a fact that the marriage itself was a part of the scheme to defraud. This, of course, made the argument so much stronger against the validity of the settlements.

But it does not follow from these cases that where the marriage itself has been arranged in good faith, the settlement, if it is found to have been made

for the purpose of defeating creditors, cannot be avoided. If that were so, it would be making marriage settlements the one single exception to the law laid down by the Statutes of Elizabeth.

Take a case, for instance, of this kind. Suppose that a marriage has been agreed upon in good faith, at a time when the intended husband was perfectly solvent, and that a settlement of a part of his property has been arranged upon the usual terms. Suppose, also, that before the marriage takes place, a change comes over the husband's fortunes. He has executions out against him, and becomes nearly, if not wholly, insolvent; whereupon the scheme of the proposed settlement is changed, and the whole of the husband's property is settled upon the wife, with her knowledge and connivance, for the express purpose of defrauding the husband's creditors.

Can it be that such a settlement would be valid as against the creditors? If it were so, there would certainly be one law applicable to marriage settlements, and another applicable to all other conveyances.

Of course, for the purpose of avoiding ante-nuptial settlements, it must be shewn that the wife was actually or constructively [962] a party to the fraud. If she were not so, she would be a *bonâ fide* purchaser without notice. In the case of *Kewan v. Crawford* (L. R., 6 Ch. D., 29), the wife was found entirely ignorant of the fraud, upon which the settlement was based, and in *Campion v. Cotton* it was found that no fraud was established.

Every case, as it seems to us, must depend upon its own circumstances, and we certainly find no warrant in the authorities for excluding contracts made in consideration of marriage from the law which governs all other contracts.

It has been said that the Statute of Elizabeth (29 Elizabeth, c. 5) is not in force in the Indian Mofussil, and in strictness perhaps that may be true. But that statute, in the opinion of Lord MANSFIELD, was only declaratory of the common law. The principles of it are undoubtedly those of equity and good conscience, and their Lordships of the Privy Council have expressly sanctioned the adoption in the Mofussil of these principles (See the late case of *Abdul Hye v. Mir Mohammed Mozaffar Hossein* (I. L. R., 10 Cal., 616, L. R., 11 I. A., 10) in which, speaking of the Statute of Elizabeth, their Lordships say.—“There seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience”

We have, therefore, to consider in this case, whether, having regard to the circumstances under which the settlement was made, it operates to protect the property in question against the defendant's execution.

Mr. Peter Nicholas Pogose, against whom the decree has been obtained, was the son of Mr. Nicholas Petroos Pogose, who is now dead. The latter was once a gentleman of very large property, but he became hopelessly and notoriously insolvent, and his property was assigned to trustees for the benefit of his creditors.

The first witness for the plaintiff, who has been in the service of the Pogose family as mohurir since the year 1841, described the property of Mr. Pogose's father as worth seven or eight lacs of rupees, whilst his debts were upwards of twelve lacs.

[963] The plaintiff was a second cousin of her husband, and the daughter of Mr. and Mrs. Carlo Johannes Manook, who have given their evidence in this case under a commission.

It is especially worthy of note, that neither the plaintiff nor her husband have been examined as witnesses, although, so far as we can see, there would have been no difficulty in obtaining their evidence on commission.

The plaintiff at the time of the marriage was sixteen years of age, and we are told by her parents that the proposals for the marriage took place in 1876, about a year before the marriage. No arrangement at that time was made or suggested about any settlement.

The defendants' decree, as we have seen, was passed in June 1877. The agreement by Mr. Pogose with the Bank was on the 21st of June, and almost immediately after this agreement, about four months before the marriage, we find this settlement arranged for the first time.

It is obviously a settlement of a very unusual character, and although we cannot doubt that some professional gentleman was employed in the matter, no such person is called as a witness, nor is any explanation given of the unusual character of the document. It professes to denude Mr. Pogose of the whole of his property of every description. This is proved by the plaintiff's own witnesses. He had a one-seventh share of his mother's property, which consisted of an 8-anna share in an estate in Mymensingh (the property in question), and in four other smaller properties in Backergunge. The whole of this one-seventh share was settled.

There was no honest reason, so far as we can see, why Mr. Pogose should have so completely denuded himself, and it does not appear that Mrs. Pogose brought anything whatever into settlement.

The instrument upon the face of it, is called a deed of gift. It recites a promise by Mr. Pogose that, in consideration of the intended marriage, he should convey to his wife all "his rights and interests in the property, to the intent that she should become the owner and enjoy the profits thereof; that she (the wife) should support him (the husband) for life; that [964] she should not alienate the properties, and that on her death the children of the marriage should have a right of disposing of the property by gift or sale, and that from henceforth (that is to say, from the time of the execution of the deed) all his (the husband's) rights in the property should cease to exist." The deed then goes on to convey the property to the wife to and for the above intents and purposes.

Mr. *Evans* has contended that, notwithstanding the words "henceforth all my rights in the same shall cease to exist," there was an ultimate reversionary interest left in Mr. Pogose, but whether this was so or not, it is clear that the practical effect of the deed was to deprive Mr. Pogose of all interest in the property, which might in any way be available for his creditors; at the same time he secured by way of trust a maintenance for himself for life.

We entirely agree with the Courts below that the manifest object of this transaction was to defraud Mr. Pogose's creditors, and it only remains now to consider—

1st—What was the state of Mr. Pogose's affairs at the time he made this settlement; and

2nd—How far Mrs. Pogose was party or privy to the fraud.

At the time of his marriage Mr. Pogose still owed the Bank upwards of Rs. 10,000, he owed his solicitors Rs. 4,000, and there is evidence of three other Small Cause Court decrees being out against him, which were taken at the hearing before us to amount to Rs. 3,000. He, therefore, owed at least Rs. 17,000; and it is possible, of course, that his debts may have been very much larger.

Then, what was the value of the property settled? His father had died hopelessly insolvent; and we have seen that all that Mr. Pogose had, was a seventh share in the properties mentioned in the deed of gift, which had come to him under his mother's marriage settlement.

It appears from the description of these properties in the schedule to the deed of gift, that Mr. Pogose's interest in the *Mymensingh* property, the property in question, was one-seventh of an 8-anna share of the whole zamindary, and the value of this seems to [963] have been about double the value of her interest in the other properties, which are situated in Backergunge.

The sudder jumma payable for the *Mymensingh* property is Rs. 10,525. The sudder jumma payable for the four Backergunge properties is about Rs. 5,239. So we may take it roughly that the value of Mr. Pogose's interest in the *Mymensingh* property was about double the value of his interest in the other properties. Then as to the value of these properties, we have no reliable information in the evidence itself. The first witness says nothing upon the subject. He appears to be under the impression that Mr. Pogose got one-seventh of his father's estate, but this is a mistake. He got nothing from his father; and the property in question came to him under his mother's settlement.

The second witness is Umakant Chakravarti. He speaks of the plaintiff's interest in the property in suit being worth Rs. 60,000 or Rs. 70,000; but he is evidently speaking at random; because at this rate he estimates it at about three or four times the value, which has been put upon it by the plaintiff herself.

Mr. Manook also puts the property at Rs. 40,000 or Rs. 50,000; and the rental of it at Rs. 200 a month, but he also speaks with considerable hesitation, merely from what Mr. Pogose told him, and not upon his own knowledge; and considering how deeply interested he and his wife are in the success of the suit, we certainly are not disposed to place much reliance upon their evidence.

Fortunately, however, we have, from the proceedings before us, and from the statements and conduct of the plaintiff and her husband, the means of forming a pretty correct estimate of the value of the property in question.

In the execution proceedings in the former suit, when the question now before us was first raised, the value of that property was found to be Rs. 12,000.

Again, in the present suit, this property has been valued (not for stamp fee, but for purposes of jurisdiction) at Rs. 12,000, and we find that in 1878, when Mr. Pogose took out a certificate of guardianship to his wife's property under Act XL of 1858, the stamp on the certificate was Rs. 65 only, which represented Rs. 12,000 as the value of the entire property

[966] Rs. 12,000 therefore is probably more than the property now in suit is really worth, but assuming this to be its value, and assuming also, for the reason already given, that the *Mymensingh* estate is worth twice as much as the Backergunge estates, the value of the whole property settled would not exceed Rs. 18,000 at the most.

Then we have seen, that Mr. Pogose's debts amounted at least to Rs. 17,000 at the date of his marriage, so that he was at that time almost, if not wholly, insolvent.

It now only remains to be seen, how far the plaintiff herself, or those who acted for her in making the settlement, were party or privy to the fraud.

The whole history of the transaction from first to last tends to satisfy us, that all the parties to the transaction were cognizant of Mr. Pogose's difficulties, and that the alleged settlement was only a device for the purpose of defeating his creditors, and retaining the settled property in his own possession.

In the first place, as we have already pointed out, there was nothing said about a settlement when the marriage was first arranged. It was negotiated in the year 1876; but it was not until the Bank had obtained their decree against Mr. Pogose, and he had been threatened with an attachment, and had entered into the agreement of the 21st of June, that the settlement in question was thought of.

Then it must be borne in mind, that the Manooks were nearly related to the Pogose family. They must have known perfectly well, what was notorious throughout the country at that time, that Mr. Pogose's father, who was once a man of fortune, had become hopelessly insolvent. Mr. Manook could hardly, under such circumstances, have allowed his daughter to marry Mr. Pogose without ascertaining his pecuniary position. And considering that Mr. Pogose's Babus were perfectly aware of his indebtedness, it seems impossible to suppose that Mr. Manook should not have known it.

Then the extraordinary character of the settlement itself appears to us a clear indication of fraud. Why should Mr. Pogose have conveyed the whole of his property to his wife, subject only to a trust for his own maintenance? It could hardly [967] have been for any other purpose than to protect it from his creditors.

Then his dealings with the property after the marriage took place show, that notwithstanding the settlement, he still retained the dominion over it, and disposed of the proceeds of it as the real owner.

He had undertaken in September 1877 to pay the Bank Rs. 2,000 every quarter; and this money, it appears from his letters, he hoped to obtain from the tenants of the property by way of *salam* soon after the beginning of the year 1878.

In his letter to the Bank of the 26th of August 1877 he says *that he did not expect to get up this money until the end of January 1878*, and, as a matter of fact, he had not, so far as we can judge, collected the second Rs. 2,000 till after the month of January, because the payments which he made to the Bank were Rs. 1,510 on the 22nd of February, and Rs. 490 on the 25th of February.

But if the settlement of November was a *bonâ fide* deed, those sums, which he paid to the Bank, belonged not to him, but to Mrs. Pogose. Mr. Pogose had no right after the settlement was made to appropriate a single pice of the proceeds of the settled property to the payment of his own debts.

We cannot suppose that either Mrs. Pogose or her parents were ignorant of these payments, and yet Mr. Pogose makes them out of the property which had been professedly settled upon his wife without the slightest objection.

And so far as appears, he has ever since managed the property and been in receipt of the rents and profits of it, through his brother, Mr. Carr Pogose. It is true that in June 1878 he obtained a certificate as the guardian of his wife's estates; but this he would naturally do for the purpose of keeping up appearances, and no steps have ever been taken, so far as we can ascertain, to register Mrs. Pogose as the owner.

So soon as Mr. Pogose had put it out of the power of the Bank to arrest him, by paying them the Rs. 2,000 in February 1878, he at once went off to England with Mrs. Pogose, and, so far as appears, he has been there ever since.

[968] The first witness tells us that the plaintiff herself, after residing in England for a year or so, returned to Dacca, and it appears from the plaint

that at the commencement of this suit she had again gone back to England, but we have no evidence, nor any reason to suppose, that Mr. Pogose has ever returned to this country ; and certain it is that neither he nor his wife have ventured to give any evidence in this cause, or have attempted to explain what appears to us to be so palpably a fraud.

This is just one of those cases, in which it was the duty of the plaintiff to give the Court all the information in her power. It is obvious that to her and her husband it is a matter of the most vital importance to establish the validity of this deed. The facts, of which the Court has a right to be informed, are facts essentially within their knowledge, and that of their legal adviser, whoever he was, and yet neither they, nor their legal adviser, have been examined as witnesses. What inference, except one adverse to the plaintiff, can we draw from this circumstance ?

It has been contended by Mr. *Evans* that, in order to avoid the settlement against Mrs. Pogose and her children, it was necessary to show that she herself was a party to the fraud ; and that, however fraudulent the conduct of her father may have been, that would not avoid the settlement as against her. But no authority has been adduced in favour of this contention ; and, so far as it is necessary for us to decide the point, we consider that it is not warranted by law.

If a guardian, whilst acting for a minor, is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts, than the guardian could, if he were acting on his own behalf.

If a guardian, for instance, in making a lease of the minor's property, were guilty of such fraud as against the proposed lessee, as would justify the lessee in repudiating the lease, the minor could no more enforce the lease as against the lessee, than the guardian could, if he were acting for himself. This proposition was in fact admitted in the course of the argument.

Then, what is the state of things here ? Mrs Pogose is attempting, as against the creditors of her husband, to enforce a marriage settlement, which has been negotiated and made on her behalf [969] by her father as guardian. If her father, under these circumstances, makes a contract for her, which is contrary to law, or void against third persons, on the ground of public policy, we consider that she can no more enforce such a contract against those third persons, than if she, being an adult, had made the contract for herself.

It may be true that no suit can be brought against a minor for any fraud or misrepresentation of which his guardian has been guilty, but that is a different matter. A minor may not be answerable on the one hand for the fraud of his guardian, but on the other hand, he cannot take advantage of it.

In this case we are satisfied, upon the question of fact, that both the lower Courts have arrived at a just conclusion. We have no doubt whatever that the settlement in question was a mere device, for the purpose of defrauding Mr. Pogose's creditors. We believe that it has never been acted upon *bonâ fide*, and was never intended to be acted upon, except so far as was necessary for that purpose. We believe, moreover, that Mrs. Pogose herself was fully aware of the object of the deed, and that Mr. Manook, the father, was both party and privy to it.

Under these circumstances, we consider that it would be contrary to equity and good conscience, and a very pernicious example, to allow such a device to prevail against the claims of creditors.

We all know that in this country, more especially amongst certain classes of the community, a marriage is easily contracted, and almost as easily dissolved.

We know also the vast variety of devices which are constantly resorted to for the purpose of defeating the claims of creditors. And if it were generally understood that the simple expedient of a marriage, coupled with a settlement upon the wife of all her husband's property, subject only to a general trust for his maintenance, would have the effect of securing to an insolvent man the full enjoyment of his property, and of effectually setting his creditors at defiance, we fear that such marriages and settlements would be of very frequent occurrence.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[Similarly, a ward will not be bound by the fraud of the guardian, 15 Cal 8, 18 Bom. 631; 28 All. 44.]

[970] APPELLATE CRIMINAL.

The 26th June, 1884.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Queen-Emress

versus

Bepin Biswas and others.

Trial by Jury—Jurisdiction of Judge—Evidence of approver—

Corroboration—Confession of one of several prisoners.

It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence; but he should always be careful to add that it is for the jury to form their own opinion.

Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as is ordinarily required to make it safe to convict a particular prisoner.

Confessions of prisoners are not, as against their fellow prisoners who were not present when the confessions were made, such corroborative evidence of the statement of an approver as would justify the conviction of the other prisoners thereon.

Confessions of two of several accused persons made in the absence of the others are of no weight as against the latter.

Such confessions, as well as the statements of approvers, are always regarded as tainted; because, from the position occupied by the persons making them, they are not entitled to the same weight as the evidence of ordinary witnesses.

An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *prima facie* to convict him of the offence.

* Criminal Appeal No. 321 of 1884 from the judgment of J. M. Kirkwood, Esq., Sessions Judge of Moorsshedabad, dated 17th of May 1884

IN this case eleven persons, namely, Bepin Biswas, Kunju Mundle, Dukee Ghose, Bidesi Ghose, Dukee Dye, Nadi Ghose, Tincouri, Ram Mundle, Sham Ghose, Gopi Ghose and Sanyasi Ghose, were tried for dacoity before a Sessions Judge and a jury. One of the persons originally accused before the Magistrate turned approver, and two of the above-named persons, namely, Bepin Biswas and Kunju Mundle, made confessions before the Magistrate which they afterwards retracted and denied. The verdict of the jury is as follows :—

[971] “ We are unanimously of opinion that Bepin Biswas, Kunju Mundle, Dukee Ghose and Nadi Ghose are guilty of dacoity under s. 395 of the Indian Penal Code. We would acquit the others, namely, Tincouri, Ram Mundle, Sham Ghose, Gopi Ghose and Sanyasi Ghose. We find that Bepin and Kunju did voluntarily make the confessions imputed to them.”

The prisoners appealed to the High Court

The **Judgment** of the High Court (PRINSEP and MACPHERSON, JJ.) was as follows :—

The six appellants have been convicted of dacoity in a trial held by jury. The evidence against them consisted of the evidence of an approver and of certain witnesses who said that they recognized the appellants at the dacoity. It is also in evidence that some “ mals,” part of the stolen property, were found in the house of Dukee Dye, one of the appellants, and two others, Bepin and Kunju, made confessions before the Magistrate which they have since retracted and denied. In laying before the jury the evidence of the witnesses who speak to having recognized the prisoners, the Judge has very properly pointed out that when the offence was reported to the Police, no one was mentioned as having committed the dacoity, which would be extremely unlikely if any of the villagers had recognized any of the dacoits. He has also mentioned the fact that these witnesses admit that they had previously no acquaintance with those they profess to have recognized in the confusion of the dacoity, and that the night was dark. The Judge has summed up this evidence in the following words :—

“ To such identification as this I am unable to attach any weight. It may possibly be explained to some extent by a theory that these witnesses that night saw these persons, carried away a general impression of their appearance, without being certain as to who they were, found on the arrest of the prisoners that they resembled those impressions, and they were in reality men they had known before.

“ At the same time, it appears to me highly probable that the pursuers did get hold of some idea of the men they were pursuing, **[972]** and that, it is in no way improbable that the identifications, at least as regards the men not known to them by name before, were made to the best of their ability, and with every wish to be accurate.”

This was not a correct way of placing the evidence before the jury for their consideration. It was certainly open to the Judge to express his own opinion regarding it, and he did do so when he stated that he was “ unable to attach any weight to it ” He should, however, have been careful to add that it was for the jury to form their own opinion on this evidence. But his subsequent remarks were, certainly, calculated to place this evidence before the jury in a manner very prejudicial to the prisoners, inasmuch it would tend to make the jury altogether lose sight of the much more important considerations already mentioned, *viz.*, that the night was dark, and that none of the dacoits were named in the early stage of the Police investigation.

But the Judge's charge to the jury is open to much stronger objection on other respects. The evidence of the witnesses who profess to have recognized

the appellants is clearly not the principal evidence in the case, on which the Judge himself, and, as far as we can determine from the character of the charge to the jury, the jury must have relied, with the exception of that relating to the finding of the "muls" in the house of Dukee Dye, that evidence consists of the evidence of an approver, and we have also the two statements or confessions made by Bepin and Kunju before the Magistrate. The Judge has thus directed the jury in this respect: "It is not illegal for you to convict on the unsupported testimony of an accomplice if you fully believe it."

"But, ordinarily, before convicting on such testimony, you should see if that testimony has received strong corroboration. In my opinion, it would not be safe to convict on the statement made in this Court by Heera Lall (the approver), unless that statement receives strong corroboration. Now, it is a corroboration of Heera Lall's statement made before you yesterday, that on two previous dates (the 5th and 2nd April) he made statements in full detail of the events of that night. These statements in all important particulars agree one with the other: the only [973] discrepancies are one or two very slight ones, as to the parts one or two of the accused played during the plundering of the house, and this may well be, when one considers that the operators were not standing still, but in constant movement and activity. It is important, however, for you to notice that on each of these three occasions he gives the same version." The Judge then proceeds to mention the points of correspondence, but we do not find that he drew attention to the discrepancies to which he has also generally alluded.

The mere repetition of the same statement of facts without contradiction or material discrepancy is, no doubt, recognized by s 157^{*} of the Evidence Act, as some corroboration of the truthfulness of that statement, but the Judge has lost sight of the fact that, from the position occupied by an approver witness his evidence is necessarily regarded with very great suspicion as being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person, that his evidence should be accepted with the greatest caution. Nothing is easier for a man than to narrate events with accuracy, and yet more so, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or an enemy.

It is for this reason, that the rule stated in the case of *The Queen v. Nawab Jan* [8 W. R., Cr., 19 (26)] has always been accepted. In that case MACPHERSON, J., pointed out that "there was no corroboration such as adds to the approver's evidence against Nawab Jan; because there is no evidence, apart from that of the accomplice, which identifies the prisoner with the commission of the offence with which he is charged. Nothing which distinctly goes to prove that he was in any way connected with the commission of the principal offences. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration, in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the [974] "accomplices say is true," he would also refer the Judge to the cases of the *Queen v. Baikanthanath Banerjee* [3 B. L. R., 3 (F. B.)] and *Queen v. Mohesh Biswas* (19 W. R., Cr., 16) as well

former statements of witness may be proved to corroborate later testimony as to same fact.

*[Sec 157.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.]

as to *Reg. v. Malapabin Kapana* (11 Bom. H. C. R., 196). In the last case the Bombay High Court refused to accept as evidence corroborative of that of the approver, statements made by him on different occasions to his parents shortly after the murder, pointing out that his statement, whether made at "the trial, or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not improve by repetition."

It is not necessary for us to consider whether the rule should be extended as far as to exclude a statement made before arrest; but we have no doubt at all, that the exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as we ordinarily require to make it safe to convict any particular prisoner.

The Judge has further misdirected the jury in telling them to regard as evidence in corroboration of the approver, the statements made by the prisoners Bepin and Kunju when examined by the Magistrate. Such statements are no legal corroboration of the tainted evidence of the approver. See *Reg. v. Malapabin Kapana* (11 Bom. H. C. R., 196), *Queen v. Budhu Nanku* (I. L. R., 1 Bom., 475), *Queen v. Jaffer Ali* (19 W. R., Cr., 57). Statements so made are certainly of no higher value than that of an approver. It should also be remembered that a prisoner under trial would have the advantage of cross-examining an approver, whereas the statement of a fellow prisoner, which would be as much tainted as that of an approver, would be subject to no such test. See *Queen v. Naga* (23 W. R., Cr., 24). In the case now before us, we would further point out that the fact that the statements made by Bepin and Kunju before the Magistrate were made in the absence of the other [975] prisoners whom it is intended to implicate thereby, should alone have induced the Sessions Judge to caution the jury against attaching any weight to them at all, except as against those who made them.

Next, the Sessions Judge should not have told the jury that "In the absence of anything whatever to show enmity, or why the other prisoners should have been falsely named by the approver, and the two confessing prisoners, there is sufficient material on which to convict them legally, but that, at the same time, it is desirable, that, if possible, the jury should have independent evidence of the identity of the accused."

In thus directing the jury, the Judge has put the evidence of the approver and the statements of the two prisoners before the Magistrate on the same footing as the evidence given by any ordinary witness. He has altogether overlooked the fact that one invariable practice is to regard such statements as tainted, because, from the position occupied by the persons making them, they are not entitled to the same weight as the evidence of an independent witness.

We next find that the Sessions Judge has commented on the fact that one of the appellants was absent from home on the night of the dacoity, and that he has adduced no evidence to contradict this, or to show that he was "innocently engaged." This is an observation that should not have been made, and cannot but have seriously prejudiced the prisoner Bedesi, for his own absence from home would be no legal corroboration of the evidence of the approver; unless there was *prima facie* sufficient legal evidence to convict him of the offence, he would not be bound to account for his movements.

We have, therefore, no hesitation in holding that the Sessions Judge has misdirected the jury in such a manner as to demand a new trial. Having regard to the special terms of the verdict of the jury convicting Bepin and Kunju, we should ordinarily have affirmed their convictions, but we find ourselves unable to hold that they too have not been seriously prejudiced by the Judge's charge. For instance, the Sessions Judge told the jury, "as regards

BEPIN &c. [1884]; ABDUL RAZZAK v. AMIR HAIDAR [1884] I.L.R. 10 Cal. 976

Kunju and Bepin, I may say that the evidence I have discussed is in any case ample for thier conviction." Again: "But [976] Bepin likewise has not been mentioned by any of the villagers, yet the evidence can have no doubt of his guilt." It is true that the Sessions Judge at the close of his charge said: "If you feel yourselves able to rely implicitly on the statements made by Kunju and Bepin, you should convict them notwithstanding the absence of further corroboration," but it is impossible to say how far the observations previously made and just quoted, did not have such effect on the minds of the jury, as to determine their verdict independently of all other considerations.

Under such circumstances we think that they also should be retried.

New trial ordered.

NOTES.

[As regards *misdirection* to the jury see (1897) 25 Cal 230, *corroboration*, see (1904) 6 Bom L. R 481.]

[10 Cal. 976]

PRIVY COUNCIL.

The 13th and 14th March, 1884.

PRESENT :

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH and SIR A. HOUBHOUSE

Abdul RazzakDefendant

versus

Amir Haidar... ..Plaintiff.

On appeal from the Court of the Judicial Commissioner of Oudh.]

"Oudh Estates' Act," I of 1869, s. 13— Compulsory registration of will devising taluq—Deposit of will distinct from registration under Act VIII of 1871.

A will devising a taluq to a sister's son of a taluqdar, in the lifetime of the taluqdar's brother, is not excepted from the necessity of being registered under s. 13 of the Oudh Estates' Act, I of 1869, such sister's son not being one of those who, in the event of the taluqdar's having died intestate, would have succeeded to an interest in his estate, within the meaning of the exceptions made in s. 13 sub-s 1, of that Act

It may be doubted whether the mere title to maintenance would be such an "interest" as would come within the meaning of the exceptions

The deposit of a will under part IX of Act VII of 1871 does not amount to the registration required by the above section of Act I of 1869

APPEAL from a decree of the Judicial Commissioner of Oudh (22nd March 1882), modifying a decree of the District Judge of Lucknow (2nd September 1881).

This appeal related to the effect of a will made by the taluqdar of a taluq entered in the lists 1 and 3, prepared under the Oudh Estates' Act, I of 1869. The question was whether a bequest of a taluq in a will, not registered in conformity with [977] s. 13 of that Act, came within the exceptions specified in that section, and could operate to give to a sister's son a title superior to the claim by inheritance of a brother of the deceased taluqdar.

The will was made by Mussumat Kutub-un-nissa, widow of Jahangir who had succeeded her husband as taluqdar of Gauria in the Lucknow district. She died in 1879, leaving a "whole" brother, Amir Haidar, the respondent. Abdul Razzak, the appellant, was the son of a deceased sister of Kutub-un-nissa.

After Kutub-un-nissa's death he obtained an order for "dakhil-kharij," or mutation into his name in the settlement record, of taluq Gauria, producing a will purporting to have been executed by his aunt, Kutub-un-nissa, dated 30th April 1874, whereby she confirmed a gift, previously made to her niece, the appellant's sister, of a village belonging to the taluq, and appointed the appellant to be her successor as taluqdar. Dividing the whole of her lands into four parts, she gave by the will to the appellant one part, and of the remainder half to him, and half to the respondent, (*sic*) to whom she bequeathed also the whole of her moveable property.

The respondent Amir Haidar then brought the present suit, stating that he was entitled to the whole of the property which had belonged to Kutub-un-nissa, and was also entitled to succeed to the taluq under s. 22, clause 6 of Act I of 1869. Kutub-un-nissa had, it was alleged, died intestate, as the will was void, because, from extreme old age, she was incapable of making one. Also the disputed will had not been drawn up, executed, and registered in the way in which such an important instrument, especially one in favour of her "karinda," and trusted agent, should have been drawn up, executed and registered.

At the hearing, before the District Judge of Lucknow, it appeared that the alleged will was deposited as the will of Kutub-un-nissa, in accordance with the provisions of part IX of the Indian Registration Act VIII of 1871 as to the deposit of wills, and that the Registrar acting under the 43rd section of that Act, had made and signed the following note upon the envelope enclosing it: "Will on the part of Kutub-un-nissa, Taluqdar and Zamindar of Gauria Kalan, situate in pergunnah and tahsil Mohan Lall Ganj, District Lucknow."

[978] The District Judge held that the plaintiff had failed to prove that the execution of the will had been obtained by fraud, or that Kutub-un-nissa was at that time incapable of making a will. He held also that it was not open to the plaintiff to raise the question as to the requirement, or sufficiency, of registration, with regard to s. 13 of Act I of 1869. He further decided that the plaintiff was not entitled to succeed to the taluqdar under clause 6, s. 22 of the Oudh Estates' Act, I of 1869, but that he was entitled to the bequests under the will, the defendant being entitled to succeed as taluqdar under the will. As to the property, not governed by the Oudh Estates' Act, given by the will to the defendant, the Judge held that by the Mahomedan law, which was applicable to that part of Kutub-un-nissa's estate, she could only will away from her heir one-third, so that the plaintiff was entitled to two thirds of the property other than the taluq. Both parties having appealed the decision of the Judicial Commissioner was as follows:—

"The defendant-respondent is the nephew (sister's son) of Mussumat, Kutub-un-nissa, and, if that lady died intestate, the plaintiff appellant, as brother, would succeed to the estate (clause (6), s. 22, Act I of 1869). It was therefore for the nephew, defendant-respondent, to prove that he held under a valid will."

"Section 13, Act I of 1869, requires that unless the will of a taluqdar be in favour of certain persons therein specified, it must be registered within one month from the date of its execution. The will of the late Mussumat Kutub-un-nissa was deposited with the Registrar in a sealed envelope, but was not otherwise registered during her lifetime."

"It has been urged in appeal that as this alleged defect was not in issue before the Court of First Instance it should not be noticed on appeal. This I

overruled, as it appeared to me that before giving a decree on a will, the Court was bound to satisfy itself that the will was a valid one.

"It was then urged that the law did not require the will to be registered, and lastly that it was sufficiently registered

"With regard to the first point it was argued that had the defendant-respondent been a minor, when the taluqdar died, he would have been entitled to maintenance under part VIII of Act I of [979] 1869 and therefore he is a person, who under the provisions of the Act would have succeeded to an interest in the estate, if the taluqdar had died intestate. Had this not been the meaning of s. 13 of the Act, the words 'could have succeeded' and 'had died' would not have been used. It is not clear why these words were used. The meaning would have been clear had the sentence run 'a person who under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's title and religion are subject, would succeed to such estate or to a portion thereof, or to an interest therein, if such taluqdar or grantee, heir or legatee, died intestate'

"It appears to me that in construing s. 13, Act I of 1869, the Court must ascertain whether the claimant is one who would have succeeded to the estate or portion thereof, or to an interest therein, if the taluqdar had died intestate. Taken in this light, the defendant-respondent would not come under the exception, for had Mussumat Kutub-un-nissa died intestate, he, not being a minor when she died, would have inherited nothing. The counsel's argument is ingenious, but, if it were allowed, the grandmother or brother of a deceased taluqdar might succeed against the son on the strength of an unregistered will, because she or he would have succeeded to an interest in the estate had the taluqdar died intestate before he married. This cannot be the meaning of the Act, and I find against the contention of the defendant-respondent that the will of Mussumat Kutub-un-nissa in favour of her nephew was required by law to be registered.

"As regards registration it is explained in s. 2, Act I of 1869, that 'registered means registered according to the provisions of the rules relating to the registration of assurances for the time being in force in Oudh.' The will of Mussumat Kutub-un-nissa was simply deposited under the provisions of part IX, Act VIII of 1871. The special rules for the deposit of wills were not the rules relating to the registration of assurances. To have made the registration valid there should have been registration under part VIII of the Act. I must find against the defendant-respondent that the will was not registered as required by Act I of 1869.

"The effect of this is that the will under which the defendant [930] respondent claims to hold the property is declared invalid as far as the taluq is concerned and plaintiff-appellant is entitled to a decree as heir.

"As regards the moveable property, plaintiff's claim is dismissed. It was clearly the deceased's intention to leave that to her nephew, and as it is not affected by Act I of 1869, the will, as far as it is concerned, will hold good.

"Plaintiff-appellant is decreed the real property left by the late Mussumat Kutub-un-nissa, taluqdar of Gauria, with mesne profits from the date of institution of suit, namely, 18th March 1881. No interest is allowed. The rest of the plaintiff's claim is dismissed.

"The costs of this suit will be paid out of the estate, and the Court executing the decree may deduct the amount of defendant-respondent's costs in both Courts from the amount to be paid by the defendant-respondent to the plaintiff-appellant, on account of mesne profits."

The defendant appealed.

Mr. J. G. W. Sykes and Mr. J. Duthi appeared for the Appellant.

Mr. R. V. Doyne for the Respondent.

*

The principal points in the argument for the appellant were: *First*, that the plaintiff's case not having been put forward in the Court of First Instance, on the ground that the will had not been registered in conformity with s. 13 of Act I of 1869, the Judge of the Original Court had rightly declined to dispose of the suit on that ground. No issue had been fixed as to that question and as to non-registration, although that subject had generally been referred to, it had not been raised as a defence, with regard to the requirements of the special law above mentioned. The alteration, after evidence adduced, of the main questions raised between the parties was not permissible in a case like the present. Reference was made to *Govind Ramachandra Gokhle v. Shek Ahmed* [5 Bom. H.C. Rep., 133 (a.c.j.)] in which case the judgment referred to Marshall's Reports, p. 71; *Mussumat Sabitra Monee v. Muddhosoodun Singh* (Marshall Rep., 519) [981] was to the same effect; and in *Burjore v. Bhaguna* (I. L. R. 10 Cal. 557) the parties had been held to the issues on which the trial had taken place.

It was also argued that the requirement in s. 13 of Act I of 1869, of registration within one month, did not mean registration actually completed; there being several processes preceding the admission of a document to registration; and presentation for registration might, under some circumstances, be a sufficient compliance with the terms of the section. It had been so here. In connection with this reference was made to *Mohammed Ewaz v. Birji Lall* (L. R., 4 I. A., 167). In addition to the above it was contended that the relations between Kutub-un-nissa and Abdul Razzak brought him within the contemplation of paragraph 4 of s. 22 of Act I of 1869, the evidence showing that she had treated him in all respects as her son.

Counsel for the respondent was not called upon.

Their Lordships' Judgment was delivered by

Sir R. P. Collier.—In this case Mussumat Kutub-un-nissa was the taluqdar of an estate called Gauria, under a sunnud granted to her by the Government of India. She died in 1879, having made a will on the 30th of April 1874. The present suit is brought by her heir-at-law, her brother, who claims what he is entitled to of her estate as heir. The defendant is a nephew of hers, a sister's son; and he sets up the will, under the provisions of which he was entitled to the taluqa and the greater part of her property. The plaintiff denied the execution of the will. He imputed fraud, he denied the capacity of the testatrix, and in other ways impugned the will. It is not necessary to dwell upon these issues, which both Courts have found against him, and which have not been argued again by his counsel here. A further question was raised which certainly had been alluded to, if not mentioned as distinctly as it might have been in the plaint, that the will had not been properly registered under the Oudh Estates' Act, 1869. The Subordinate Judge declined to entertain this question, because it was raised at a late stage, when apparently the evidence had been finished, and because on the settlement of issues it had not been suggested on either side that an issue should be raised on this point; and he found the will to be established. Thereupon [982] an appeal was brought by the plaintiff to the Judicial Commissioner. The Judicial Commissioner agreed with the Subordinate Judge as to the factum and validity of the will, except so far as it was not registered; but he came to the conclusion that it had not been properly registered under the provisions of s. 13 of the Oudh Estates' Act. That is the question before their Lordships. Many other questions were raised

in the ingenious argument of Mr. *Sykes*; but inasmuch as the greater part of them have been disposed of in the course of the argument, their Lordships do not think it necessary further to advert to them.

The 13th section is to this effect "No taluqdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person, who under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such taluqdar or grantee had died intestate." Sub-section 2 follows, which is not material to the present case, and then come the words "Except by an instrument of gift or a will executed and attested, not less than three months before the death of the donor or testator, in manner hereinafter provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution." There is an interpretation clause, which says "registered means registered according to the provisions of the rules relating to the registration of assurances for the time being in force in Oudh" The two questions, then, which arise are these. In the first place, was it necessary that this will should be registered? In the second place, was it registered?

The first question depends upon whether the devisee came under the description of persons in the first sub-section of clause 13—"a person who, under the provisions of this Act, or under the ordinary law, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such taluqdar or grantee had died intestate" The only plausible argument adduced on the part of the appellant on this sub-section was that the appellant would have been entitled to maintenance, [983] which, if not an "estate or a portion thereof," was "an interest therein" and therefore that a devise to him need not be registered. Their Lordships are far from affirming that a mere title to maintenance would be such an "interest therein" as would come within this clause, but it is not necessary to decide this question, because the section which, if at all, confers this right to maintenance—s. 26—(taken in conjunction with s. 24), speaks of "nephews of the deceased, being fatherless minors," and it is not shown that this appellant was a minor either at the time of the death of the testatrix or at the execution of the will. It is scarcely necessary to observe that under s. 22, which regulates the succession to taluqs, his claim cannot be supported. There appears no pretence for speaking of him as an adopted son under the fifth clause, and none of the other clauses have been contended to be applicable to him.

This being so, it follows that the will is one which, in order to be valid so far as to pass the taluq, requires registration, and then we come to the question whether it has been registered in accordance with the Act.

The interpretation clause before referred to leads to the inquiry what were the rules relating to the registration of assurances for the time being in force in Oudh. They are to be found in Act VIII of 1871. It is to be observed with reference to that Act that it contains a very distinct set of provisions with respect to what is called depositing wills and registering them. Section 27 is in these terms: "A will may at any time be presented for registration," that is one thing,— "or deposited in manner hereinafter provided," which is another thing. When we proceed with the Act we find that part VIII relates to presenting for registration wills and authorities to adopt. Section 40 is in these terms: "The testator, or any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration," Section 41 runs thus. "A will or an authority to adopt, presented for

registration by the testator or donor, may be registered in the same manner as any other document." Part IX refers to the deposit of wills, and s. 42 says: "Any [984] testator may, either personally or by duly authorized agent, deposit with any Registrar the will in a sealed cover superscribed with the name of the depositor and the nature of the document." Section 43 says: "On receiving such sealed cover, the Registrar, if satisfied that the depositor is the testator or his duly authorised agent, shall transcribe in his register book No. 5, the superscription on such sealed cover, and note in the Register and on the sealed cover the year, month, day, and hour of such presentation and receipt, together with the name of the depositor and the name of each of the persons testifying to the identity of such depositor, and the inscription, so far as it is legible, on the seal of the cover. The Registrar shall then place and retain the said cover in his fire-proof box." Section 44 says "If the depositor of any such sealed cover wishes to withdraw it, he may apply to the Registrar with whom it has been so deposited for the delivery of the cover, and the Registrar, if satisfied as to the identity of the depositor with the applicant, shall deliver the cover accordingly." And then, after the death of the testator, there is a provision for its being opened and registered. So it appears that by the deposit of a will no information is given to anybody who may search the register as to its contents, and the testator can at any time during his lifetime withdraw it in the sealed envelope in which it was deposited, whereas, with respect to the registration, in the ordinary and proper sense of the word, of wills and other documents, there are provisions which would enable persons who searched the register to ascertain the contents of those documents.

It appears, therefore, to their Lordships that the will was not registered in accordance with the provisions of s. 13 of the Oudh Taluqdars' Act. That being so, they are of opinion that the judgment of the Commissioner was right, that the will had no operation as far as the taluq was concerned, but as far as the personal property was concerned it had an operation, inasmuch as so much of it did not require to be registered, and he gave the defendant the benefit of its operation in that respect.

[985] Under the circumstances their Lordships will humbly advise Her Majesty that the judgment appealed against should be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. W. Buttle

Solicitors for the Respondent: Messrs. Barrow and Rogers.

[10 Cal. 985]
PRIVY COUNCIL.

The 12th and 13th March, 1884.

PRESENT

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Jugul KishorePlaintiff
versus
Jotendro Mohun Tagore and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Test of what passes under execution sale of Hindu widow's estate.

Although a Hindu widow has, for some purposes, only a partial or qualified right, title, and interest in the estate which was her husband's, yet for other purposes she represents an absolute interest therein.

The question, whether on the sale of the right, title, and interest of the widow in execution of a decree, the whole interest, or inheritance in the family estate does, or does not, pass, depends on the nature of the suit in which the execution of the decree takes place. If the suit is a personal claim against the widow, then merely the widow's limited estate is sold.

If, on the other hand, the suit is against the widow in respect of the family estate, or upon a cause not merely personal against her, then the whole of the inheritance passes by the execution sale. The judgment which the decree has followed, may be examined in order to determine which of these two results attends the execution sale of the widow's right, title, and interest.

The principle in *Barjun Doobey v Brij Bhookun Lall Awasthi* (I. L. R. , 1 Cal., 133 ; L. R. , 2 I. A., 275), referred to and applied.

CONSOLIDATED appeals against four decrees of the High Court (29th April 1881) (I.L.R., 7 Cal. 357) founded on one judgment delivered on appeals preferred by the appellant against two decrees of the Subordinate Judge of Nuddea (12th September 1879), and two cross-appeals.

This consolidated appeal raised the question, whether by the sale, in execution of a decree, of the right, title, and interest of a widow in the estate which had belonged to her husband, the [986] whole inheritance passed to the purchaser, or only the widow's interest for her life.

It arose out of the decisions in two suits brought to obtain possession of shares in zemindari lands, Dehi Hatishala and Dehi Kagoj Pakhuria, numbered 243 and 118, respectively, in the taozi of the Nuddea Collectorate, which belonged to Norendrochandra Rai and on his death passed to his widow Sarodamoyi.

The above were shares in the zemindari lands formerly held as joint family estate by the six sons of Nilkanto Rai, who died at the beginning of this century, and whose eldest son, Bhoirabkant Rai, was kurta, or manager, of the family estate till 1815, when he died, leaving his daughter named Umamoyi. One of his five brothers, Nidhiram, survived him, and left one son, Norendrochandra Rai; as to whose widow, Sarodamoyi, arose the present question, viz., whether she represented the family estate of inheritance, or her own interest only.

In 1855 Umamoyi brought a suit against all the representatives of her father's brothers, including Sarodamoyi, claiming for herself and her son the inheritance in a sixth share of the property which had belonged to Bhoirabchandra Rai. For the defence a gift and a partition were set up, both of which, in the end, were found inoperative by the Sadr Court, and on the 31st December 1859, Umamoyi obtained, as next heir, a decree for possession of the property claimed against all the defendants, including Sarodamoyi, together with an order for mesne profits and costs. The judgment of the Sadr Court explains the state of things in the family (S. D. A. Rep., 1859, p. 1659).

Umamoyi, on the 15th December 1866, brought to sale, in execution of the decree in her favour, all the property of the judgment-debtors, and purchased it herself. Among these were the right, title, and interest of Sarodamoyi in the estate of her deceased husband, Norendrochandra Rai, viz., 243 and 118, above mentioned.

Umamoyi made a gift of the property, so purchased by her, to her son, Gaur Mohun Rai, who sold it to the respondent, the Maharaja Jotendro Mohun Tagore.

[987] Sarodamoyi died in 1869, and on her death her deceased husband's brother, Behari Lal, became entitled, as heir, to whatever remained of the estate, if anything remained, after the transfers above mentioned. Behari Lal's estate had been attached, before that date, by one Raghobchandra Banerji

who held a decree against him; and in 1870, after the death of Sarodamoyi, this decree-holder, in execution, sold Behari Lal's interest in 243 and 118. These interests were purchased by the respondents, Rambaksh and Ramdhone, Chetlanghis; and afterwards, in 1878, sold to the appellant Jugul Kishore, who in the same year filed the two suits, out of which this appeal arose, claiming the estates so numbered. In each suit there were three sets of defendants, including the present respondents.

The plaintiff claimed possession of the property on the ground that, at the sale in execution against Sarodamoyi, Umamoyi merely purchased the life-interest of a Hindu widow, and not an estate of inheritance; and that, on the death of Sarodamoyi, the title of the Maharajah who had purchased this limited interest only became extinguished. For the defence it was alleged that the suit of Umamoyi was brought against Sarodamoyi and the co-sharers in the family estate, and that the mesne profits and costs, in respect whereof execution was sued out, were not the personal debts of Sarodamoyi, but were debts incurred in protecting the interests of all those who had any interest in the family estate, as well as her own rights. So that, by the sale on execution, the purchaser acquired no mere life estate terminable on the death of Sarodamoyi, but the estate of inheritance absolutely.

In the Court of First Instance it was held that the decree made against Sarodamoyi was made in a suit in which she was only personally liable, and that the estate, in which she had only a life-interest, did not pass by the sale in execution of decree, as an estate of inheritance.

On appeal to the High Court (GARTH, C J, and McDONELL, J.) that judgment was reversed. It was held that the nature of the suit, and of the decree against Sarodamoyi, must be regarded in order that it might be seen whether, under the sale, her own life-interest only, or the whole inheritance, passed [988] to the purchaser. This depended on whether the suit was brought upon a cause of action personal to her, or upon one which affected the whole inheritance. That test being applied it appeared that Umamoyi's object had been not merely to proceed against Sarodamoyi personally, but to obtain possession of her father's share by inheritance in the ancestral property of which she had been deprived under colour of the alleged gift. In the defence of that suit the heirs after Sarodamoyi were as much interested as she was. Accordingly the whole inheritance was sold in execution. The judgments are printed in the report of the appeal, *Jotendro Mohun Tagore v. Jugul Kishore* (I. L. R., 7 Cal., 357).

On this appeal—

Mr. R. V. Doyne and Mr. J. T. Woodroffe appeared for the Appellant.

Mr. T. H. Cowie, Q.C., and Mr. J. D. Mayne for the Respondent.

For the appellant it was argued that the decree against Sarodamoyi for mesne profits and costs, in execution whereof the sale of the 15th December 1866 had taken place, had proceeded upon a cause of suit which accrued to the decree-holder after the death of Norendrochandra Rai. The debt established against Sarodamoyi for mesne profits and costs was, therefore, a personal liability. Even on the assumption that the respondent's case could rest upon the state of things anterior to the decree, the facts had not established legal necessity for the alienation of the family estate by the widow. In the latter way alone could the right of the heir be affected by a sale of the widow's right, title, and interest. The presumption that arose upon such a sale was, that the widow's estate alone was sold; and the evidence to establish affirmatively that the family inheritance had passed at the execution sale was insufficient.

Reference was made to *Barjun Doobey v. Brij Bhookun Lal Awasti* (I. L. R., 1 Cal., 133; L. R., 2 I. A., 275), *Kistomoyee Dossee v. Prosunno Narain Choudry* (6 W. R., 304), [989] *Ishanchunder Mitter v. Buksh Ali Soudagur* (Marshall's Rep., 614); *General Manager of the Durbhunga Raj v. Maharaja Coomar Ramaput Singh* (14 Moo. I. A., 605).

Counsel for the respondents were not called upon

Their Lordships' **Judgment** was delivered by

Sir B Peacock.—Their Lordships are of opinion that the decision of the High Court is correct, and that it ought to be affirmed

The suits out of which these appeals arise relate to the share in certain joint family property which belonged to Norendrochandra, deceased

The defendants claim through a sale in execution of a decree against Sarodamoyi, the widow of Norendro, who had succeeded to his share.

The plaintiff claims under a purchase at a sale after the death of Sarodamoyi of the alleged interest of Behari Lal, as reversionary heir of Norendro in the said share, in execution of a decree against Behari Lal.

The main question in the case is, as stated by the Chief Justice in delivering the judgment of the High Court, "whether, under the sale of the right, title, and interest of Sarodamoyi in her share of the family property, the whole inheritance in that share passed to the purchaser, or only the widow's interest subject to the right of the reversionary heir to succeed to the property at her death." If the whole heritance passed under the sale in execution of the decree against Sarodamoyi, then the plaintiff is not entitled to succeed. If, on the other hand, the only interest that was sold under that decree was the qualified interest, which is usually called the widow's estate, then the reversionary heir was not bound by it, and the claimants under the purchase at the sale in execution of the decree against him are entitled to succeed.

The suit in which the decree against the widow, Sarodamoyi, was obtained was brought by Umamoyi, who was the daughter of Bhoirabchandra. She brought a suit against the other members of the joint family to recover the share of the property [990] which belonged to her father, who, in his lifetime, was a member of the joint family. Bhoirab having died without parting with his interest, Umamoyi, as his daughter, became entitled to his share of the property; but some of the members of the joint family set up that Bhoirab, before his death, had executed a hibanamah by which he conveyed his share to them. Sarodamoyi and the other members of the joint family, including Behari Lal, were made co-defendants. The record is very defective in many respects. It includes a number of valuations and other documents which are wholly unnecessary for the purposes of this case, and it omits many documents which were very important to be looked at. Sarodamoyi, though made a party to the suit, did not appear. Other members of the family appeared, and set up as a defence to the suit that Bhoirabchandra had conveyed his share by the hibanamah. The first Court dismissed the suit, holding that the hibanamah was a genuine document. Upon appeal to the Sadr Court, that Court held that the hibanamah was not a valid document, or binding upon Umamoyi as the daughter of Bhoirabchandra; and they reversed the decision of the first Court, and decreed that Umamoyi should recover her share of the property, together with mesne profits and the costs of the suit. It was urged in the course of argument that Sarodamoyi never received those mesne profits, but it is unimportant whether she did receive them or not. She was made a party to the suit and did not appear. The other defendants appeared and set up a defence, and it was by reason of

that defence that the principal part of the costs in the suit were incurred. Sarodamoyi not having appeared, she was not represented at the trial, but the case was tried *ex parte* against her upon the evidence which was produced by the other members of the family. Upon that defence the Sadr Court gave a decree against all the defendants. If, in the execution of that decree, Umamoyi had attached and sold the right, title, and interest of all the other members of the family, although one portion of it was represented by the widow, the whole property would have passed to the purchaser. The reversionary interest of Behari would have passed, although the share of Norendro was represented by the widow. If that [991] would have been the case, if the execution had been against the whole property, why should not it be so when the execution was against only the widow's share of the property? The first Judge held that under the execution against Sarodamoyi the reversionary interest of Behari Lal could not have been sold. He was quite right in that respect, because Behari Lal during the widow's life had no reversionary interest to sell, but it was a strong reason why, when the sale was against the widow, who represented her deceased husband's share, the whole interest in the estate should pass under it. It was held in the *Shivagunga* case, that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against the widow in respect of the estate the decision is binding upon the reversionary heir. Their Lordships (9 Moo. I. A., 604) in that case say: "Assuming her"—that is the widow—"to be entitled to the zamindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest"

A difficulty was caused by s. 249 of Act VIII of 1859, which enacted that the proclamation of a sale in execution shall declare "that the sale extends only to the right, title, and interest of the defendant in the property specified therein." In the case of a widow it is necessary that the proclamation shall make that statement. But then there are many cases in which when the right, title, and interest of the widow is sold the whole interest in the estate passes. In other cases the whole interest does not pass. The case depends upon the nature of the suit in which the execution issues. There are many authorities to that effect. It is unnecessary to recapitulate them—they are referred to by the Chief Justice in his judgment in the High Court. If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes. [992] In many of the cases, although the right, title, and interest of the widow had been sold, the whole interest in the estate was held to have passed and the reversionary heir to be bound by it.

In the case referred to. *Barjun Doobey v Brij Bhookun Lall Awasth* (L. R., 2 I. A., 275, I. L. R., 1 Cal., 275) it was held that only the widow's qualified estate passed by the sale in execution. That was a suit brought against a widow for arrears of maintenance. It was stated in the judgment that the maintenance was a charge upon the inheritance; but the Judicial Committee held that the claim against the widow was for a personal debt due by the widow, although the maintenance might be a charge upon the inheritance, still the widow whilst in possession of the estate had received the profits and failed to pay the maintenance. The arrears created a personal claim against the widow, for which she was personally liable. The Judicial

Committee held that the suit was to enforce the personal liability of the widow, and consequently that the execution in that suit passed merely the widow's interest.

Their Lordships think that, upon the authorities referred to by the Chief Justice, the Court was at liberty to look to the judgment to ascertain what was sold under the right, title, and interest of the widow. Looking to that in the present case, their Lordships are of opinion that not only the widow's right, but the whole interest in the estate passed under the sale in execution of the decree.

Under these circumstances, their Lordships will humbly advise Her Majesty to affirm the decrees of the High Court, and the appellant must pay the costs of these appeals.

Appeal dismissed

Solicitors for the Appellant Messrs. Sanderson & Holland.

Solicitors for the Respondents Messrs Miller, Smith & Bell.

NOTES

[DECREE AGAINST HINDU QUALIFIED OWNER—WHEN SALE IN EXECUTION BINDS THE REVERSION—

"If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes".—10 Cal., 985, at 991.

"No doubt it is an important element also to take into consideration the form of the suit and to construe whether the suit is framed so as only to claim a personal decree against a limited owner or a decree which binds the entire inheritance"—(1907) 6 C L. J., 490, at 520.

"If the foundation of the decree be a debt of the character for which the widow could have bound the entire interest, it is sufficiently clear, as the result of Privy Council decisions, that even if the decree is based on the widow's contract, and does not give a charge on the husband's estate, and the reversioners had not been made parties to the suit or execution proceedings, the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser, the reversioner could not defeat the purchaser's title to the property"—(1910) 34 Mad., 188, 20 I. C., 248.

Where the suit for rent was brought against the limited owner alone and in respect of arrears which accrued due after her father's death, and she was in enjoyment of the rents and profits, the liability for rent, it was held, should be regarded as a personal liability and ought not to be held as attaching to the reversion, unless the landlord proceeded to bring the tenure itself to sale under the special provisions of the rent law—(1898) 26 Cal., 285, at 299; see also 17 C. W. N., 337; 16 Cal., 511, mesne profits were made payable under a decree against a Hindu widow and others, being owed by the estate, in a suit for contribution, a decree was passed against the widow in execution of which certain property was sold, it was held that the entire interest passed.—(1895) 22 Cal., 974. See also 16 C. W. N., 1,070.

In (1884) 11 Cal., 45, the debt was the debt of the husband.

In (1898) 17 Mad., 208, it was held an immaterial circumstance whether the debt was the husband's or not, in view of the proceedings *having been* a personal decree against the widow. But this position is hard to maintain. During the proceedings, evidence may be given:—(1912) M. W. N., 49.

It may be noted that in (1893) 17 Mad., 208, this case of 10 Cal., 985, was described as one in which "the decree was passed against the husband." But this appears to be erroneous since the decree appears to have been passed against *Sharodamoyi* herself.

Where there has been a sale of the tenure itself, the ordinary description in execution has been held not to cut down the quantum of interest —(1902) 29 Cal., 813.

The terms 'right, title and interest' of the judgment-debtor, the widow, are not of themselves conclusive as regards what passed by the sale:—(1902) 29 Cal., 813, (1899) 26 Cal., 677.

This case was incidentally referred to in (1885) 9 Bom., 198, where the alienability of *vatan* tenures was discussed:—(1895) 20 Bom., 338 (representative suit against some of several Mahomedan heirs) Reference may be made to Mr. B. Sitarama Rao's excellent article on representative proceedings in the Madras Law Journal:—(1910) 30 M. L. J., p 323.]

[993] APPELLATE CIVIL.

The 15th July, 1884.

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Runjit Singh and othersPlaintiffs

versus

Bunwari Lal Sahu and othersDefendants.*

Execution—Symbolical possession, Effect of.

Where in execution proceedings symbolical possession is given to a person, such possession amounts to an actual transfer of possession as between the parties to the suit; but such possession has no such operation against third persons who are not parties to the suit *Juggobundhu Mukerjee v. Ram Chunder Bysack* (I.L.R., 5 Cal, 584; 5 C.L.R., 548) explained.

THIS was a suit for possession of a certain share in mouzah Rahimapore. So far as is material for the purposes of this report, the following statement of facts will suffice:—

On the 4th May 1866 one Bunwari Lal Sahu, in execution of a decree obtained by him against one Amrit Lal, put up for sale, and himself became the purchaser of, a five-gunda share in mouzah Rahimapore, but in consequence of subsequent litigation he did not obtain possession of these five gundas until the 12th September 1873, when symbolical possession was given to him.

On the 17th September 1866 Mussumat Lagan Kooer (as benamidar of her husband Amrit Lal), sold six gundas of mouzah Rahimapore (in which

* Appeal from Original Decree No. 78 of 1888 against the decree of Alfred C. Brett, Esq., Judge of Tirhoot, dated the 24th of January 1883.

were included the five gundas bought by Bunwari Lal) to one Runjit Singh, who held actual possession of his purchase until forcibly dispossessed by Bunwari Lal on the 18th January 1879.

Runjit Singh, on the 28th July 1882, brought this suit for possession of the five gundas share in mouzah Rahimapore, against Bunwari Lal, Amrit Lal, and the representative of Lagan Coor. Runjit Singh contended that his adverse possession from 1866 to 1879 had put an end to the defendant's title under the sale in execution, whereas Bunwari Lal contended that the symbolical possession given him by the Court on the 12th September 1873 did away with the plea of limitation.

No oral evidence was taken at the hearing, the documents on [994] either side being admitted, with the exception of the *perwana* of the 12th September 1873.

The Subordinate Judge held that the symbolical possession given to the defendants in 1873 had the effect of vesting a sufficient possession in the defendants, so as to prevent the plaintiff's answer to the plea of limitation from setting up as against them a statutory title by limitation, and he therefore dismissed the plaintiff's suit as far as regarded his claim to the five gundas.

The plaintiff appealed to the High Court

Baboo Mohesh Chunder Chowdhry (with him Mr. C Gregory and Baboo Raghunandan Pershad), for the Appellant, contended that the delivery of possession by beat of drums being long after the plaintiff's purchase, and the plaintiff not having been a party to the proceedings in the suit in which symbolical possession was given to the defendants, such proceedings could not affect the plaintiff's title, or be used as evidence against him, and cited *Juggobundhu Mukerjee v Ram Chunder Bysack* (I L. R., 5 Cal., 584, 5 C. L. R., 548), and *Doyanidhi Panda v. Kelai Panda* (11 C. L. R., 395).

Mr. A. H. Khan and Baboo Chunder Madub Ghose for the Respondents.

Judgment of the Court was delivered by

Garth, C J. (BEVERLEY, J., *concurring*).—We think that the learned Judge has made a mistake in this case.

It is admitted that the defendant's purchase was prior to that of the plaintiffs', but the plaintiffs' case was, that as they were in possession of the property from the time of their purchase in September 1866 up to the year 1879, they have acquired a statutory title by limitation as against the defendants.

In answer to this the defendants say that, under their decree against Amrit Lal the plaintiffs' vendor in the year 1873, they obtained symbolical possession of the property in the usual way by process of execution, and the lower Court has held that this proceeding had the effect of vesting a sufficient possession in the defendants to prevent the plaintiffs from setting up as against them a statutory title by limitation.

We think that this is clearly a mistake. Upon reference to the [995] Full Bench case of *Juggobundhu Mukerjee v. Ram Chunder Bysack* (I. L. R., 5 Cal., 584, 5 C. L. R., 548), in which the effect of such a proceeding in execution was fully considered, we held that the delivery in execution of symbolical possession, *as between the parties to the suit*, amounted to an actual transfer of possession from the defendants to the plaintiffs; that being the only means by which, *as between the parties*, the Court could effectuate and carry out its own decree.

But we especially guarded ourselves from saying that symbolical possession would operate as a transfer of possession as against third persons, who were no parties to the suit ; and the reason for this is very plain.

A suit might be brought, and a decree obtained, by a person who has neither title nor possession, against another person, who has neither title nor possession ; and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner, who had been in actual possession, for many years, and who was no party to the suit, it would operate most unjustly.

It will be found that another case, to which we have been referred, viz., *Doyandhi Panda Kelar Panda* (11 C. L. R., 395) is to the same effect.

As against the plaintiffs, therefore, who were no parties to the suit, we consider that the symbolical possession, which the defendants obtained in 1873, was no possession at all.

But then the question remains, whether, as a matter of fact, the plaintiffs have, as against the defendants, acquired a statutory title by adverse possession ? And as the evidence which they were proposing to bring forward upon that point was considered in the view taken by the Judge to be unnecessary, we must send the case back under s. 566 of the Code, in order that the question, whether the plaintiffs have obtained a statutory title against the defendants by adverse possession, may be properly tried. Both parties will be at liberty to adduce evidence on this point, and the Court below will return its finding to this Court, with the evidence taken as early as possible.

We will then finally decide the appeal, and the question of costs will be of course reserved.

Case remanded.

NOTES.

[EFFECT OF SYMBOLICAL POSSESSION—

As against the judgment-debtor this is effective, but not as against third parties.—
8 C. W. N., 49 4 C. W. N., 297, 16 Bom , 722 , 19 Bom , 620 , 5 I. C., 273 , 10 I. C., 319 ,
16 Cal., 530 , 25 Bom , 358 ; 275 ; 21 Bom., 98 , 1 Bom. L. R , 48]

[996] APPELLATE CIVIL.

The 30th July, 1884.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Jeo Lal Singh and others..... Defendants

versus

Gunga Pershad and another... Plaintiffs.*

Right, title, and interest, Sale of, of a registered holder in a tenure—Sale of right, title, and interest—Tenure, Sale of interest of registered holder in a, when there are other joint-holders—Arrears of rent, Suit for, against one of several joint-holders in a tenure who is alone registered—Beng. Act VIII of 1869, ss. 59, 64

In execution of a decree against one of several joint-holders of a tenure, when it is clear that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure had he taken proper steps to do so, or although the purchaser may have obtained possession of the whole tenure under the sale

But if, however, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right, title, and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as a sale of the tenure, the whole tenure must be considered as having passed by the sale

If the question is doubtful on the face of the proceedings, the Court must look to the substance of the matter, and not to the form or language of the proceedings

Where a judgment-debtor was alone registered in the *sherista* of the zamindar as owner of a tenure, but it appeared that his two brothers who were joint in estate with him were entitled to an equal share with him in the tenure, but that the judgment-debtor was the manager, and when it appeared that the zamindar being only entitled to a share in the zamindari had obtained a decree against the judgment-debtor alone for arrears of rent, and in execution thereof proceeded to sell his right, title, and interest under s. 64 of the Rent Act,

Held, that as the judgment-debtor represented his brothers, and as they were equally liable to pay the amount of the decree, upon the principle set out above, the latter were not entitled to recover their share of the tenure which the auction-purchaser had obtained possession of in execution of the decree against the judgment-debtor.

[997] *Doolar Chand Sahoo v. Lalla Chabeel Chand* (L R., 6 I. A , 47), and *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (L R., 6 I. A , 233) commented upon

IN this case the plaintiffs sought to recover possession of two-thirds of a tenure consisting of 50 bighas odd, alleging that it was their ancestral property which had belonged to their father, and on his death had come to them and their brother Gupta Lal.

Gupta Lal, who was the eldest of the three brothers, was the manager of the property, and his name was alone registered in the zamindar's *sherista* as proprietor.

* Appeal from Appellate Decree No. 978 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 6th of January 1883, reversing the decree of Moulvi Mahomed Nurul Hosain, Khan Bahadur, Second Subordinate Judge of that District, dated the 21st of November 1881.

The zamindar, one Mussumat Adhikari Koer, who was entitled to an 8½ annas share of the land in question, brought a suit against Gupta Lal for arrears of rent and obtained a decree. In execution of that decree the right, title, and interest of Gupta Lal in the tenure was brought to sale, and purchased by defendant No. 1, in the names of others who were also made defendants in the suit.

Defendant No. 1, Sew Lal Singh, thereupon took possession of the whole of the tenure, and the plaintiffs accordingly brought this suit to recover their shares, alleging that not being debtors of Mussumat Adhikari Koer the decree against their brother did not affect their interest, and nothing passed to the purchaser except the right, title, and interest of the judgment-debtor. The plaintiffs in their plaint admitted that they were members of a joint undivided family.

Jeo Lal Singh in his written statement denied that he was the purchaser, and pleaded that he was not a necessary party. He further contended that the decree being for arrears of rent, the whole of the tenure was liable, and that the plaintiffs had therefore no right to object to the sale of their interest therein.

He also raised several other issues which are immaterial for the purposes of this report.

The first Court found on the facts that the rent account of the *kasht* sold stood in the name of Gupta Lal, that he was in arrears, and that as the suit was brought against him and the sale held in exe-[998]cution of the decree in that suit, the plaintiffs must also be taken to be debtors by implication. That they having failed to pay their rent and protect their right, they could not now come in and claim that their rights had been protected for them.

That s. 59 of the Rent Act was inapplicable to the case, and that the property sold was sold for the debt for which the whole family was liable, and not for Gupta Lal's own personal debt.

The plaintiff's suit was therefore dismissed with costs.

This decision was, however, reversed by the lower Appellate Court, which held that, as the sale took place under s. 64, the zamindar was no better off than an ordinary decree-holder who sold under a money decree, and therefore that he could only sell what his judgment-debtor possessed. that the plaintiffs being parties to the suit and not being bound to pay their brother's debt in the way in which they would have been bound had he been their father, their rights in the property were not affected by the sale. The Court also held that it made no difference that the name of Gupta Lal was alone registered in respect of the property.

The decree of the lower Court was therefore reversed, and the plaintiffs obtained a decree for possession of two-thirds of the property.

The first defendant, Jeo Lal Singh, now specially appealed to the High Court.

Baboo Mohesh Chunder Chowdhry, Munshi Mahomed Yusoof, and Mr. C. Gregory for the Appellant.

Baboo Chunder Madhub Ghose and Baboo Sahgram Singh for the Respondents.

The Judgment of the Court (GARTH, C.J., and BEVERLEY, J.) was delivered by

Garth, C.J.—The two plaintiffs in this case are the brothers of Gupta Lal, the defendant No. 4, and they bring this suit to recover from the defendant No. 1 possession of their shares of an ancestral tenure which belonged to their father Jugrup Mahton.

This tenure was held under two zamindars, one of whom, Mussumat Adhikari Koer, was entitled to an 8 annas odd share in it, [999] and the other zamindar to the residue, the collections of the two zamindars being made separately.

The defendant Gupta Lal was the eldest of the three brothers and the manager of the property, and his name only was registered as the proprietor of it in the zamindar's *sherista*.

The rent being in arrear, Adhikari Koer sued him (Gupta Lal) for her share of it, and obtained a decree. But being only a part-proprietor, she could not sell the entire tenure under s. 59 of the Rent Law, but she brought to sale under s. 64 the right and interest of Gupta Lal, the judgment-debtor, and Jeo Lal Singh *ahas* Kushi Singh, the defendant No. 1, became the purchaser.

Under this purchase the defendant No. 1 obtained possession of the whole tenure, whereupon the two plaintiffs, the brothers of Gupta Lal, who were each undoubtedly entitled to a share in the property, brought this suit to recover possession of their shares.

They contend that, as the sale was only of the right and interest of Gupta Lal, his share only in it passed to the purchaser.

The defendant No. 1, on the other hand, says that, as the decree was for rent due from all the brothers, and as the defendant No. 1 was the manager and sole registered owner, representing all the brothers, the whole interest in the tenure passed by the sale.

The first Court dismissed the suit, but the Judge has given the plaintiffs a decree.

Against this the defendant No. 1 has appealed, and the only question is, what passed by the sale to defendant No. 1.

Upon this point we have been referred to two cases decided by the Privy Council.

The first of these, which is relied upon by the plaintiffs, is *Doolar Chand Sahoo v. Lalla Chabeel Chand* (L. R., 6 I. A., 47).

In that case one Gooder Khan and his three sisters were entitled as heirs to their father Bachoo Khan to a tenure consisting of a certain mouzah, Gooder Khan's share being 7 annas odd, and his sisters being entitled in separate shares to the residue.

[1000] The rent of this tenure being in arrear, the zamindar brought a suit against Gooder Khan for the whole rent, and obtained a decree, and in execution of that decree he applied by petition for a sale, not of the tenure itself, which he might have done, but "for an attachment" and sale of the "judgment-debtor's property in it."

An order was made in accordance with that petition, and the sale notification expressly stated: "The rights and interests of other persons in the said property will not be sold by auction, besides that of the judgment-debtors." Doolar Chand and others became the purchasers at the sale, and the sale certificate was in these terms:—

"Hence this certificate being made over to Doolar Chand, Baijnath and Ram Saran Sahoo, the auction-purchasers, it is proclaimed, that whatever rights and interests the judgment-debtor has in the property aforesaid have ceased to exist from the 25th of July 1872, the date of the auction sale, and become vested in the auction-purchasers."

Thereupon the purchasers were let into possession of the entire tenure, and a suit was afterwards brought against them by a person who had acquired the shares of the three sisters to recover possession of those shares.

In that suit the question arose, whether by the sale in execution the whole tenure passed to the purchasers, or only Gooder Khan's share in it.

It was one important element in that suit (which appears from the report of the High Court's judgment, but does not appear in the report of the case before the Privy Council) that the name of the registered owner of the tenure in the zamindar's *sherista* was Bachoo Khan, the father, who was dead; and as the parties were Mahomedans, Gooder Khan and his sisters did not constitute a joint undivided family, as they might have done if they had been Hindus.

Their Lordships held, under these circumstances, that as the zamindar, the decree-holder, sued Gooder Khan alone, and as instead of selling the whole tenure, as he might have done, he sold only the right and interest of one of the heirs, Gooder Khan; and as the sale notification and sale certificate expressly confined [1001] the sale to the right of Gooder Khan, the shares of the sisters did not pass to the purchasers.

The other case to which we were referred is *Bissessur Lall Sahoo v. Maharajah Luchmessu Singh* (L R, 6 I.A., 233).

In that case two decrees had been obtained against one member only of a joint Hindu family for sums due for the rent of a mouzah, which had been taken on lease, as the Privy Council found, for the benefit of the family. Under these decrees certain property, which belonged to the joint family, was sold in execution and the question afterwards arose in the case to which we are now referring, whether, under that sale, the whole of the property passed to the purchaser, or only the share of the member of the family against whom the suits were brought, and it was held by their Lordships, that although there was some informality with regard to the form of the decrees, still as the decrees were obtained against the representative of the family in respect of a family debt, they could properly be executed against the joint property of the family.

Their Lordships, after referring to some other authorities in support of that view, say, "that in execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution on mere technical grounds when they find that it is substantially right."

We think that these two cases afford an apt illustration of the principle by which we should be guided in the decision of the present case.

Where it is clear from the proceedings that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure if he had taken proper steps to do so, or although the purchasers may have obtained possession of the whole tenure under the sale.

But if, on the other hand, it appears that the judgment-debtor has been sued as *representing the ownership of the whole tenure*, and that the sale, although purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate, as a sale of the tenure, the [1002] whole tenure then must be considered as having passed by the sale. And if the question is a doubtful one on the face of the proceedings or one part of those proceedings may appear inconsistent with another, the Court must look to the substance of the matter, and not the form or language of the proceedings.

The case of *Doolar Chand* illustrates the first of these propositions, the case of *Bissessur Lall Sahoo* illustrates the second.

Now, in the present case, Gupta Lal, the defendant No. 4, was not only the manager, but the sole registered owner of the tenure, and Adhikari Koer, in claiming against him the entirety of her share of the rent, took the ordinary and proper course of suing the tenant, who in the zamindar's *sherista* represented the entire tenure.

Moreover, when she had obtained her decree, she was unable, as she only owned a share in the zamindari interest, to sell the whole tenure under s. 59. She could only obtain her execution in the way in which she proceeded to enforce it, namely, by selling the right and interest of the judgment-debtor under s. 64.

But as between her and the persons interested in the tenure she had a right to treat Gupta Lal as the sole owner of the tenure, and when she sold his right and interest for the rent due, she was, in our opinion, selling the tenure itself.

As his name was registered as the sole owner of the tenure, he represented his brother's interests in it as well as his own. The rent was due from them all, though he alone was sued for it, and as they were equitably liable to pay the amount of the decree, it was only just that their interests as well as his should be sold to satisfy it.

We think, therefore, that the judgment of the District Judge should be reversed, and that of the Subordinate Judge restored, with costs in both Courts.

Appeal allowed.

NOTES.

[SALE IN EXECUTION—WHEN INTEREST OF PARTIES OTHER THAN JUDGMENT-DEBTOR PASSES—

Prima facie, a person who is not a party to the suit cannot be affected in person or property by anything that is done in the suit.—1 C. L. J. 500 at 514, 13 C. W. N., 270 at 272; 26 Cal., 677 at 697.

An exception exists under the statutory provisions of the Rent Law whereby the whole tenure may be brought to sale in proceedings against the registered tenant alone.—13 C. W. N., 270 at 272. Where the statutory procedure is not followed, the sale is to be treated as if it were a sale in execution of an ordinary money decree—(1903) 30 Cal., 550, 30 I. A., 81 at 87. A suit by the assignee of the decree who was not also the assignee of the land does not come within this.—(1904) 1 C. L. J., 500, nor is a suit under the Public Demands Recovery Act.—6 C. W. N., 302.

Another exception is where proceedings are taken against persons holding a representative character, (e.g., persons having power to act on behalf of, or to deal with the interest of, others) in circumstances justifying their being treated as representative proceedings.—13 C. W. N., 270 at 273.

Such circumstances have been recognised when the defendant was the *Karta* of the Mitakshara family.—10 Cal., 996 (as explained in 13 C. W. N. 270, 13 C. W. N., 746 at 749, but see also the different explanation in 26 Cal., 677 at 699 where this point is treated as immaterial), (1890) 14 Bom., 597, when the defendant had been, as a matter of fact, the person held out by the unrecorded persons as their representative in other suits.—(1899) 26 Cal., 677; when the persons sued are all the registered owners, representing, consequently, the ownership of the whole tenure—(1884) 10 Cal., 996 as explained in (1899) 26 Cal., 677 at 699 which is explained in 10 C. W. N., 176, see also (1887) 13 C. W. N., 270 at 273 where this case was doubted;

Accordingly the presumption was not applied where the co-sharers were Mahomedans, one of whom alone was registered in the *sherista*, (1888) 13 C. W. N., 270, nor where the unrecorded tenant's interest had been transferred, as the recorded tenant presumably did not represent the transferee, 10 C. W. N., 176, nor where the sale had been held at the instance of a fractional landlord for his share of the rent—(1905) 10 C. W. N., 176 at 180, 4 C. L. J., 68, (1909) 13 C. W. N., 746.

A suit would lie for declaration of liability to sale in execution of the interests of persons not made parties thereto.—(1895) 23 Cal. 302.]

[1003] APPELLATE CIVIL.
The 30th July, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Ram Pershad Chowdry and others.....Plaintiffs
versus
Jokhoo Roy and another.....Defendants.*

Declaratory suit, Ground of—Waste by a Hindu widow—Mitakshara Law.

It is open to a Hindu widow to give over possession to a stranger to the extent of her interest in the estate, but actually to favour the claims of the latter, and allow him to enter his name in the landlord's *sherista*, would have the effect of setting up an adverse title as against the reversionary heirs, upon which a declaratory suit could lie

THE plaintiffs, as the brother's sons of one Bikramajit, brought this suit for possession of thirty-nine highas fifteen biswas of culturable and orchard land in mouzah Bilaur, pergunnah Pawar, on the allegation that Mussumat Khati (defendant No. 2), who held the property as the widow and sole heiress of Sheo Shahai Chowdry, the only son of Bikramajit, had, in collusion with Jokhoo Roy (defendant No. 1), given up the entire possession of the property to him, and allowed him to record his name in the landlord's *sherista*. The plaint also prayed that it might be declared that defendant No. 1 had no right of inheritance to the property. Jokhoo Roy, the principal defendant, contended that inasmuch as the husband of Khati had predeceased his father, he (the defendant) held the property through his mother, the daughter of Bikramajit, on whom the property had descended in the ordinary course of succession, nor were Sheo Shahai or his widow ever in possession of the property.

The Munsif found that Sheo Shahai had succeeded to his father, and the widow having died after the institution of the suit, gave the plaintiffs a decree as reversioners under the Mitakshara law.

On appeal the Subordinate Judge dismissed the suit, on the ground that the plaint disclosed no cause of action, and that "the mere fact of causing or allowing another's name to be registered in the landlord's *sherista* is not waste, so as to entitle the reversioner to step in and take possession of the property."

[1004] The plaintiffs appealed to the High Court.

Baboo Chunder Madhub Ghose and Baboo Romesh Chunder Bose for Appellants.

Baboo Mohesh Chunder Chowdhry and Munshi Mohamed Yusoof for the Respondents.

The facts and arguments fully appear in the **Judgment** of the Court* (GARTH, C. J., and BEVERLEY, J.) which was delivered by

Garth C. J.—The plaintiffs in this case are the heirs of the brothers of one Bikramajit Singh, who is said to have died in 1252 fusli.

Bikramajit admittedly left a widow called Sabja, and a daughter, called Moona, who is the mother of the defendant No. 1. He also had a son, Sheo Shahai Singh, whose widow, Khati, is defendant No. 2; and one,—the

* Appeal from Appellate Decree No. 1012 of 1883 against the decree of Baboo Troiloky-Nath Mitter, Second Subordinate Judge of Shahabad, dated the 26th of March 1883, reversing the decree of Moulvi Abdul Aziz, Third Munsif of Arrah, dated the 18th of March 1882.

main—issue in the case, so far as the question of title is concerned, is, whether or not this son survived his father.

The plaintiff's case was that he did survive his father, and that after his death his estate descended to his widow, Khati, and that they (the plaintiffs) were the reversionary heirs.

The defendant's case, on the other hand, was that Sheo Shahai Singh died before his father, and the estate then passed to Bikramajit's widow, Sabja, and after her death to their daughter, Moona, who, with her son, the defendant No. 1, has taken possession of the property.

The plaintiffs brought this suit on the following allegations. They say, in paragraph 2 of the plaint, that after Sheo Shahai's death his widow, Khati, came into possession of the estate, and that Sheo Shahai's mother, that is Sabja, used to live jointly with Khati, and receive her maintenance up to the time of her death in 1276.

Then in paragraph 5 they go on to say that the defendant No. 1, having fraudulently brought the defendant No. 2 under his influence, entered upon possession from Agrahan 1277; and (in paragraph 6) that defendant No. 2 having relinquished her right and possession, and having got the name of defendant No. 1 registered, has put him into possession.

[1005] And they accordingly pray that their title as reversioners may be declared as against defendant No. 1, and that in consequence of defendant No. 2 having wrongfully given over the property to defendant No. 1, they, the plaintiffs, may be declared entitled to recover immediate possession of it.

The defence was, as already stated, that the plaintiffs had no title as reversionary heirs, that Sheo Shahai died before his father, and consequently that his widow, Khati, the defendant No. 1, never inherited the property, but that, on the contrary, first, Sabja, and after her death in 1264, the defendant No. 1 and his mother Moona, have been in adverse possession.

Defendant No. 2 died during the pendency of the suit, and for this reason the first Court (erroneously as it seems to us) did not think it necessary to try the question of possession. Having found as a fact that Sheo Shahai survived his father, the Munsif came to the conclusion that the plaintiffs were entitled to a decree for possession, as being the reversionary heirs.

It is clear, however, that if Sabja and Moona, and the defendant No. 1 have been all along in adverse possession as against Khati, this circumstance, though it might not operate to bar the plaintiffs' title as reversioners, may nevertheless be important as showing that Sheo Shahai never in fact succeeded to his father's estate. Khati was admittedly out of possession at the time when the suit was brought, and it is a circumstance well worthy of consideration that the plaintiffs put the death of the mother Sabja at so recent a period as 1276.

The Subordinate Judge disposed of the case on a ground quite irrespective of the question of title. He held that, assuming the plaintiffs to be the reversionary heirs, the plaint disclosed no valid cause of action, and he accordingly dismissed the suit, leaving the question of rights to be determined hereafter.

It has been contended before us that this decision of the lower Appellate Court was wrong; and that the plaint, as originally framed, disclosed a sufficient cause of action.

It seems clear to us that, so far as the suit was one for immediate possession, it could not have been brought during the lifetime of Khati. Assuming, for the sake of argument, that the estate was properly vested in her, she had a right, of course, to dispose of [1006] it for the term of her life in any manner she thought fit. But it is clear from the plaint and written statement, as well

as from the issues raised in the first Court, that the mere fact of the defendant No. 2 having given up to the defendant No. 1 the temporary possession of the property, is by no means the real cause of complaint.

It is obvious that the question between the parties is a very serious one of title, and possibly also of adverse possession; and what the plaintiffs say is, not that the defendant No. 2 has merely allowed the defendant No. 1 to enter upon possession *in her interest*, but that she had favoured his claims to the ownership of the property as against those of the plaintiffs and that he has accordingly had his name registered in the landlord's *sherista* as the trueowner.

This is in fact setting up an adverse title as against the plaintiffs; and it is plain from the written statement and the issues that this is the declared intention of defendant No. 1.

The suit, therefore, seems to us to be precisely one of those which are referred to by the Privy Council in the late case of *Isri Dut Koer v. Hansbutti Koerain* (I. L. R., 10 Cal, 324).

In that case a Hindu widow had alienated her husband's estate, not for any legal necessity, or for her own personal benefit, but with a view to change the succession, and to give the inheritance to her own heirs, in preference to those of her husband; and the latter, under these circumstances, brought a suit to obtain a declaration, that the alienation made by the widow was only valid for her life, and void as against the reversionary heirs.

The High Court in that case had refused to interfere, but the Privy Council held that the plaintiffs were entitled to a decree.

In page 332 of the report their Lordships say --

"It is laid down, and in their Lordships' opinion correctly, in Shyama Charan Sircar's *Vyavastha Darpana*, that if a widow, without consent of her husband's heirs, dispose of his property for purposes not sanctioned by law, they are entitled to interfere, and prevent any such wrongful alienation by her, yet it is clear, that a widow may alien her own interest. If then she executes [1007] a conveyance valid for her own interest, but purporting to convey a larger interest to the grantee, it is difficult to see how the reversioner can get any relief, except by a declaration that the conveyance is void *pro tanto*.

He cannot set the deed aside, because it is partly valid, nor can he affect the possession, which the widow has a right to keep or to give up to another. Such suits as this would seem to be, at least in many cases, the only practical mode of enforcing the heir's right to interfere with a widow's alienation."

The principle thus laid down by their Lordships appears to us to apply, almost with greater force, in the present instance.

The defendant No. 2 is not only charged by the plaintiffs with having made an alienation of her property, which might be good for her life, and void as against the reversionary heirs, but they say that she has relinquished the property in favour of a rival claimant, the defendant No. 1, who, apparently, with her full consent and concurrence, has been registered as the absolute owner.

It appears to us that this is the very case in which the reversionary heir is justified in asking the Court to interfere.

It is true that under the present Limitation Act his rights as against the rival claimant might not be affected by limitation (see the Full Bench case of *Srinath Kur v. Prosunno Kumar Ghose* (I. L. R., 9 Cal., 934); but it is obvious that, apart from limitation, cases may, and often do occur, in which silence, or apparent acquiescence on the part of a reversioner, in assertions of his rights as against the wrongful acts of a rival claimant, may throw a cloud over his title, and tend seriously to jeopardise his rights.

In such cases it is often most desirable, in the interests of justice, that the question should be brought before the Court with as little delay as possible, and we consider that in this instance the plaintiffs were perfectly justified (assuming, of course, that their title is what they state it to be), in asking for the assistance of the Court. The case must, therefore, go back to the Subordinate Judge in order that the issues may be properly tried with a due regard to these observations.

The costs in both Courts will abide the result.

Case remanded.

NOTES.

[As to when reversioner can sue for declaration that the alienation by a Hindu widow are not binding, see 32 Cal., 62, 18 M. L. J., 275, 8 A. L. J., 454, 11 Cal., 791, 14 Bom., 512.]

[1008] APPELLATE CIVIL

The 30th July, 1884

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Nundo Pershad Thakur. . . . Plaintiff

versus

Gopal Thakur. . . . Defendant

Pre-emption—Ceremonies—Claim where there are several co-sharers—Tender of price for the land claimed—One out of several co-sharers claiming a right to pre-emption

A person seeking pre-emption declared his right thereto when he first heard of the sale in the presence of witnesses, and, as soon as was possible on the same day, in the presence of the same witnesses, demanded his right from the vendors and the purchasers. *Held*, that it was unnecessary that he should again state when making his demand, or that his witnesses should testify to the fact, that he had declared his right as soon as he heard of the sale.

The principle of the law of pre-emption is that the pre-emptor should assert his right as soon as he has heard of the sale, that he should demand his right from the vendor, or purchaser, or on the ground, in the presence of witnesses, and this assertion and demand may be simultaneous; but if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before witnesses that he asserted his right when first he heard of the sale.

In a suit for pre-emption it is unnecessary to prove a tender of the actual price paid for the property claimed, it being sufficient if the person claiming the right to pre-emption states that he is ready to pay for the land such sum as the Court may assess as the proper price for the property.

Under the *Sumi*-law the right of pre-emption may be exercised by one or more of a plurality of co-sharers.

THIS was a suit claiming a right of pre-emption over certain lands sold by defendants Nos. 4 and 5 to defendants Nos. 1, 2 and 3.

* Appeal from Appellate Decree No. 659 of 1883, against the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of Tirhoot, dated 29th of December 1882, reversing the decree of Moulvi Mahomed Nurul Hosain, Munsif of Tajpore, dated 31st of January 1882.

The plaintiff sued as a *shofa khulst* to obtain his right of pre-emption over a ten-gunda two-cowrie share in mouzah Bishenpur Lukhmi, bearing the touzi No. 1656. The share claimed was sold by defendants 4 and 5 to defendants 1, 2 and 3 under a *kobala*, dated the 1st June 1881.

This *kobala* purported to sell-a share in mouzah Rampur [1009] Bishen as well as the share claimed in the suit, and the consideration for the two shares was set out as Rs. 700. no specified separate sum being set out as the value of either of the shares sold. It appeared that mouzah Bishenpur had been partitioned into two estates bearing touzi Nos. 1656 and 1657, and that the plaintiff was a shareholder in No. 1656, in which the defendants 4 and 5 had also a share, the defendants 1, 2 and 3 being the shareholders of No. 1657.

The plaintiff stated that he first learnt of the sale from one Jhullu Thakur who, on the 15th July 1881, at mouzah Bishenpur, informed him that the share claimed had been sold for Rs. 400. And that on the same day he performed the ceremony of *talubi-mowasibat*, by exclaiming—"I have purchased the property sold for a consideration of Rs. 400," and at the same time called upon the persons present in the assembly to bear witness; that on the same day he duly performed the ceremony of *talubi-ishhad*, by taking with him the purchase money and witnesses and going to the house of the defendants 4 and 5 in mouzah Kusour, and after asserting his right of purchase, demanding the return of the *kobala*, and calling upon the witnesses to bear testimony; that, on the refusal of the defendants 4 and 5 to return the *kobala*, he went accompanied by witnesses to the first defendant, Gopal Thakur, and asserted his right and asked for the return of the *kobala*, calling upon the witnesses to bear testimony, and that he subsequently went to the defendants 2 and 3, accompanied by witnesses, and in the same manner asserted his right of pre-emption and asked for the return of the *kobala*, and that he lastly went to the locality of the share claimed, and proclaimed his right of pre-emption in the presence of witnesses, and performed the ceremony of *talubi-ishhad*, calling upon his witnesses to bear testimony to the fact. That, on the defendants refusing to return the *kobala* he brought this suit, asking that his right might be declared on payment of Rs. 400 or such other sum as might be found to be the value of the property claimed.

Defendants 1, 2 and 3 stated that, although mouzah Bishenpur had been partitioned by the Collector into two distinct kulum, and although they were not the proprietors of the kulum in which lay the share claimed in the suit, they were shareholders in the [1010] other kulum, and as the *julker* and *nimaksayer* and 70 bighas of cultured land had not been partitioned but belonged jointly to both kulum, they were therefore joint proprietors with the plaintiff in these lands and no right of pre-emption could be claimed as against them, and they further contended that the two ceremonies had not been duly performed, and that the plaintiff was aware of the sale prior to the 15th July 1881.

The Munsif found that the defendants 1, 2 and 3 could not be considered co-sharers with the plaintiff, and that, therefore, the latter had a right to bring the suit; that the two ceremonies had been duly performed; and that the plaintiff was unaware of the sale until the 15th July 1881.

The defendants appealed.

The Subordinate Judge found that the plaintiff had other co-sharers in the estate No. 1656, who had not been made parties to the suit; and that the right of pre-emption was extinguished where there were several sharers in the estate claimed and where, as in this case, it had not been shown that the other co-sharers had surrendered their claim to pre-emption; and further that the plaintiff was bound to prove that Rs. 400 was the price given for the share he

claimed, and that he had failed to do so; that he had duly made his claim in the *talubi-mowasibat*, and that the plaintiff had not declared, when performing the *talubi-ishhad*, nor had his witnesses testified to the fact, that the principal demand by invocation of witnesses had been duly made. He therefore allowed the appeal and dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Uma Kali Mookerjee* for the Appellant.

Baboo *Rajendro Nath Bose* for the Respondents.

Judgment of the Court was delivered by

Garth, C. J.—We think the Court below has fallen into error on several points of law in this case.

The facts are these : Mouzah Bishenpur Lukhmi, otherwise called Gahi, has been partitioned into two estates, bearing Nos. 1656 and 1657 on the touzi of the Mozufferpore District. The plaintiff is a proprietor of No. 1656, in which the second [1011] party defendants had also a small share. This share they sold to the first party defendants, who are proprietors in estate No. 1657. The plaintiff accordingly brought this suit to establish his right of pre-emption to purchase the property so sold.

Now it appears that, at the time the butwara was made, the *julkur*, *nimaksayer*, and some 70 bighas of culturable land were left in the joint possession of the proprietors of both estates, and were not partitioned, and the plaintiff and the first party defendants were both joint co-proprietors in the same. The Subordinate Judge considers that this circumstance gave the first party defendants a right equal to that of the plaintiff to purchase the property in question. But this clearly is not so. The plaintiff, who was a co-sharer of the defendants second party in No. 1656, had a preferential right of purchasing lands forming part of that patti as against the defendants first party. The case quoted by the Subordinate Judge—*Golam Ali Khan v. Agurgeet Roy* (17 W. R., 343)—appears to be precisely in point. The Subordinate Judge attempts to distinguish it on the ground that in this case there were 70 bighas of "cultivated and ryatti lands" left *ymah*, but we think this is a distinction which makes no difference in the present case.

Then it appears that there are other co-sharers in estate No. 1656, and the Subordinate Judge seems to think that for this reason the plaintiff's suit will not lie.

But here, again, we think he is in error. The provision of the Mahomedan law, on which he has relied, is peculiar to the Imamiyah Code, which is not generally applicable in this country. The Sunni law, which prevails here, allows the exercise of the right by one or more of a plurality of co-sharers (Tagore Law Lectures for 1873, pp. 518-19). Moreover, it does not appear that this objection was either taken in the written statement, or when the issues were framed between the parties.

The next point on which we think the Subordinate Judge erred is this : It appears that at the time when the first party defendants purchased the property in suit, they also by the same [1012] conveyance purchased a share in another property, and the consideration paid for both properties was Rs. 700. The plaintiff alleged that the price assessed by the parties for the property in suit was Rs. 400, but he offered in his plaint to pay any further sum which the Court might find the property to be worth. The first party defendants did not deny this allegation, and no issue was raised upon the point. The allegation was, moreover, supported by the statement of one of

the vendors. We think the Subordinate Judge, therefore, was wrong in saying that the plaintiff was bound to prove the alleged separate price for the land in suit, and in finding that he had not offered a proper price for the property. We think that it was impossible to gather from the defendant's written statement that this objection would be raised in the suit; and that if the Subordinate Judge considered it a proper objection to be taken for the first time in appeal, he should have remanded the case, in order to give the plaintiff an opportunity of proving his allegation. But in point of fact it has been frequently ruled, that a tender of the price paid is not necessary in such cases; and that it is sufficient if the person seeking pre-emption agrees to pay any sum which the Court may assess as the proper price of the property. See *Jahangeer Buksh v. Bhickaree Lall* (11 W. R., 71), *Heera Lall v. Moorut Lall* (11 W. R., 275); *Nubee Baksh v. Kaloo Lashker* (22 W. R., 4); and *Lalga Prasad v. Debi Prasad* (I. L. R., 3 All., 236)

The real defence to the suit was not that the price offered was insufficient, but that the plaintiff was aware of the purchase long before the date on which he says he became aware of it; and that, in fact, the property was offered to him and that he declined to purchase it. This defence has, so far as we can see, completely broken down

Lastly, the Subordinate Judge says. "Then as to the performance of the ceremonies of *talubs*, I see that the principal demand by invocation of witnesses was not, even according to the statements of the plaintiff's witnesses, duly made. For one of the main ingredients in the *talubi-ishhad* is the declaration by the *shafi* that he made the claim in the *talubi-mowasibat* (i.e., immediately after the hearing of the sale) and this none of the plaintiff's witnesses testify that the plaintiff [1013] did. That an omission to do this is fatal to the plaintiff's suit was held by the High Court, in accordance with the provisions of the Mahomedan law in a case which was cited from page 462, vol. 24, of Sutherland's Weekly Reporter."

Now, what the Subordinate Judge means in this passage is apparently this:—that the plaintiff's witnesses do not say that at the time of the *talubi-ishhad* the plaintiff stated, in their presence, that he had claimed his right of pre-emption (in other words, performed the *talubi-mowasibat*) as soon as he heard of the sale. And this omission on the plaintiff's part, the Subordinate Judge, relying on the ruling of this Court in the case cited by him, considers to be fatal to his suit. The facts of that case are not set out in the report, and it may be that some considerable time elapsed between the performance of the two ceremonies. In the present case, however, the two ceremonies followed immediately upon one another, if indeed they were not performed simultaneously. It would appear from the authorities that the *talubi-ishhad*, or demand with invocation of witnesses, should take place *either in the presence of the vendor or of the purchaser, or on the land* which is the subject of dispute. The Hedaya says that the ceremony is performed "by the *shafi* taking some person to witness, either against the seller (if the ground sold be still in his possession) or against the purchaser, or upon the spot regarding which the dispute has arisen," and the form of affirmation should be to the following effect: "Such a person has bought such a house, of which I am the *shafi*; I have already claimed my privilege of *shafa* and now again claim it; be therefore witness thereof."—(Hedaya, III, 571-72). And the Futawa Alamgiri (V. 268) tells us that this ceremony is only necessary "if at the time of making the *talubi-mowasibat* or immediate demand, there was no opportunity of invoking witnesses; as for instance, when the pre-emptor at the time of the hearing of the sale was absent from the seller, the purchaser and the premises." But if he

heard it in the presence of any of these and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other. The principle of the law indeed seems to be this : *First*, that the pre-emptor should assert his right as soon as he hears of the sale ; and, [1014] *secondly*, that he should demand his right from the vendor or purchaser or on the ground in the presence of witnesses , and of course this assertion and demand may be simultaneous. But if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before the witnesses that he asserted his right when first he heard of the sale. And the reason of this seems to be that, in the absence of witnesses at the time of the assertion or *talabi-mowasibat*, the declaration of the pre-emptor himself shortly afterwards was good evidence that he had really asserted his right without delay. But in this case the witnesses in whose presence the plaintiff demanded his right from, first, the vendor, and then the purchasers, were also present when he first heard of the sale, and asserted his intention of claiming his right. It was, therefore, unnecessary for him to go through the form of reminding them that he had claimed his right as soon as he heard of the sale. The witnesses all say that they proceeded at once with the plaintiff to the houses of the vendors and the purchasers, and that he then and there demanded his right of pre-emption. Under these circumstances, we think that it was not necessary that the plaintiff should go through the empty form of reminding the witnesses of what they had just heard. We may add that it does not appear that this objection was taken in the first Court.

Finding then, as we do, that the lower Appellate Court has fallen into several errors on points of law, we must set aside its decree, and send the case back for a new trial. We think that the costs in both Courts should abide the event

Case remanded. •

NOTES.

[This case was overruled in (1890) 17 Cal , 543 ; and this overruling case was followed in (1894) 16 All , 983 , (1898) 20 All , 457 , 499 . (1904) 27 All , 163 See also (1911) 34 All , 1 , 1 A L J , 569 . 6 S. L. R. , 107]

The 8th August, 1884.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

A. B. Miller, Offg. Receiver of the High Court (in respect of the Estate of
Khettermoni Dassee).....Defendant
versus
Ram Ranjan Chakravarti.....Plaintiff. *

Receiver—Sanction of the Court for Receiver to sue and be sued.

The Receiver of the High Court does not represent the owner of the estate for which he is Receiver, but is merely an officer of the Court, and as such cannot sue or be sued, except with the permission of the Court.

[1015] THE plaintiff who was a co-sharer with the defendants in a certain zamindari, Shah Alampore, sued his co-sharer (each of whom collected and received their share of the rents of the zamindari separately) for a sum of Rs. 44,030, which he alleged he had paid away for Government revenue in order to preserve the entire property from being sold for arrear of Government revenue.

It appeared that by mutual arrangement with defendant No. 1, Khettermoni, the plaintiff, had been in the habit, for several years, of paying the share of Government revenue due from defendant No 1, who was the zamindar of a 3-anna share and durpatnidar of a 6-gunda share in the estate, setting the payment off against certain moneys due by him to defendant No. 1 for the rent of certain patni and durpatni tenures, and adjusting the account of such payments. On the 12th June 1880, the estate of Khettermoni was, by order of the High Court, placed in the hands of the Receiver of the High Court.

Subsequently to this last-mentioned order, the plaintiff paid the Government revenue according to the arrangement above mentioned, and applied to the Receiver of the High Court to adjust the account, but no adjustment having been come to, he brought this suit for the purposes above mentioned, making both Khettermoni and the Receiver, with his other co-sharer, parties to the suit. It did not appear that the plaintiff had, however, obtained the permission of the Court to institute the suit against the Receiver.

The defendant No. 2, the Receiver of the High Court, put in a written statement, and stated therein that he had obtained permission of the Court to defend the suit, contending that being "a public officer" he was entitled to notice of suit under s. 424 of the Civil Procedure Code, and that being in possession under an order of the High Court, he could not be disturbed in such possession without the leave of the Court, and that such leave not having been obtained, the suit ought to be dismissed.

The defendant Khettermoni also put in a written statement which is immaterial for the purposes of this report.

The Subordinate Judge found that notice under s. 424 was not necessary, the suit not being one for damages on account of any wrong done by the Receiver in his official capacity and in the [1016] discharge of his official duties; referring to the case of *Shahebzadee Shahunshah Begum v. Ferguson*

* Appeal from Original Decree No. 268 of 1882 against the decree of S. H. C. Taylor, Esq., Judge of Beerbhoom, dated the 30th of June 1882.

(I. L. R., 7 Cal., 499). And as regards the point of sanction, he found that no authority had been produced for the contention that the sanction of the High Court must be first obtained before suing its Receiver; and on the merits, after setting off a certain sum due to the Receiver as rent, gave the plaintiff a decree for a part of his claim.

The Receiver, defendant, appealed to the High Court.

Mr. Sale, Mr. Dunne, and Baboo Bhobani Churn Dutt for the Appellant.

Baboo Mohini Mohun Roy and Baboo Surrendra Nath Muttyloll for the Respondent.

Mr. Sale contended that the possession of a Receiver was merely the possession of the Court, and that any attempt to disturb that possession without leave of the Court was contempt of that Court.

That a Receiver, being in the position of an agent for the owner, and having no interest in the property, could not be made personally liable and ought never to be a party, either as plaintiff or defendant, citing *Wilkinson v. Gangadhar Sirkar* (6 B. L. R., 486), *Kerr on Receivers*, pp 124, 126, 156; *De Winton v. The Mayor of Brecon* (28 Beav., 203), *Ames v The Trustees of the Birkenhead Docks* [20 Beav., 332 (353)]; *Defries v Creed* (34 L. J. Ch., 607); *Hawkins v. Gathercole* [1 Dr., 12 (18)].

Judgment of the Court was delivered by

Tottenham, J (NORRIS, J., *concurring*) —The appellant in this appeal is the Receiver of the High Court. The learned counsel, who appears for him, urges only one objection to the decree of the lower Court, and that a technical one. He says that it is a point of principle and therefore he contends for it. The objection is this that there was no authority of the Court for making the Receiver a party to this suit. The plaintiff made him a defendant and a substantial defendant without having obtained the leave of the High Court. It appears to us indubitable that this contention is valid. It is an elementary matter that the Receiver of the High Court does not represent the owner of an estate. He is an officer of the Court, and as such cannot sue or be sued except with the permission of the Court.

As against the Receiver, therefore, the decree must be set aside with costs in both Courts.

The costs of the Receiver will be in proportion to the claim against him.

Appeal allowed.

NOTES.

[RECEIVER—SANCTION OF THE COURT—

In the later case of (1891) 18 Cal. 477 (481) the Court stated that it had been referred to this case and said that it did not altogether agree with the general terms of this decision. Referring to this Mr. Woodroffe in his *Receivers* (1903) 1st Edn. p. 242, remarks "In what respect the Court disagreed is not stated, but it is a well-nigh universal rule in all Courts that a Receiver may not bring a suit without having first obtained leave of the Court."

Where the usual form is not followed, the Receiver has only those powers which are contained in the order of appointment. —(1887) 14 Cal., 323.

Where property in the hand of the Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and necessary party to such suit by way of addition to and not in substitution for the parties primarily responsible—(1910) 14 C. W. N., 653.

The sanction of the Court is not a condition precedent, (1910) 8 I. C., 1

The sanction of the Court is necessary even for the Magistrate to make an order on him under sec. 145 of the Cr. P. C., 1898.

The Receiver being an officer of the Court, any party aggrieved by his conduct should seek redress in the very proceeding in which he was appointed receiver —(1902) 26 Mad., 492.]

[10 Cal. 1017]

APPELLATE CIVIL.

The 22nd July, 1884.

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND

MR. JUSTICE BEVERLEY.

Isree Pershad Singh and another. Defendants

versus

Nasib Kooer and others. Plaintiffs.

Hindu law—Mitakshara—Share of widow mother on partition in ancestral and proceeds of ancestral property.

A Hindu mother on partition is entitled to a share equal to that of a son both in the ancestral property of her husband and in all property acquired with the proceeds of such ancestral property

Sudanund Mohapattur v. Soonjamoney Dayee (11 W R , 436) dissented from

THIS was a suit by a Hindu widow to obtain, after a partition had been come to in the family (the family being governed by the Mitakshara law), a share in such property equal to the share of a son

Nasib Kooer, the plaintiff, was the wife of one Baijnath Singh who died in 1263, leaving him surviving his two widows and four sons, members of a joint Mitakshara family. After the death of Baijnath, the family remained under the management of Nasib Kooer. In 1276 Kasida Kooer (the other widow) died, and in 1281 a separation took place in the joint family, and the properties were partitioned off, no share in this partition was allotted to Nasib Kooer, although she retained in her possession the whole of a certain mouzah called Lodipore, after their separation the two eldest sons continued to live together, whilst the two younger lived also by themselves. Nasib Kooer, according to her own [1018] statement, which was disputed, was living at Lodipore. In March 1878 the two elder brothers (defendants Nos. 1 and 2) brought a suit against Nasib Kooer for partition of mouzah Lodipore, in which the Court directed a partition, and directed that a one-fifth share should be allotted to Nasib Kooer as the widow of Baijnath Singh to whom the mouzah had formerly belonged. Nasib Kooer then demanded from her sons a one-fifth share in the whole of the estate left by Baijnath Singh. The two younger sons (defendants 3 and 4) expressed their willingness to make over to her a one-tenth share in the estate, and on the refusal of the elder brothers to make over the remaining one-tenth share, Nasib Kooer brought this suit on the 25th July 1882 for the purpose of obtaining possession of one-fifth share of the estate. The defendants Nos. 1 and 2 contended that the plaintiff had waived her right to partition, and that certain of the properties claimed were acquired by them after the death of their father. The defendants 3 and 4 were made *pro forma* defendants, and did not dispute their mother's claim.

The Subordinate Judge held that the plaintiff had not waived her right to share in the partition; and on the other question (issue No. 6), as to what properties were acquired by the defendants after Baijnath's death, and whether or not the plaintiff was entitled to share in them, he found that the defendants

*Appeal from Original Decree No. 803 of 1882, against the decree of Baboo Matadin Roy, Bahadur, Subordinate Judge of Gya, dated the 25th July 1882.

had failed to prove that any property had been exclusively acquired by any one of them, but that, on the contrary, the properties which were purchased after the death of Baijnath Singh, were purchased at the time the plaintiff was acting as the guardian of her sons, and were purchased out of the proceeds of certain properties left by their ancestors and acquired by her husband, and that no property had been purchased since the partition. He, therefore, gave the plaintiff a decree.

The defendants Nos 1 and 2 appealed to the High Court.

Baboo Mohesh Chunder Chowdhry and Baboo Amerkali Mookerjee for the Appellants contending that, although the plaintiff was entitled on partition to share in the ancestral property, which came to the family through Baijnath, yet she was not entitled to share in any of the properties which had been purchased by them, or [1019] her as manager, since Baijnath's death, nor to share either in the proceeds of the ancestral property since Baijnath's death or in any other property which might have been purchased with those proceeds. *Gunga Pershad v. Sheodyal Singh* [9 C L R., 417, (420)]

The case of *Sudanund Mohapattur v. Bonomallee* (1 Marshall, 317, 320) shows that property acquired from the income of ancestral property is not to be considered ancestral property.

Mr. C. Gregory (with him Baboo T. C. Paulit) for the Respondent cited *Sudanund Mohapattur v. Soorjoomoney Dayee* (11 W R., 436) and *shudanund Mohapattur v. Bonomallee Dass Mohapattur* (6 W R., 256), and *Macnaghten Cons. Hindu Law*, pp 51 and 54, as showing that a Hindu mother could share in the proceeds of ancestral property, also *Mayne's Hindu Law*, p 250

Judgment of the High Court was delivered by

Garth, C.J.—This suit was brought by the plaintiff, Mussumat Nasib Koor, to recover a one-fifth share of the estate of her deceased husband, Baijnath Singh, under these circumstances.

Baijnath Singh was the head of a Mitakshara family, consisting of his two wives (the plaintiff, and one Mussumat Kasida Koor, who is since dead) and four sons, who are the defendants in this suit, and the family were possessed of several ancestral properties

Baijnath died on the 13th Aghran 1263 Fusli, and after his death, and that of Mussumat Kasida Koor, the four brothers separated, and a partition of the family property was made by the plaintiff with the consent of her sons, the plaintiff retaining in her own possession an estate called Lodipore, upon the ground that it was her *stridhan*

At this time, it appears the two elder brothers (the defendants 1 and 2) separated themselves from their two younger brothers (the defendants 3 and 4), who continued to live with the plaintiff; and afterwards, the defendants 1 and 2 brought a suit against the plaintiff for a partition of Lodipore, upon the ground that it was not the plaintiff's *stridhan*, but was subject to partition like the rest of the ancestral property. This suit was successful, and consequently the plaintiff had to give up the [1020] exclusive possession of Lodipore, which was declared to be subject to partition.

The plaintiff then brought this suit to recover her one-fifth share of the rest of the ancestral property. She says, that when the partition took place, she was content to forego her share, upon condition that her exclusive right to Lodipore was admitted, but as she has been now deprived of four-fifths of Lodipore, she insists upon her right to a one-fifth of the rest.

The lower Court has decreed her claim ; and, as we consider, justly. We think it plain that she only waived her right when the partition was made upon the understanding that she was to retain Lodipore ; but now that she has been deprived of that, she is justified in insisting upon her rights under the partition.

A question, however, has arisen upon the sixth issue, which we have thought it right to hear fully argued. The appellants (defendants 1 and 2) contend that the plaintiff is not entitled to a share in any of the properties, which have been purchased by them (or by her as the manager of the property), since the death of Baijnath out of the proceeds of the ancestral estate. They say, that although the plaintiff (as Baijnath's wife), is entitled upon partition to an equal share with a son in *all the ancestral property*, which came to the family through Baijnath, she is not entitled to a share either in the proceeds of that property since Baijnath's death, or in any other properties which have been purchased with those proceeds.

It is argued that a wife is only entitled on partition to a share of that which was her husband's, because she has to be maintained out of that property, and her share upon partition is given to her as representing, or instead of, her maintenance, but no part of the property before partition is hers ; it belongs to the sons conjointly ; they may spend the proceeds of it as they think proper ; and whether they spend those proceeds, or hoard them up, or purchase other property with them, the wife has no part or lot in those proceeds.

In support of this view we have been referred to certain texts of the Mitakshara, and to an expression of opinion by Mr Justice MITTER in the case of *Gunga Pershad v. Sheodyal Singh* (9 C. L. R., 417).

[1021] The question there was, whether in the case of a Mitakshara family, consisting of a father and sons, the sons were entitled to any share in the property which their father had purchased before their birth from the proceeds of an ancestral estate. Mr. Justice MITTER says that in his opinion they were not. He considers that property acquired out of the income of ancestral property is not property inherited, and, therefore, if the father acquired such property before the birth of his sons, they had no interest in it

The view thus expressed by Mr. Justice MITTER would, if it were established law, seem in favour of the defendants' argument in the present case, because, if the proceeds of ancestral property, although hoarded up or laid out in other property by the sons, are to be considered as the self-acquired property of the sons, there would seem good reason why the mother should not have any share in them upon partition.

But this was only an expression of opinion by Mr. Justice MITTER and the case was decided upon another ground. In fact, that learned Judge observes, that as his opinion was opposed to a previous decision of this Court in the case of *Sudanund Mohapattur v. Soorjoomoney Dayee* (11 W. R., 436), he could not have overruled that decision without referring the point to a Full Bench.

In this case, of course, we are in the same position, and although we much respect the opinion of Mr. Justice MITTER, especially in a matter of this kind, we think we ought not to refer the point to a Full Bench, unless our own view was that Mr. Justice MITTER was right.

We find, however, other authorities besides the case in the 11th Weekly Reporter, which are certainly in conflict with Mr. Justice MITTER's view.

Macnaghten in his "Considerations on the Hindu Law," p. 51, lays down the law thus : "The mother shall not be entitled to share in the property acquired by the individual exertions of one of her sons, nor in the property

acquired by the joint exertions of them all, unless it shall appear that such acquisitions were made out of the patrimonial wealth, in which case she shall be entitled to share in the *increase* of the patrimonial wealth upon partition."

[1022] And, again, on page 54 he says: "Partition, to entitle the mother to a share, must be made of ancestral property or of property acquired by means of ancestral wealth."

And Mr. *Mayne*, in his work on Hindu Law, quotes this last extract from *Macnaghten* as being the approved rule in such cases.

We think, therefore, that as these authorities seem strongly in favour of the plaintiff, and as we do not see any such reason to the contrary as would justify us in referring the question to a Full Bench, we should decide the point in favour of the plaintiff and dismiss this appeal with costs.

Appeal dismissed.

NOTES

[As for the share allotted on a partition between the grandson and the great-grandson, see 31 Cal., 1065.]

[10 Cal. 1022]

ORIGINAL CRIMINAL.

The 21st July, 1884.

PRESENT :

MR. JUSTICE FIELD.

Queen-Empress

versus

Mathews.

Incriminating statement by prisoner to Police Officer—Evidence of Police Constable.

A policeman on being cross-examined stated, that when he arrested the prisoner, the prisoner said to him, some Chinamen *at the time of the occurrence* came out with hatchets; in re-examination the policeman so far altered the words stated to have been used by the prisoner as to substitute for the words *at the time of the occurrence* the words *at the time*, and on being asked if the prisoner had explained "what time," answered, he said at the time I struck the deceased.

Counsel for the prisoner interposed and objected to the evidence. The Standing Counsel contended that he was entitled to clear up a matter which had been left in doubt by the cross-examination.

Held, that the evidence could not be given. . . .

ONE Mathews had been committed to the Sessions by the Presidency Magistrate of Calcutta, charged with murder. At the trial a Police officer was examined for the prosecution, and in the course of cross-examination gave the following answer to Mr. *Gaspar*, who appeared for the defence.

A.—The prisoner, when I arrested him, said "some Chinamen at the time of the occurrence came out with hatchets."

[1023] Re-examined by the Standing Counsel (Mr. *Phillips*).

Q.—Did the accused use the word "occurrence?"

A.—He said "at the time."

Q.—Did the accused explain what "time?"

A.—He said "at the time I struck the deceased——"

Mr. Gasper.—I object to this.

[**FIELD, J.**—The evidence cannot be given. I must instruct the jury to put out of their minds anything the present witness, being a policeman, may say implicating the prisoner by quoting words alleged to have been used by the prisoner himself.]

The Standing Counsel (**Mr. Phillips**).—Your Lordship will hear me on the point. I am entitled to obtain an answer to the question I have asked, even if the reply should bring out any statement or part of a statement made by the accused implicating himself to the witness. The Court will remember that my question is directed to clear up a matter left in doubt by the cross-examination, not an independent enquiry started by the prosecution. The witness used an ambiguous expression "the time." I am entitled to fix the precise meaning he attached to these words. For instance, if the accused had said to the Police officer "I did not kill the deceased with a knife, but shot him with a pistol, and the cross-examining counsel extracted from the witness the statement that the accused had used the words "I did not kill the deceased," surely the prosecution in re-examination is entitled to get from the witness the whole statement made by the accused on the occasion.

[**FIELD, J.**—I don't think you would be entitled to have the words *in extenso*. You might perhaps get the witness to say the accused had qualified that statement, but you could not have the exact words he used if they amounted to an incriminating statement. The law is imperative on the point.]

Mr. Gasper.—As the witness has already given us a part of the statement made by the accused, I prefer the whole statement being given to the jury, as the whole statement shows that he did not strike the deceased with a knife.

[**FIELD, J.**—I am afraid I cannot permit that: the law is imperative in excluding what comes from an accused person in custody of the Police if it incriminates him.]

NOTES.

[See also the following cases —15 Cal , 589 ; 2 C W N., 702 at 708 ; 7 All 646 ; 19 Bom., 363.]

[1024] ORIGINAL CRIMINAL.

The 26th, 29th and 30th July, 1884

PRESENT :

MR. JUSTICE FIELD.

The Queen-Empress

versus

Grees Chunder Banerjee.

Evidence—Absence of entry in a book irrelevant—Act I of 1882, s. 34 Reply, Prosecutor's right of—Criminal Procedure Code, Act X of 1832, ss. 289, 292.

Though under s. 34 of the Evidence Act the actual entries in books of account regularly kept in the course of business are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.

The fact that the accused has during the cross-examination of the witnesses for the prosecution, used certain documents, and that such documents have been put in as evidence on his behalf does not entitle the prosecutor to the right of reply, if when asked upon the close of the case for the prosecution whether he means to adduce evidence, the accused says that he does not.

THIS was a private prosecution at the instance of one Mohendro Nath Holder, an attorney of the High Court, the charges consisting of forgery, using as genuine a forged document, and giving false evidence.

The charges were brought in respect of a promissory note and certain letters purporting to be in the handwriting of the complainant, which had been used by the accused as genuine in a certain suit in the Calcutta Court of Small Causes.

Mr. O. C. Mullick and Mr. Deva for the Prosecution.

Mr. M. P. Gasper, Mr. Trevelyan and Mr. Roy for the Defence.

During the examination-in-chief of the complainant, he said, referring to a book of account before him —

“ This is my cash book. It is written up by me. It is kept in the ordinary course of business. I am in the habit of entering in this book all sums received by me and all sums paid away by me. I did not receive from the accused the sum of Rs. 500 on the 26th day of October or on any other day.”

Mr. Mullick (to witness) — “ Look at your book and say whether or not it contains any entry of a receipt by you of Rs. 500 from the prisoner on the 26th day of October 1880 or on any other day ” ; and he tendered the book as evidence to show that no such entries existed.

[1023] Mr. Gasper objected to the admissibility of the book itself for the purpose for which it was sought to be used. He relied on s. 34 of the Evidence Act, and contended that though that section made an entry in a book of account relevant, it did not also make the *absence* of an entry equally relevant. The value of such evidence is absolutely *nil*.

Mr. Mullick pressed the question.

FIELD, J.—It is no doubt fair of the prosecution to produce the book to give the prisoner an opportunity of seeing if the entry is there, but I think the book itself is not relevant to disprove the alleged transaction by the absence of any entry concerning it.

During the progress of the trial, Mr. *Gasper* put certain documents into the hand of the witness for the prosecution, and having proved them by cross-examination, tendered them in evidence, and had them marked as exhibits on behalf of the prisoner, at the same time intimating that he would contend that by so doing he did not give the counsel for the prosecution the right of replying upon his case in the event of no witnesses for the defence being called.

When the case for the prosecution had closed, Mr. *Gasper* had stated that he did not intend to call any witnesses.

Mr. *Mullick* contended that under s. 292, coupled with s. 289 of the Criminal Procedure Code, he was entitled to a reply, in consequence of the documents above referred to having been put in. He argued that it was impossible for the prosecution to predicate what use the defence intended to make of the documents which had been put in.

Mr. *Gasper* was not called upon.

[**FIELD, J.**—You knew when summing up your whole case that they had been used for a certain purpose in cross-examination, and you had an opportunity of observing upon them. The Criminal Procedure Code being a penal statute, the principle to be applied in construing those sections is, that the construction most favourable to the prisoner must be adopted. In this view I hold that under s. 292 the prosecution is not entitled to a reply.]

NOTES.

[I. ABSENCE OF ENTRIES—

Messrs. **Ameer Ali** and **Woodroffe** in their commentaries upon the *Evidence Act*, 1872. (5th Edn., (1911), p. 343), make these remarks.—“ The decision cited (10 Cal., 1024) if it is to be taken to have ruled that the fact of the absence of an entry is not evidence at all under any section of the Act is, it is submitted, erroneous, and has not in such sense been followed :— *Sagurmull v. Manraj* (1900) 4 C. W. N. ccvii. In *Ram Pershad v. Lakpat Koor*, 30 Cal., at p. 247, Lord DAVEY referred to *R. v. Gregg Chunder*, 10 Cal., 1024, and Lord ROBERTSON said, “ The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter,” but this remark must be taken with reference to the preceding statement of counsel which referred to sec. 84, Indian Evidence Act, 1872.

This section which presupposes the existence of an entry and deals with the question how far *existent* entries tendered in evidence may fix parties with liability does not obviously apply where there is no entry. Evidence that there is no entry is not admissible under this section, but may be so under other sections of the Act, as for instance, the ninth and eleventh sections.

These remarks have now the support of the decision of **MOOKERJEE** and **CARNDUFF, JJ** in (1911) 17 C. W. N. 108. See also the observations in (1902) 25 All. 90 at 100—101.

II. RIGHT OF REPLY—

As regards the right of reply, merely by reason of documents being put in, during and for the purposes of cross-examination of Crown witnesses, see also (1886) 14 Cal., 245 ; (1890) 17 Cal. 980 ; 14 Bom. 480, *contra* (1892) 14 All. 212.]

[1026] CRIMINAL REFERENCE.

The 22nd July, 1884.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Queen-Empress

versus

Autal Muchi.*

*Evidence—Criminal Procedure Code—Act X of 1882, s. 510—Report of
“Additional Chemical Examiner.”*

A document purporting to be a report under the hand of an “Additional Chemical Examiner” upon a matter or thing submitted to him for analysis and report, cannot be received in evidence under s. 510 of Act X of 1882

THIS was a reference under s. 438 of the Code of Criminal Procedure.

One Autal Muchi was charged by a Deputy Magistrate under ss. 428—511 of the Penal Code for an attempt at cattle-poisoning.

At the trial, the evidence against him was that he was seen by the villagers to offer bamboo leaves to some cattle, that the villagers suspecting him, searched him and found upon him a small packet containing some white powder. It was then proved that the packet found upon him was made over to the Civil Surgeon of the station for transmission to a Chemical Examiner in Calcutta; there was, however, no evidence to connect the packet produced in Court with the packet stated to have been made over to the Civil Surgeon, and the report which purported to give the analysis of the packet produced was signed by a person styling himself “Additional Chemical Examiner.”

The Deputy Magistrate found the prisoner guilty and fined him two rupees.

The District Magistrate, after calling upon the Deputy Magistrate for an explanation, referred the case to the High Court.

No one appeared on the reference.

The **Opinion** of the Court (TOTTENHAM and NORRIS, JJ.) was as follows :—

The conviction in this case must be set aside, and the fine, if realized, refunded. There is no evidence on the record to show that the packet received by the Chemical Examiner in Calcutta was the packet taken from the prisoner, the packet is traced into the [1027] hands of the Civil Surgeon and no further. We are at a loss to understand why the Civil Surgeon was not called; but even if the identity of the packet had been established, we think the certificate produced and put in at the trial was not admissible in evidence. Section 510 of the Code of Criminal Procedure enacts that a document purporting to be a report under the hand of the “Chemical Examiner or Assistant Chemical Examiner” may be used as evidence in any inquiry: the certificate in this case is signed by a person styling himself “Additional Chemical Examiner,” and is of no more value as evidence than a piece of waste paper.

* Criminal Reference No. 101 of 1884 from an order passed by the Deputy Magistrate of Burdwan, Moulvi Ikram Russoul, dated 12th June 1884.

Serious miscarriage of justice may result from the production of certificates such as the one under discussion; the local Government may, perhaps, move the Government of India to amend s. 510 by the insertion of the words "and Additional Chemical Examiner" therein.

Conviction set aside.

[10 Cal. 1027]
CRIMINAL REVISION.

The 31st July, 1884.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR JUSTICE NORRIS.

Jeebunkisto Roy and another.. . . .Petitioners
versus
Shib Chunder Das.... . . .Opposite Party *

Discharge of accused—Further enquiry, Powers to direct—Criminal Procedure Code (Act X of 1882), ss. 253, 437.

An accused having been discharged after a full enquiry before a competent Court is entitled to the benefit of such discharge, unless some further evidence is disclosed. Consequently an order made by a District Judge directing a further enquiry to be held under s. 437 of the Criminal Procedure Code in a case where a Magistrate had discharged the accused under s. 253 was not warranted by law, when there had been a full enquiry by a competent Court and when no further evidence was disclosed, such order being based merely upon the ground that, in the opinion of the District Judge, the evidence recorded was sufficient for the conviction of the accused

THIS was an application to set aside an order of a District Judge directing a further enquiry, under s. 437 of the Criminal Procedure Code, into a case which had been heard by a Deputy [1023] Magistrate and which had resulted in the discharge of the accused. The case was one of trespass and unlawful cutting and taking of certain crops, the right to possession of which was disputed. The Deputy Magistrate, disbelieving the evidence on behalf of the prosecution, dismissed the case and discharged the accused under s. 253 of the Criminal Procedure Code.

The prosecutor then applied to the District Judge, who came to the conclusion that a *prima facie* case had been made out against the accused, and that they should have been called upon for their defence. He also characterized the Magistrate's order as a long and laboured effort to explain away the force of the evidence for the prosecution, which he considered clearly established their case in the absence of any evidence to rebut it, and he therefore considered that a further enquiry should be held, and under s. 437 directed such to be made.

The accused now applied to the High Court to set aside the latter order.

Baboo *Umbica Churn Bose* appeared on behalf of the Petitioner.

No one appeared for the Opposite Party

The Judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

* Criminal Motion No. 252 of 1884 against the order of J. P. Grant. Esq., Sessions Judge of Hooghly, dated the 30th June 1884.

Tottenham, J. (NORRIS, J., *concurring*).—We think that the order of the Sessions Judge directing a further enquiry in this case is not warranted by law. It seems to us that the law allows a further enquiry only where there has not been a full enquiry and where further evidence is disclosed. The application to the Judge was to the effect that the evidence recorded by the Deputy Magistrate was sufficient for the conviction of the accused, and the accused ought to have been convicted. The Sessions Judge seems to have endorsed the applicant's opinion, and upon that ground ordered the further enquiry. It seems to us that the accused having been discharged after a full enquiry by a competent Court, he is entitled to the benefit of that discharge, unless some further evidence is disclosed.

The order of the Sessions Judge will be set aside and the proceedings stopped.

Order set aside and proceedings stopped.

NOTES.

[THIS CASE which was followed in 12 Cal , 522 , 8 Mad , 336, was dissented from 10 Bom., 131 , 9 All , 52, F B See also 10 Cal , 207]

[1029] CRIMINAL REVISION.

The 14th August, 1884

PRESENT

MR. JUSTICE MITTER AND MR. JUSTICE PIGOT.

The Government of Bengal (through the Deputy Legal

Remembrancer) . . . Petitioner

versus

Parmeshur Mulhok, Opposite Party.*

*Appeal by Local Government—Appeal upon facts from verdict of a jury—
Criminal Procedure Code (Act X of 1882), ss. 417, 418, 423.*

Under the provisions of Act X of 1882 no appeal at the instance of the Local Government lies from an order of acquittal in a case which has been tried by a jury, when the questions involved are purely questions of fact, for such an appeal to lie it must be supported upon a ground which is covered by s. 418.

THIS was an application by the Local Government for the admission of an appeal.

Mr. Leith (Deputy Legal Remembrancer), on behalf of the Local Government, stated that the present case was tried by a jury and that the appeal was based entirely upon questions of fact. The present application was due to the fact that Sessions Judges frequently abstained from availing themselves of the provisions of s. 307 of the Criminal Procedure Code in cases in which the jury had clearly returned an erroneous verdict, under the impression that it was open to the Local Government, if it thought fit, to prefer an appeal. Doubtless

* Criminal Motion No. 4 of 1884 under s. 417 of the Code of Criminal Procedure against the order of acquittal made by C. W. Macpherson, Additional Sessions Judge of Howrah, dated March 22nd, 1884.

such a course was open to the Local Government under the provisions of Act X of 1872. And it was for their Lordships to decide whether the Legislature intended to take away that right by the provisions of Act X of 1882 and whether, as a matter of fact, that had been done.

Mr. *Leith* then proceeded to refer to the sections bearing upon the question. The **Judgment** of the Court (MITTER and PIGOT, JJ.) was delivered by

Mitter, J.—This is an application by the Local Government for leave to appeal under s. 417 of the Code of Criminal Procedure against an order of acquittal passed in a trial by jury. The grounds upon which the appeal is sought to be preferred are all questions of fact. It is contended [1030] that under the Code an appeal under s. 417 would lie upon questions of fact, although the acquittal was had in a trial by jury. We are of opinion that this contention is not valid. Section 417, which provides for the appeal, says :—"The Local Government may direct the Public Prosecutor to present an appeal to the High Court, from an Original or Appellate order of acquittal passed by any Court other than a High Court." Section 418 says :—"An appeal may lie upon a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only." Then s. 423, clause (d) says—"Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him." These provisions clearly show that an appeal against an order of acquittal in a case which is tried by a jury must be supported upon a ground which is covered by s. 418 of the Code of Criminal Procedure. It is admitted in this case that there is no such ground alleged in the petition of appeal. We therefore reject this application.

Application refused.

[10 Cal. 1030]

CRIMINAL REVISION.

The 22nd August, 1884.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

In the matter of Kharak Chand PalPetitioner

versus

Tarack Chunder Gupta, Municipal Overseer.....Opposite Party *

*Indian Penal Code, Act XIV of 1860, s. 188—Beng. Act V of 1876, s. 256—
Disobedience of lawful order—Interest of Magistrate in convicting the prisoner
— Disqualification of Judge.*

On the 29th of March 1883, the Municipal Commissioners of Commillah at a meeting issued an order under s. 256 of the Bengal Municipal Act of 1876.

The accused was tried and convicted before the District Magistrate under s. 188 of the Indian Penal Code, and fined Re. 100 for having disobeyed that order.

* Criminal Revision No. 196 of 1884 against the order passed by G. H. Hopkins, Esq., District Magistrate of Tipperah, dated the 5th of May 1884.

The Magistrate, who tried and convicted the accused, was present as Chairman of the Municipal Commissioners at the meeting of the 29th of [1031] March, when the order was passed, for disobedience of which the accused was tried and convicted.

Held, that the conviction was illegal and must be set aside.

Sergeant v. Dale (L. R., 2 Q. B. D., 558) cited and followed

THE facts of this case are fully set forth in the **Judgment** of the Court delivered by PRINSEP, J.

Munshi *Serajul Islam* for the Petitioner

No one appeared for the other side.

Prinsep, J.—The petitioner has been convicted under s. 188 of the Penal Code of having disobeyed an order of the Municipal Commissioners of Com-millah under s. 256, Beng. Act V of 1876, dated the 29th March 1883.

On enquiry we have ascertained that the District Magistrate, who tried and convicted the petitioner, was present as Chairman of the Municipal Commissioners at the meeting of the 29th March 1883, when the order was passed, the disobedience of which forms the subject of the present case.

Section 555 of the Code of Criminal Procedure provides that "no Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested." (No permission has been applied for in the present case.) The explanation to s. 555 further declares that, "a Magistrate shall not be deemed to be a party, or personally interested, within the meaning of this section, to or in any case, merely because he is a Municipal Commissioner."

That explanation, however, does not, in our opinion, apply to any case in which a Magistrate may have been personally concerned as a Municipal Commissioner in the matter which forms the subject of trial before him. It was rather intended to prevent an objection being raised that from the mere fact that the Magistrate might happen to be a Municipal Commissioner, he was necessarily disqualified from holding a trial in which some municipal matter was involved. It is a very different matter when in the present case we find that the Magistrate is practically one of the prosecutors and the Judge.

[1032] An objection has been raised before us, which was probably raised before the District Magistrate, that the order, which has been disobeyed, was an illegal order; obviously the District Magistrate having been a party to that order was not a proper person to try such an objection. In the present case, we do not find that the order in question was in any way illegal, but this does not affect the propriety of the trial which has taken place. We would refer to the case of *Sergeant v. Dale* (L. R., 2 Q. B. D., 558). The passage quoted is to be found at pages 566 and 567: "By the common law, a Judge who has an interest in the result of a suit is disqualified from acting, except in cases of necessity, where no other Judge has jurisdiction. * * * The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law in laying down this strict rule has regard not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security. * * * We are anxious not to be misunderstood in using this language. No right-minded person does, or can, for a moment entertain the thought that

the right reverend prelate (or, in the present case, the District Magistrate) who was called upon to act in this case was, or could, be influenced by any consideration of personal interest in the proceeding. * * * The applicant stands upon his legal right and calls upon us to give effect to it."

On these grounds we think that the proceedings before the Magistrate must be set aside and the fine, if paid, refunded.

Conviction set aside.

NOTES.

[See also 23 Cal., 44 ; 15 All., 192 ; Criminal Procedure Code, 1898, sec. 556.]

[1033] SMALL CAUSE COURT REFERENCE.

The 30th July, 1884.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Rameshwar Mandal....Plaintiff

versus

Ram Chand Roy and another.....Defendants.

Loan on verbal agreement to repay at a specified date—Limitation—

Art. 115, sch II, Act XV of 1877.

A suit to recover money lent with interest upon a verbal agreement that the loan should be repaid with interest within one year from the date of the loan, is governed by art. 115† of sch. II of Act XV of 1877, which virtually provides for all contracts, which are not in writing, registered, and not otherwise specifically provided for.

THIS was a reference to the High Court under s 617 of Act XIV of 1882, made by the Judge of the Small Cause Court at Hooghly.

The suit was one to recover money lent with interest on a verbal agreement.

* Small Cause Court Reference No. 9 of 1884 from the order made by Baboo Mahindra Nath Ghose, First Munsif of Jehanabad, dated the 31st of May 1884

†[Art 115

Description of suit.	Period of limitation	Time from which period begins to run.
For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Three years	... When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.]

The alleged loan was made in Falgoun 1287, without being secured by any written instrument, and the suit was brought to recover the money more than three years after that date; the plaintiff, however, proved that there was a verbal agreement to repay the money with interest within one year from the date of the loan, and contended that therefore his cause of action accrued from that specified date of payment. The defendant pleaded never indebted, and limitation, relying on art. 57 of sch. II of Act XV of 1877.

The Small Cause Court Judge was of opinion that it was not the intention of the Legislature, in cases of money lent unsecured by any instrument, that any specified date for payment would save limitation, and that limitation, therefore, should run from the date of the loan, he, therefore, dismissed the suit, as being barred under art. 57 of sch II of the Limitation Act, and at the request of the plaintiff referred to the High Court the question. Whether in the case of a loan unsecured by any written contract, but regard-[1034]ing which a verbal agreement had been come to fixing a date certain for the repayment of the money, limitation would run from the date of the loan, or from the specified date of payment?

No one appeared on the reference.

Opinions of the Court were delivered by GARTH, C J, and BEVERLEY, J.

Garth, C.J.—I think that in this case the Munsif has hardly appreciated the nature of the contract.

The suit is not for *money lent* in the ordinary sense of that expression, it is not for a loan repayable *at once*, or, what is the same thing in point of law, repayable *on demand*. Articles 57 and 59 of the Limitation Act are only applicable, in my opinion, to cases of that kind.

The contract here set up by the plaintiff is one of a special nature. In consideration of a present advance by him, the defendant is said to have agreed to repay the money at the end of a year with interest.

This being the contract, it is clear that the plaintiffs would have no right of suit until the expiration of the year, and therefore it would seem obviously unjust, and contrary to the meaning of the Limitation Act, that limitation should run, not from the time when the plaintiff's right of action accrued, but from the time when the advance was made, which was the consideration for the defendant's promise.

Suppose that by a contract of this nature, instead of the money being repayable at the end of *one year*, it were repayable at the end of four years. It is clear, that if the Munsif were right in his construction of art. 57, the plaintiff, however honest and *bonâ fide* his bargain may have been, would never have a right to enforce it, because by the time when his right to sue accrued, it would be barred by limitation.

In England, by the Statute of Frauds, a contract which is not to be performed within three years from the making thereof, must necessarily be in writing.

But here we have no Statute of Frauds, and in commercial affairs people are at liberty to make any verbal contracts they please.

*[Art. 57.—

Description of suit.	Period of limitation	Time from which period begins to run
For money payable for money lent.	Three years	When the loan is made]

[1035] And it seems to me, that it could never have been the intention of the Legislature to prohibit verbal contracts by means of an Act which was passed for a totally different purpose, and which merely professes to regulate the time within which different suits are to be brought.

I think that this case is governed by art. 115, which virtually provides for the case of all contracts which are not in writing, registered, and not otherwise specifically provided for.

Beverley, J.—I have had some doubt in this case as to whether the suit is properly one for compensation ; but, looking at what was decided in *Nobocommar Mookhopadhaya v. Siru Mullick* (I.L.R., 6 Cal., 94) I am inclined to agree in the view taken by the learned Chief Justice. I quite think, that it cannot and ought not to be inferred that the Legislature intended to prohibit verbal contracts of this nature, merely because there is no express provision in respect to them in the Limitation Act. See the remarks in *Sheikh Akbar v. Sheikh Khan* [I.L.R., 7 Cal., 256 (261).]

NOTES.

[This was followed in 15 Mad., 280 , see also 22 I. C., 60, as regards payment on a certain event , as regards the meaning of ' *on demand* ' see (1896) 20 Mad., 245.]

[10 Cal. 1035]

PRIVY COUNCIL.

The 19th February and 22nd March, 1884.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

Gokaldas Gopaldas.....(Defendant) Appellant
and

Rambaksh Seochand..(Plaintiff) Respondent
versus

Puranmal Preamsukhdas.....(Defendant) Respondent.

[On appeal from the Court of the Resident at Hyderabad.]

Effect of payment of prior mortgage by a subsequent incumbrancer, as against intermediate charge.

The mortgagor's right, title, and interest in certain immovables in the Deccan, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser, who afterwards paid off the first mortgage.

Held, that, as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him ; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter, of course, according to the English [1036] practice, to have it assigned to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable. But in India a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive ever formally expressed.

It was ruled in the English Court of Chancery in *Toulmin v. Steere* (3 Mer , 210) that the purchaser from an owner of an equity of redemption, with actual or constructive notice of another intermediate incumbrance, is precluded, in the absence of any contemporaneous expression of intention, from alleging that, as against such other incumbrance, the prior mortgage, paid off out of the purchase-money, is not extinguished. That case was not identical with this, where the prior mortgage was not paid off out of the purchase-money, but was paid off afterwards by the purchaser. The above ruling, however, is not to be extended to India, where the question to ask is, in the interests of justice, equity, and good conscience, there applicable,—what was the intention of the party paying off the charge.

APPEAL from a decree of the Resident at Haiderabad (24th June 1880), affirming a decree of the Judicial Commissioner of the Haiderabad Assigned Districts (28th February 1880), affirming a decree of the Deputy Commissioner of Amraoti (8th August 1879).

The principal question here raised was whether or not the purchaser of a mortgagor's right, title, and interest in mortgaged property, having afterwards paid off a balance due on a prior mortgage, was entitled to use this paid-off charge as against an intermediate incumbrance, of which he had notice at the time of his purchase.

This appeal was preferred by one of two co-defendants against the other of-them, together with the plaintiff in the suit, the latter having obtained a decree. The appellant, Gokaldas, who carried on a banking business at Jabalpur, had obtained a money-decree against the second respondent, Puranmal Preamsukhdas, a *shraf* at Amraoti, and had issued execution against the property of the latter. At the auction sale this judgment-creditor, on the 12th September 1876, bought the right, title, and interest of Puranmal Preamsukhdas in nine houses situate in Amraoti, and obtained possession. Three of these nine houses were already subject to a mortgage made by Puranmal Preamsukhdas to the Bank of Bombay, originally for Rs. 30,000, [1037] but reduced by payments to Rs. 5,137. This balance Gokaldas, in April and May 1877, paid off. On the 11th July 1877 Rambaksh Seochand brought this suit, alleging that the nine houses had been mortgaged to him by two registered mortgages, dated respectively in June and December 1873, for a mortgage debt of Rs. 37,985. In the latter of these two mortgages it was stated that three of the houses were then in the possession of the Bank of Bombay, under a prior deed of mortgage to secure Rs. 30,000, and it was provided that as soon as they should be redeemed, they should be made over to Rambaksh Seochand. The latter, accordingly, claimed that the second defendant should give him possession of all the nine houses.

The defence of Gokaldas was . *First*, that the mortgages of 1873 had not been *bonâ fide* made, but had been put forward to defeat the execution of the decree against Puranmal Preamsukhdas . *Secondly*, that, as regards the three houses mortgaged to the Bank of Bombay, Rambaksh Seochand could not claim possession of them, until he had repaid Gokaldas, who had, by paying the mortgage debt due to that Bank, acquired the rights of the first mortgagee, as against a subsequent incumbrancer. Puranmal Preamsukhdas, the second defendant, admitted the execution of the mortgages of June and December 1873 with the debt due thereon. Issues were fixed, raising questions as to the *bona-fides* of the mortgages of 1873, and as to the legal effect of the payment by the plaintiff of the balance due to the Bank of Bombay in regard to the right to the three houses.

The Deputy Commissioner of Amraoti, holding that the burden of proving that the mortgages of 1873 were *bonâ fide* was on the plaintiff, and also that

he was responsible for the return to a commission to take evidence at Haiderabad not having been made in due time, dismissed the suit, on 17th October 1877, on the ground that the plaintiff's case had not been proved.

On appeal to the Judicial Commissioner of the Haiderabad Assigned Districts, a different opinion in regard to the delay led to the remand of the suit for hearing on the merits.

The Court of First Instance then decided that the mortgages in favour of the plaintiff were *bonâ fide*; but that the second [1038] defendant, by reason merely of his having discharged the debt due from the first defendant to the Bank of Bombay, stood in no better position than the first defendant as mortgagor would have been as regards the second mortgage, had he redeemed the first. It was accordingly determined that the effect of the second defendant's payment off of the balance due on the first mortgage was to entitle the plaintiff to immediate possession of the three houses according to the agreement in the mortgage of December 1873. The plaintiff, therefore, obtained a decree for possession of the nine houses as mortgagee, subject to the second defendant's equity of redemption.

This was affirmed by the Judicial Commissioner on regular appeal; and a second or special appeal having been preferred to the Court of the Resident of Haiderabad under the provisions of s. 584 of Act X of 1877 was dismissed. The decree of the lower Court was confirmed in accordance with the provisions of s. 551 of the Code, read with s. 587.

On this appeal—

Mr. *A. Kekewich*, Q. C., and Mr. *R. Hornel* appeared for the Appellant.

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe* for the Respondent, Rambhaksh Seochand.

For the appellant it was argued *First*, that on the evidence it should not have been decided that the two mortgages of 1873, on which the respondent Rambhaksh Seochand claimed, were *bonâ fide*, and made for good consideration. *Secondly*, that the appellant was entitled to retain, even if the two mortgages were established, possession of the three houses previously mortgaged to the Bank of Bombay against the intermediate incumbrancer, until the amount paid by him to the first mortgagee should have been repaid. The appellant was entitled to do so, because the presumption was that when he paid off the balance of the debt due on the first mortgage, he intended to protect himself with it against the subsequent one. This was the presumption, and thus the charge was kept alive. There was no formal declaration of this intention; but the presumption was sufficient. [1039] The proposition stated in *Dart's Vendors and Purchasers*, Chapter XXV, s. 7, *viz*: "It has long been considered that where a mortgagee purchases and takes a conveyance to himself of the equity of redemption he thereby lets in all the intermediate encumbrances of which he had notice, unless the property is conveyed to a trustee for the express purpose of keeping the charge alive," was not applicable here. The decision in *Toulmin v. Steere* (3 Mer., 210), upon which that proposition rested, had been questioned; and, at all events, had not been adopted by this Committee as applicable to mortgages in India. Reference was made to 2 *Dart's Vendors and Purchasers*, 5th edition, page 917, and to *Toulmin v. Steere* (3 Mer., 210), *Greswold v. Marsham* (2 Ch. Ca., 170), *Mocatta v. Murgatroyd* (1 P. Wms., 393), *Gregg v. Arrot* (Lloyd and Gould, Ch. Ca., Ireland, 246), *Parry v. Wright* (5 Russ., 142), *Adams v. Angell* (L. R., 5 Ch. D., 634), *Stevens v. The Mid-Hants Railway Company* (L. R., 8 Ch. App., 1064), *Otter v. Lord Vaux* (2 Kay and J., 650; 6 DeG., M. and G., 638), *Watts v. Symes* (1 DeG., M. and G., 240),

Bell v. Sunderland Building Society (L. R., 24 Ch. D., 618), *Cracknall v. Janson* (L. R., 6 Ch. D., 735), *Hayden v. Kirkpatrick* (34 Beav., 645), *Bekon Singh v. Deen Dyal Lall* (24 W. R., 47), *Gopee Bundhoo Shantra Mohapattar v. Kalee Budo Banerjee* (23 W. R., 338, 14 B. L. R., 480).

Mr. J. D. Mayne referred to *Mohesh Lal v. Mohant Bawan Das* (I. L. R., 9 Cal., 961), on reference being made to *Bhughubutty Dossee v. Shama Churn Bose* (I. L. R., 1 Cal., 337).

For the first respondent, Rambaksh Seochand, as to the first point, reliance was placed on the Courts in India having con-[1940]curred in finding that the mortgages of 1873 had been *bona fide* made, and, as to the second point, it was argued that the respondent having paid off the balance that was due on the mortgage to the Bank of Bombay had extinguished that incumbrance on the property. Having only his rights as purchaser of the right, title, and interest of the mortgagor who had created the intermediate charge, he took the property charged with all existing incumbrances, and in effect from the nature of his purchase had notice of them. He therefore stood in no better position than the mortgagor himself in regard to the second mortgage when the first was paid off.

As well as to the above cases cited for the appellant, reference was made to *Oojagur Roy v. Ram Kelawan Singh* (10 W. R., 384), *Ranchoddas Dayaldas v. Ranchoddas Nanabhai* (I. L. R., 1 Bom., 581), *Land Mortgage Bank v. Ramruttun Neogy* (21 W. R., 270), *Chintaman Bhaskar v. Shiv Ram Hari* (9 Bom. H. C. Rep., 304), *Ramu Narkan v. Subbaraya Mudali* (7 Mad. H. C. Rep., 229), in which last case it was held that a prior mortgagee having purchased the interest of the mortgagor may still use his mortgage to protect himself against the claims of subsequent mortgagees, also to *Garnett v. Armstrong* (4 Dru. and War., 182).

Mr. A. Kekewich, Q. C., replied.

Their Lordships' **Judgment** was delivered on a subsequent day, March 22nd, by

Sir Richard Couch.—This is an appeal from an order of the Court of the Resident at Haiderabad, in the Deccan, dismissing an appeal from a decree of the Judicial Commissioner of the Haiderabad Assigned Districts, by which a decree of the Deputy Commissioner of the Amraoti District was affirmed. This decree was dated the 8th of August 1879, and it was decreed by it that the respondent, Rambaksh Seochand, who was the plaintiff in the suit, was entitled, as mortgagee, to possession of nine houses thereafter described, and it was directed that he be put in possession thereof. The facts out of which the suit arose are as follows:—On the 22nd of June 1873, a firm carrying [1041] on business as bankers at Amraoti under the name of Puranmal Prem-sukhdas, by which name it has been sued, executed, by their manager Bhairaojin, a mortgage to Rambaksh Seochand of immoveable and moveable property at Amraoti for Rs. 26,500 and interest. On the 18th of December the firm, having become further indebted to Rambaksh Seochand in Rs. 40,000, executed in like manner to him a mortgage of other immoveable property in Amraoti, to secure the repayment of that sum, with interest. Of the nine houses which were the subject of the suit, and are described in the decree of the 8th of August 1879, one was included in the former mortgage, and the other eight in the latter. The mortgagee was put in possession of six of the houses. As to the remaining three, the latter mortgage contained the following provision:—

"On account* of the following three houses, which we have already mortgaged to the New Bombay Bank for Rs. 80,000, reserving the mortgaged lien of the Bank on these houses, we mortgage them to you in payment of the sum of Rs. 16,000, subject to the condition that the New Bombay Bank has a prior right for the recovery of money due to it from these houses, and, after full recovery by it, you will be entitled to the balance, if any left. If the balance falls short, we ourselves will be responsible for the payment. At present, these houses being in the possession of the New Bombay Bank, we cannot put you in possession of them, and as soon as they will be redeemed, that is, as soon as the Bank's possession of them ceases, you should understand that they are put in your possession."

The appellant, Gokaldas Gopaldas, having obtained a decree for about Rs. 19,000, against Puranmal Preamsukhdas, caused the nine houses to be attached and sold in execution of it, and in September 1876 himself purchased the right, title, and interest of Puranmal Preamsukhdas in them. On the 21st of April 1877 he paid the Bank Rs. 5,000 on account of the mortgage debt, and on the 10th of May 1877 Rs. 137-2-10 as payment in full of its claim upon the mortgage. The debt to the Bank had previously been reduced. He appears to have taken possession of the nine houses and on the 11th of July 1877 Rambaksh Seochand brought a suit against him and Puranmal Preamsukhdas, who was made the first defendant, to recover possession of them, alleging that he was entitled to it under the two mortgages to him. And if the houses were not restored to him, he claimed the mortgage money and interest.

[1042] The defence of Gokaldas Gopaldas was that the mortgages to the plaintiff were fraudulent and without consideration, and made to defeat creditors, and that the agent had no authority to execute them. And, further, as to the houses mortgaged to the New Bombay Bank, that he had paid the money due to the Bank, and had obtained the right of mortgage thereon, and the plaintiff could not claim them until they had been redeemed by Puranmal Preamsukhdas. Issues were framed, the fourth being:—

"What was the effect of the payment made to the Bank of Bombay in satisfaction of Puranmal's debt on the rights of the plaintiff as mortgagee? Did possession vest in him thereupon?"

There was a dismissal of the suit by the Deputy Commissioner, and a remand by the Judicial Commissioner, of which it is not necessary to take any further notice. On the remand, the Deputy Commissioner found that the mortgages to the plaintiff were *bonâ fide*, that there was good consideration, that "possession passed to the plaintiff in accordance with the terms of those deeds," and the plaintiff was in possession when the defendant attached the houses. Upon the fourth issue he held that when Gokaldas had paid the debt to the Bank, he stood to the plaintiff in the exact position in which the mortgagor, first defendant, would have stood had he redeemed the Bank's mortgage, and that the effect of the payment to the Bank was to entitle the plaintiff to immediate possession of the houses mortgaged to it. He gave the plaintiff a decree for possession of the nine houses, and directed him to be put into possession.

This judgment was affirmed on appeal by the Judicial Commissioner, and a special appeal therefrom to the Court of the Resident at Haiderabad was dismissed.

Two grounds have been taken in the appeal to Her Majesty in Council from the decree of the Resident: (1) that the mortgages to Rambaksh Seochand were not *bonâ fide* or made for good consideration; (2) that as regards the three houses in mortgage to the Bombay Bank, the appellant was entitled to stand in the place of the Bank, and to retain possession of them until the amount paid by him to the Bank was repaid.

[1043] As to the first ground, there are concurrent judgments of the lower Courts against the appellant, and the propriety of them was not disputed at the bar. Consequently the appeal fails as to this ground, and altogether so far as it relates to six of the houses.

Upon the second ground the question is whether the doctrine in *Toulmin v. Steere* (3 Mer. 210) should be applied in this case. In the judgment of Sir WILLIAM GRANT, M. R., in that case there is a passage to the following effect —

“The cases of *Greswold v. Marsham* (2 Ch. Cas., 170) and *Mocatta v. Murgatroyd* (P. Wms. 393) are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice.”

The authority of *Toulmin v. Steere* has been much questioned and it has been found upon examining the Registrar's book that *Greswold v. Marsham* (2 Ch. Cas., 170) is no authority whatever for the proposition in support of which it has been usually cited (2 Dart's “Vendors and Purchasers,” 5th ed., 917). Vice-Chancellor HALL, in *Adams v. Angell* (L. R., 5 Ch. D., 634) shows in how unsatisfactory a state the law is upon this point. He says (p. 641):—

“Doubtless those cases have been questioned. In *Gregg v. Arrott* (1 Lloyd & Gould, 246) Sir E. SUGDEN said that he and Sir SAMUEL ROMILLY thought ‘at the time’ it was wrong; and, in *Watts v. Symes* (1 De G. M. & G., 240), Lord Justice Knight BRUCE expressed doubts as to the decision. In the recent case of *Stevens v. Mid-Hants Railway Company* (L. R., 8 Ch. Ap., 1064) Lord Justice JAMES said as to *Mocatta v. Murgatroyd* (P. Wms., 393), *Toulmin v. Steere* (3 Mer. 210) and *Parry v. Wright* (5 Rus., 142, 148): ‘Those cases, perhaps, some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off.’ But the decision in *Toulmin v. Steere* (3 Mer., 210) was recognized by Sir GEORGE TUNNER in *Squire v. Ford* (9 Hare, Ca. in Chanc., 47) by Sir J. LEACH and Lord LYNDHURST in *Parry v. Wright* (5 Rus., 142, 148), in effect by Lord St. LEONARDS in *Armstrong v. Garnett* (4 Dru & War., 182), and by Lord [1044] CRANWORTH in *Otter v. Lord Vaux* (2 Kay & J., 650, 6 De G. M. & G., 642). In *Anderson v. Pignet* (L. R., 8 Ch. App. Cas. 180), it was referred to by Lord SELBORNE as having been questioned by some persons, but his Lordship did not say that he approved or disapproved of it. It is said in some of the cases that the priority may be preserved.”

When *Adams v. Angell* came before the Court of Appeal, Sir GEORGE JESSEL, M. R., said as to *Toulmin v. Steere*. “Assuming it, however, to be binding upon us, it amounts to no more than this, that, in the case of a purchase from the owner of an equity of redemption, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further.” This principle was acted upon in *Watts v. Symes* (1 De G. M. & G., 240), where, as in *Toulmin v. Steere* (3 Mer., 210), a first mortgage was paid off by the purchaser of the ultimate equity of redemption at the time of his purchase, and out of the purchase-money, but a declaration by the vendor that the first mortgage should be kept alive was considered sufficient to prevent a second mortgagee from treating it as extinguished.

In the case before their Lordships, the debt to the bank was not paid off out of the purchase-money. The appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that debt. When he paid the Bank, some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distinguished from *Toulmin v. Steere* (3 Mer., 210), but their Lordships do not think it necessary to do this, as they are not prepared to extend its doctrine to India.

There are some decisions in India which their Lordships think they ought to notice. In *Gaur Narayan Mazumdar v. Brajanath Kundu Chowdhry* (5 B.

L. R., 463), *A* mortgaged certain lands to *B*, and afterwards mortgaged the same to *C*, who, having obtained [1043] a decree for the redemption of the mortgage to *B*, paid off the debt to him, but it did not appear that he took an assignment of the mortgage. It was held by the High Court at Calcutta, on the authority of *Toulmin v Steere*, that the first mortgage was extinguished, and a lease made by *A* between the two mortgages was binding upon *C*. In *Icharam Dayaram v. Raji Jaga* (11 Bom. H. C. R., 41), the High Court at Bombay held that, generally speaking, the purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation as regards such subsequent incumbrances, as if he had been himself the mortgagor, he can neither set up against such subsequent incumbrances a prior mortgage or his own, nor consequently a mortgage which he or the mortgagor may have got in. For this, *Toulmin v Steere*, *Greswold v. Marsham*, and *Mocatta v. Murqatroyd* are quoted. On the other hand, the High Court at Madras in *Ramu Naikan v. Subaraya Madah* (7 Mad. H. C. Rep., 229) held that a prior mortgagee, having purchased the ultimate interest, may still use his mortgage as a shield against the claims of subsequent mortgagees, saying that in later cases the Judges had sought to mitigate the rigidity of the doctrine of Sir W GRANT in *Toulmin v. Steere* (3 Mer., 210). The doubts as to that case, or the propriety of introducing the doctrine of it into India as a rule of justice, equity, and good conscience, do not seem to have been considered by the High Court at Calcutta or Bombay.

The doctrine of *Toulmin v. Steere* (3 Mer., 210) is not applicable to Indian transactions, except as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal [1046] transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere*, seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

The obvious question to ask in the interests of justice, equity and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

Their Lordships are of opinion that the lower Courts in this case were wrong in holding that the appellant was in the same position as the mortgagor. They hold that the mortgage to the Bank was not extinguished, and that the appellant, the second defendant, had a good defence to the suit for possession of the three houses included in that mortgage. They will therefore humbly advise Her Majesty that the decree appealed from should be modified by

omitting from it the houses which are described in it under the numbers 4, 5 and 6, and by dismissing the suit so far as it regards those houses with costs in the lower Courts in proportion. And as the appellant has failed on the question of the validity of the mortgages to Rambaksh Seochand, they make no order as to the costs of this appeal.

Solicitors for the Appellant. Messrs *Merriman, Pike, & Merriman*

Solicitors for the Respondent, Rambaksh Seochand Messrs. *Sanderson & Holland.*

NOTES

[I. THE RULE IN TOULMIN v. STEERE—ITS PLACE IN ENGLISH LAW—

In the case of *Whiteley v. Delaney* (1914) A.C. 132, the rule in *Toulmin v. Steere* was considered at great length by PARKER, J.—(1911) 2 Ch. 448—and by the Court of Appeal—(1912) 1 Ch. 735—but in the view of the facts taken by the House of Lords, this question did not arise, and was not expressly overruled. There were, however, observations, by the Lord Chancellor and Lord Dunedin some of which are reproduced below.

LORD DUNEDIN said, "Not only was the judgment that of a great Judge, but it is many years old, and only the strongest reason should make a Court of last resort upset a judgment on a point of conveyancing which has remained as authority for so long a time. It is clear, however, that there has been, to say the least of it, a great reluctance on the part of Judges, learned in equity to extend the principle of *Toulmin v. Steere* beyond the limits of its own facts.

"All seem agreed that in debateable cases merger takes place or not according to intention. Indeed, this seems a necessary corollary to the interposition of equity; for otherwise why not leave the parties to their position at law? The difference of opinion seems to come to a question of onus. Where law would involve merger, and where equity can save that consequence, is the onus on those who seek to say that there is merger or on those who will have the contrary? Must you prove an intention to merge, or an intention to keep alive the security?"

"I think, taking the cases cited as a whole, that the general view comes to this. Where by appropriate conveyancing the charge could be preserved (this excludes all cases of which *Otter v. Lord Vaux* 2 K. & J., 650, 6 D.M. & G., 638 is a type), then it will be for the party alleging the charge to be dead to show an intention to that effect. What have been called the presumptions arising from the continued existence of the charge, being to the benefit of the person who has paid it off, as, e.g., in the case of payment by a limited owner, are just, I think, other ways of expressing the rule."

This is how Lord Justice Fletcher Moulton in the Court of Appeal in that case, *sub nomine, Manks v. Whiteley* (1912) 1 Ch., 735 at 764, described the origin and the limits of the principle—"At common law, the merger of estates took place by operation of law without regard to the injustice caused thereby. Equity interfered both with regard to the merger of interests which were recognized by common law and those which are equally real but were at that date recognized only by equity itself. That estates and interests in estates which were quite distinct and could exist in separate hands should mutually destroy one another wholly or partially when they came into the same hands was absurd and unjust when that destruction affected substance and not merely form. Its operation was to lessen the beneficial interest of the owner and thereby to make a gift of a portion of it to some third person. Equity set itself to remedy this anomaly. It never presumes in favour of a gift. If the intention to give exists and the gift is completed it will recognize it, but it requires the intention to be proved, and the onus of proving it rests on the party who claims under it. It applied this simple and equitable principle to merger and it did nothing more. This appears to me to reconcile all the cases. The test whether the merger is or is not beneficial to the owner of the interests is merely another form of saying whether or not it would in substance be a gift to the third party who has given no consideration for the advantage he gains thereby. If that is so, the third party must prove the intention to give. Such cases as *Otter v. Lord Vaux* 2 K. & J., 650 do not militate against this principle. Equity does not regard the man who is merely performing his own obligation and thus removing the charge which was created to secure that performance as making a gift to his other creditors."

The following passage from the Judgment of Lord Justice Lindley in *Liquidation Estates Purchase Co. v. Willoughby* (1896) 1 Ch., 735 (which the House of Lords reversed in (1898) A.C., 321 on certain special facts) is often quoted—If, indeed, there were some unknown encumbrancer who would be let in as a first incumbrancer if Norton's charge were not treated as subsisting, it may be that, notwithstanding *Toulmin v. Steere* it could be so treated. But why? Because in that case the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts

have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him."

Also this from Lord Macnaghten's speech in the House of Lords in *Thorne v. Cam* (1895) A. C., 11 at 18, 19:—"Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

II. THE PRINCIPLES OF MERGER—SUBROGATION—

The cases of 9 Cal., 961 and 10 Cal., 1035 are decisions of the Privy Council where the principles are fully expounded. Justice MOOKERJEE has elaborately expressed them in a series of Judgments from which extracts are given below:—

In (1911) 14 C. L. J., 500 Mr. Justice MOOKERJEE stated the principles as follows:—

"The cases of (1905) 2 C. L. J., 288; (1910) 33 All., 101; 7 A. L. J., 914 merely affirm the doctrine that, if a person purchases a property which is subject to two mortgages, and retains a portion of the purchase money for payment to the mortgagees but pays the first of the two encumbrances and not the second, he cannot treat the first mortgage as kept alive to be used as a shield against the second; nor can he claim to be subrogated to the position of the mortgagee whose debt he has satisfied. The principle is that a person cannot claim a subrogation when he simply performs his own obligation or covenant." * * *

As was explained by this Court in the case of (1907) 36 Cal., 193: 5 C. L. J., 611, a subrogation may arise only in those cases where the party claiming it advanced the money to pay a debt, which, in the event of default by the debtor he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. The distinction between legal subrogation and conventional subrogation is well established, and an illustration of the former class is furnished by the case of *Gokaldas v. Puranmal* 10 Cal., 1035 where it was held that the purchaser of an equity of redemption who had paid off the first charge, only to protect his own interest might use the first mortgage as a shield against mesne encumbrancers (the payment being made by a person who is under no personal obligation to pay). To put the matter in another way, the purchaser of an equity of redemption, upon paying off prior mortgages is subrogated to the rights of the mortgagees paid off, the mortgages paid being considered part of the purchaser's title to the premises."

In (1907) 7 C. L. J., 1 Mr. Justice MOOKERJEE observed,

"Although as laid down in 31 Cal., 863 a security is extinguished upon the actual sale of the mortgaged properties and distribution of the proceeds, yet a mortgagee who has purchased at a sale in execution of a decree upon his mortgage is entitled to rely upon his mortgage as a shield against a subsequent incumbrancer (1903) 30 Cal., 599 * * * Where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption. The rule, however, is subject to the important qualification that a mortgage will not be kept alive in aid of a fraud or wrong; a mortgage substantially satisfied may be kept alive in equity, only when this is requisite to the advancement of Justice and this will never be allowed when the result will be, from the forms of law, to aid in perpetrating a fraud or an injury; in other words, although the object of a purchase by a mortgagee at a sale in execution of a decree upon his mortgage is to obtain the equity of redemption and thus become full owner of the property, it may sometimes be an advantage to him to preserve his mortgage title so that he may not be defeated by an intermediate title which ought not justly to supersede or extinguish his title."

In (1907) 36 Cal., 193: 5 C. L. J., 611, Mr. Justice MOOKERJEE said, "To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with a debtor or creditor that he should receive and hold an assignment of the debt as security or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected."

"It is only in the case of 'legal subrogation' or subrogation as a matter of right, as distinguished from 'conventional subrogation' or subrogation by reason of agreement, that the question of intention to keep the mortgage alive arises."

"The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own."

"Before one creditor can be subrogated to the rights of another the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble risk and expense."

III. APPLICATIONS—

(a) The principle is not confined to cases of incumbrances only. "The doctrine ought to be invoked where the purchaser is met by an *intermediate title* which ought not, in justice, to supersede his rights, and the recognition of which, in supercession of his rights would mean that the satisfaction of the mortgage is completely or partially nullified :—(1907) 7 C. L. J., 1 at 32.

(b) It does not make any difference that the money paid is paid by the hand of the mortgagor and with a view to pay off or reduce his own debt, when he was doing so for the benefit of the lender and in performance of the agreement with him :—(1901) 29 Cal., 154 P. C.; 6 C. W. N., 209; 29 I. A., 9 affirming (1898) 3 C. W. N., 153 (156).

(c) Even when the obligation is converted into a decree, the principle is applied :—(1905) 2 C. L. J., 202; (1907) 7 C. L. J., 1; (1911) 13 I. C., 913.

(d) The lender is subrogated to the rights (with their limitations) of the mortgagee who was paid off :—(1885) 7 All., 568 (*per* MAHMOOD, J.), and can claim his priority :—(1885) 7 All., 577 (priority by registration).

(e) To the extent that the later mortgage was in renewal of a prior one, the intermediate incumbrancer was postponed :—(1909) 10 C. L. J., 150 at 179, (1899) 16 Cal., 523, (1896) 20 Mad., 274.

(f) Purchase of equity of redemption.—A first mortgagee buying the equity of redemption is entitled to use his mortgage as a shield against subsequent mortgages :—(1905) 1 C. L. J., 531,

One of two co-mortgagors paying off the entire debt is entitled to subrogation as regards the other's share :—(1906) 4 C. L. J., 79.

This principle was applied to the part payment by one of two mortgagors, so as to keep alive the charge for the remainder on the whole property :—(1909) 10 I. C., 196, where mortgaged property is sold to a third person while under attachment in execution of a money decree and the purchaser pays off the mortgage, it must be presumed that he intended to keep the mortgage alive for his protection :—(1913) 18 I. C. 704 11 A.L.J., 127.

There being no merger on a purchase of the equity of redemption and the mortgagee's rights, (at a Court sale) it was open to the purchaser in the former capacity to question the validity of an intermediate mortgage :—(1913) 19 C. L. J., 200. 20 I. C., 864

(g) In the following cases it was held immaterial whether the lender was aware of the prior incumbrance :—

A purchaser of land who, while in possession of the land purchased, pays off an incumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off :—(1908) 31 Mad., 439 18 M. L. J., 306 following 21 Mad., 143

The fact that the person paying off the prior charge was not aware of other charges did not prevent the application of the rule :—(1904) 8 C. W. N., 690.

In (1911) 14 C. L.J., 500, the purchaser of the equity of redemption undertook to pay out of the purchase money certain prior incumbrances, it was held that he was entitled to use those incumbrances against those which he did not undertake to pay, though (apparently) he was not aware of their existence (it was suggested he *might* have been, if he had searched for incumbrances in the Registration Office) *see* p. 505. Payment of prior incumbrance without knowledge of intermediate sale :—(1893) 18 Bom., 86.

No notice at the time :—(1913) 26 M. L. J., 94. 21 I. C., 978, following (1912) 35 Mad., 642 and distinguishing (1910) 34 Mad., 119 20 M. L. J., 380, kept alive, notice or no notice :—(1884) 8 Mad., 247.

(h) As to other applications *see* (1911) 11 I. C. 469, 8 A. L. J., 663. 10 I. C., 556, (1906) 33 Cal., 1133; 10 C. W. N., 1010; 4 C. L. J., 121; (1901) 29 Cal., 25, (1892) 16 Mad., 94; (1891) 13 All., 581; (1888) 11 Mad., 345, (1899) P. R., 67; (1904) P. R., 30. (1904) P. L. R., 189; (1913) 19 I. C., 755; (1913) P. L. R., 215; (1913) P. W. R., 128.

(i) As regards the second mortgagee's rights on a merger *see* (1911) 21 M. L. J., 213 F.B.

(j) But the principle is not applied where the payment is in discharge of one's own obligation :—

The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy :—(1906) 2 C. L. J., 288. If a person purchases property which is subject to two mortgages and retains a portion of the purchase money for payment to the mortgagees but pays the first of two incumbrancers and not the second, he cannot treat the first mortgage as kept alive to be used as a shield against the second nor can he claim to be subrogated to the position of the mortgagee whose debt he has satisfied :—(1905) 2 C. L. J., 288.

This principle was not applied to persons who being the assignees of a *mokurari* interest granted by a co-mortgagor, paid off a mortgage and claimed contribution from the co-mortgagor :—(1906) 4 C. L. J., 79.

Where the purchaser of the equity of redemption undertook to pay off the two prior incumbrances on the property out of the consideration amount, it was held that he could not

set up one of them which he paid off as a shield against the other which he did not pay—any more than the mortgagor:—(1910) 33 All., 101; 7 A.L.J., 914; 71 C., 200; 6 A.L.J., 549; 2 I.C., 207 citing (1907) A.W.N., 85, 2 C.L.J., 288, (1893) 17 Mad., 62, 4 A.L.J., 849 but see 7 A.L.J., 15; 5 I.C., 177.

See also (1910) 20 M. L. J., 380; 8 M. L. T., 132; 6 I. C., 781; (1910) 21 M. L. J., 180; 9 I. C., 139; (1905) 29 Mad., 37.

Thus, where one's charges were made part of the consideration for the sale of an equity of redemption, and there was the charge of another outstanding, it was held that those charges may be used as a shield against that other:—(1891) 13 All., 432.

In (1900) 22 All., 284 it was laid down that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him.

But in respect of incumbrances other than those contracted to be paid off, the rule would be applied:—(1911) 12 I. C., 607; 8 A. L. J., 1289, (1911) 14 C. L. J. 500.

(k) Being a question of intention the presumption is a rebuttable one:—(1905) 2 C.L.J., 574

The intention was held negatived when the later mortgage, like the prior one, was also a usufructuary mortgage and both could not coexist:—(1895) 19 Mad., 105.

(l) As regards application to benami transactions, see (1914) M. W. N., 131; 26 M. L. J., 74; 22 I. C., 253

(m) Incidentally, in (1903) 26 Mad., 686 (710) BHASHYAM AYYANGAR, J. drew attention to 11 Mad., 452 as having erroneously proceeded on the principle of subrogation on the authority of 10 Cal., 1035.

IV. INDIAN DEEDS AND CONTRACTS—INTERPRETATION—

Rules established in English Courts for construing English documents are not as such applicable to transactions between natives of India:—See (1886) 12 Cal., 663 at 679 where many instances are collected.]

[1047] APPELLATE CRIMINAL.

The 18th August, 1884.

PRESENT.

MR JUSTICE MITTER AND MR JUSTICE PIGOT.

In the matter of Nobin Krishna Mookerjee Petitioner
versus

Rassick Lall Laha... .. Opposite Party

*Revision on facts—Act X of 1882, s. 435—Evidence—Registration
Act III of 1877, s. 82.*

Under s. 435 of the Criminal Procedure Code the High Court has power to go into questions of fact, but it will only exercise this power in cases in which it finds that it will be in the interests of justice to do so.

N was charged with having made a false statement before a Sub-Registrar in indemnifying K, a person who had executed a mortgage deed in favour of R, and who was a neighbour of his (N's) as being the person to whom R had agreed to advance the money, the consideration of the mortgage. The false statement consisted in his stating to the Sub-Registrar that he "knew K as his neighbour." During the hearing of the case it was sought to prove a statement made by R to a third party (R having died previous to the institution of the case) to the effect that N had told him certain facts. A memorandum, alleged to be in the handwriting of N, was also tendered and received in evidence without any further proof as to its being in N's handwriting than that it bore a similarity to another piece of paper proved to bear his handwriting.

Held, that the statement made by R to the third party was inadmissible and irrelevant and that the memorandum was wrongly received in evidence.

IN this case the accused was charged with having abetted the false personation of one Khirod Chunder Mookerjee before the Sub-Registrar of Sealdah, with having intentionally made a false statement before that officer in that he identified some unknown person as the said Khirod Chunder Mookerjee, and also with having abetted the offence of cheating.

The facts of the case were shortly as follows . One Bossunto Coomar Mookerjee, a broker, negotiated a loan in September 1881 with one Roma Nath Laha for the sum of Rs. 5,000 to one Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee of Bhowanipore, to be secured by a mortgage of the borrower's property.

In pursuance of that arrangement a draft mortgage was pre-[1048]pared and given to Bossunto for the purpose of being approved. It was then taken away by him, and afterwards returned accompanied by a memorandum on a slip of paper which ran as follows .—

‘ I approve the draft, only the time is to be extended to one year instead of six months , the schedule of the properties covered by the deed will be sent to-morrow, 25th September 1881. (Sd.) Nobin Krishna Mookerjee, Pleader.’

The deed was then engrossed, and on the 27th September an attempt was made to get it registered at the Sealdah Sub-Registrar's Office after Khirod had executed it, but registration was refused on the ground that there was no proper person present to identify Khirod. Subsequently on the 10th October 1881, it was registered, Khirod being then identified by the accused Nobin Krishna.

It subsequently transpired that the Khirod who executed the deed was not the real Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, and the accused was placed before the joint Magistrate of Alipore upon the above charges.

Previous to the institution of the case Roma Nath Laha died.

During the hearing of the case, the following question was put to one of the witnesses for the prosecution in re-examination Q—What did Roma Nath tell you about his interview with ‘Nobin’?

This question was objected to by the pleader who appeared on behalf of the accused, but the objection was overruled by the Magistrate, who remarked that had the objection been a valid one he would still have put the question himself.

In reply to the question, the witness detailed a statement made to him by Roma Nath to the effect that the accused had told him (Roma Nath) that after he (the accused) had identified the executant, there was no cause for anxiety for him, and that he (the accused) would be responsible for the money.

In the course of the hearing, the memorandum attached to the draft above referred to was admitted in evidence without any proof of its being in the handwriting of the accused, but merely on the ground of the similarity between the handwriting of the accused and the handwriting appearing on the memorandum.

[1049] The remainder of the facts of the case appear sufficiently for the purpose of this report in the judgment of the High Court.

The Joint Magistrate having convicted the accused and sentenced him to rigorous imprisonment for one year and a fine, an appeal was preferred to the District Judge. That appeal being dismissed, an application was made to the High Court under its revisional power to send for the record in the case, and the Court granted a rule.

The rule now came on to be heard.

Mr. Evans, Mr. Gasper, and Baboos Umbica Churn Bose, Grish Chunder Chowdhry, Jogesh Chunder Roy and Dwarkanath Chuckerbutty for the Petitioner.

Mr. Allen and Baboo Srinath Chunder for the Opposite party.

The Judgment of the High Court was delivered by

Mitter, J. (PIGOT, J., concurring).—The petitioner before us was convicted by the Joint Magistrate of Alipore (1) of having abetted the false personation of one Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore, before the Sub-Registrar of Sealdah, (2) of having intentionally made a false statement before the said officer in identifying some unknown person as the said Khirod Chunder; and (3) of having abetted

the offence of cheating by dishonestly inducing one Huridas Bhuttacharjee to deliver the sum of Rs. 5,000 to the said unknown person under the belief that he was advancing the said sum of money to Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore. The petitioner was sentenced to one year's rigorous imprisonment and a fine of Rs. 200 in respect of the second of the above mentioned offences, no sentence being passed for the others. On appeal the conviction and the sentence have been upheld by the Sessions Judge of the 24-Pergunnahs. The present application has been made under s. 435 of the Code of Criminal Procedure to set aside the conviction and the sentence on various grounds of law and facts. Under s. 435 we generally decline to go into the questions of fact, though we have the power to do so. We exercise this power only in such cases where we find that in the interests of [1050] justice it should be exercised. After fully hearing arguments in this case, we were of opinion that the present is a case in which that power should be exercised. Moreover we find that there are two grave errors of law in the proceedings and the judgment of the lower Court. The first error is that the Joint Magistrate allowed a statement of a deceased person, namely, Roma Nath Laha, the master of Huridas, to go in as evidence, although objected to. This statement was deposed to by Huridas. There is no question that this statement was not relevant. The other error is that the lower Courts have assumed without any evidence that the petitioner as a vakeel had approved the draft of the mortgage bond which was executed by an unknown person calling himself Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore, in favour of Roma Nath Laha.

These two errors of law being established we have to determine how far they affected the merits of the decisions of the lower Courts. We cannot decide this question without considering the weight of the remaining evidence. For these reasons we find it necessary to consider the evidence adduced in this case, in order to judge how far the conclusions of facts arrived at by the lower Courts are correct.

The most essential question of fact in this case was, whether in regard to the execution of the mortgage bond in favour of Roma Nath Laha, and in respect of its registration there was false personation of Khirod Chunder Mookerjee son of Prosono Koomar Mookerjee, of Bhowanipore, by an unknown person.

Upon this point, after fully considering the evidence, I find no reason to dissent from the view taken by the Courts below.

I have no reasonable doubt in my mind that the person who executed the mortgage bond, and who appeared before the Sub-Registrar of Sealdah and registered it was not Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee of Bhowanipore; I see no ground to disbelieve the evidence of Khirod Chunder Mookerjee, Russickloll Mookerjee, Iswar Chunder Chunder and Bepin-behary Chowdhry upon this point. Their evidence is strengthened by a comparison of the signature of Khirod Chunder Mookerjee, both in English and in Bengali, with the signatures of the so-called Khirod on the mortgage bond, and the note of hand [1051] executed in favour of the witness Iswar Chunder. In coming to this conclusion the circumstance, the absence of any tangible evidence showing that about the time of the said mortgage bond the real Khirod was in need of borrowing such a large sum of money as Rs. 5,000, has, to a certain extent, weighed with me. The petitioner being a neighbour of Khirod, if the latter had really borrowed the money he would have been in a position to give some evidence upon the point. Upon the question of false personation, therefore, I think that the lower Courts have come to a correct conclusion.

Then comes the question whether Nobin Chunder knowingly participated in any way in abetting the successful carrying out of the fraudulent scheme by which Roma Nath Laha was defrauded of Rs. 5,000. The conclusion to which the lower Courts have come upon this point is unfavourable to the petitioner. The oral evidence upon this point is, in my opinion, very unsatisfactory. The only documentary evidence which has been put in is also, in my opinion, not entitled to much weight. It is a memorandum of an alleged approval of the mortgage bond by Nobin Chunder. Its proof rests merely upon a comparison of handwriting. I do not think that the evidence is strong enough to establish its genuineness. Then, again, supposing that it is genuine, there is no evidence to connect it with the particular transaction in question in this case. Putting aside this document there is only the oral evidence which, as I have already said, is unsatisfactory. Then balancing this oral evidence against certain circumstances, to which I shall presently refer, it seems to me that the reasonable conclusion upon this point is that Nobin Chunder was in no way party to the fraud which was perpetrated upon Roma Nath Laha. It is in evidence that, on the 27th September 1881, when the mortgage bond was executed at the Sealdah Sub-Registrar's Office, Nobin Chunder was not present. Upon the evidence it seems to me that on that day the document in question would have been registered, and the money paid to the executant if the Sub-Registrar had not objected to the identification of Khirod Chunder as unsatisfactory. Then, again, on the next day when Iswar Chunder advanced Rs. 1,000 to the personator [1052] of Khirod, Nobin Chunder was admittedly not present. These two circumstances almost conclusively show that the petitioner was not a party to the fraudulent device. He is a vakeel and also a well-to-do person. If he was depraved enough to join in the fraud, it is exceedingly improbable that he should have done so, unless he was assured of a very large share in the spoil, and if he had to receive such a share it is almost impossible to believe that he should not have been present at the Sub-Registrar's Office on the 27th September, and at Roma Nath Laha's *Boytuckhana* on the following day. Then, again, Nobin Chunder is not shown to have received anything more than eight rupees in the whole transaction. His conduct in telling Huridas, who called at his house in April 1882 to fetch the real Khirod Chunder, is inconsistent with a guilty conscience. These circumstances, in my opinion, decidedly outweigh the oral evidence upon this point, which, as I have already said, is of a meagre and unsatisfactory character upon the question of the complicity of Nobin Chunder in the fraud. I therefore come to a different conclusion from that of the lower Courts.

The next question is whether Nobin Chunder, when he identified some unknown person as Khirod Chunder, made a false statement intentionally: upon the evidence upon the record, I cannot but come to the conclusion that he made that false statement intentionally. It seems to me that when he stated to the Sub-Registrar that he knew Khirod as his neighbour, he was perfectly aware that that statement was false. But having regard to his position in life, and to the amount of remuneration he received, I think it is a reasonable conclusion to come to, that placing full reliance on the representations of Bossunto, Nobin Chunder believed that he was identifying Khirod Chunder, the son of Prosono Coomar.

Upon the conclusions at which I arrive, Nobin Chunder is only guilty under clause (a), s. 82, of intentionally making a false statement before the Sub-Registrar of Sealdah, and is not guilty of the other offences charged against him.

It will be convenient here to notice a point which was a good deal discussed before us. It was contended that the conviction under s. 82 of the Registration Act cannot be sustained, [1033] because the prosecution for the said offence was not commenced with the permission of the Sub-Registrar of Sealdah. But we find that on the 22nd April 1884 the Sub-Registrar of Sealdah gave permission for the prosecution of Nobin Chunder under s. 82 of the Registration Act. It is true that that permission was given when a complaint against Nobin Chunder was pending in the Joint Magistrate's Court, but that complaint had nothing to do with any offence under s. 82 of the Registration Act. The Joint Magistrate in investigating that complaint examined the witnesses for the prosecution in the month of April 1884. On that evidence, on the 23rd May 1884, the Joint Magistrate for the first time framed the charges under s. 82 of the Registration Act against Nobin Chunder. The prosecution for the offence under clause (a), s. 82, of the Registration Act, was, in my opinion, commenced on the date when the charges were framed. That being so, the objection as to the want of permission falls to the ground.

The only question that remains to be considered is that of punishment. Having regard to the facts which, in my opinion, have been established against Nobin Chunder, and to his position of life, I think the interests of justice would be fully met if we pass the sentence of rigorous imprisonment for one month, and a fine of two hundred rupees. The conviction under clause (a), s. 82, will stand, and the conviction of the other offences mentioned in the charge will be set aside. The sentence will be modified as stated above. If Nobin Chunder has undergone imprisonment under the sentence of the lower Court for any period, he will have to complete the time of imprisonment to which we sentence him.

Conviction upheld.

NOTES.

[Under the Criminal Procedure Code (1898) there may be revision on facts also, though this power should be exercised in exceptional circumstances only.—8 Bom., 197, 10 Cal., 1047, (1888) 12 Bom., 377, (1890) 14 Bom., 331, 14 Cal., 361, (1895) 22 Cal., 998.]

The discretion left to the Judges as to the exercise of these powers ought not to be fettered by hard and fast rules:—(1904) 28 Bom., 533; 6 Bom., L. R., 376.

Comparison is one of the modes of proving handwriting—37 Cal., 467 14 C. W. N., 1114. The case of 10 Cal., 1047, was distinguished in (1912) 14 I. C., 741, as having simply decided on the facts that the handwriting was not proved, it was held in this case by SUNDARA IYER, J., that the finding based on comparison would not be disturbed in second appeal.]

[1054] SMALL CAUSE COURT REFERENCE.

The 30th July, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Ram Chand Sen.....Plaintiff

versus

Audaito Sen and Srinath Sen.....Defendants.

*Marriage, Contract for—Consideration money, Suit for return of—
Public policy.*

The defendant in consideration of Rs 100 promised to give his minor daughter in marriage to the plaintiff, the defendant failed to fulfil his part of the promise, and the plaintiff brought a suit to recover the money paid as consideration for the promise.

Held, that such a suit would lie.

Juggeshur Chuckerbutty v. Panch Cowree Chuckerbutty (14 W. R. , 154) approved.

Query.—Whether the Court could have enforced the payment of Rs. 100 to the father of the minor as against the person engaging to marry the minor.

THIS suit was brought to recover Rs 100 alleged to have been paid by the plaintiff to defendant No 1, Audaito Sen, in consideration of a promise made by the defendant, Audaito, to give his daughter in marriage to the plaintiff. The defendant, Srinath Sen, was the brother of the defendant, Audaito, and it was alleged that the money was received by them both jointly. Defendant No. 1 failed to give his daughter in marriage to the plaintiff. The defendants, *inter alia*, contended that the agreement in question was illegal, and, therefore, no action was maintainable upon it.

The Judge of the Small Cause Court gave the following judgment.—

"I think that the suit is not maintainable. The money sought to be recovered was admittedly paid as *pon*, *i.e.*, as price for the promised marriage. the agreement is illegal and void, being contrary to public policy. To hold that an action will lie upon such an agreement would lead to the encouragement of the vicious practice of selling girls by their parents for the purpose of marriage. The practice no doubt [1055] obtains to a great extent in this province. But that, I think, is no reason why a Court of justice and equity should recognize, and give effect to it. It cannot be doubted for a moment that the practice is injurious to the public good. A parent who would give his daughter in marriage for *pon* would not, as a rule, care to consider the fitness, or the unfitness of the match, but would give preference to whomsoever pays the highest price."

"The case reported at page 154, 14 W. R.—*Juggeshur Chuckerbutty v. Panch Cowree Chuckerbutty*—is cited by the pleader for the plaintiff as authority, in support of his contention, that the suit will lie. But it seems that that case is distinguishable from the present case. In that case, the money sought to be recovered, appears to have been paid, not to the legal guardian of the girl, but to her brother, her mother being her legal guardian. But though there is this difference in the features of the two cases, the question seems to be not altogether free from doubt. But as the pleader for the plaintiff has

* Small Cause Court Reference No. 11 of 1884, made by Baboo Gonesh Chunder Chowdry, Judge of the Small Cause Court, Midnapore, dated the 26th June 1884.

applied for a reference to the Honourable High Court, I respectfully submit the following point for decision :—Whether a suit will lie for recovery of the money paid as *pon* to the defendant, in consideration of his promise to give his minor daughter in marriage to the plaintiff ? ”

“ The suit is dismissed contingent upon the opinion of the High Court on the point referred.”

No one appeared on the reference for either party.

Judgments were delivered by GARTH, C. J., and BEVERLEY, J.

Garth, C. J.— In this case I have great doubt whether the opinion of the Judge of the Small Cause Court is not correct : and if we were now asked to *enforce an agreement to pay pon to a girl's father*, in consideration of his giving her in marriage, I should have wished to refer the question to a Full Bench.

But the facts, as I understand them, are these :—

The plaintiff paid Rs. 100 to the defendant No. 1, in consideration of his giving his daughter to him in marriage, and the defendant No. 2, who is a brother of the defendant No. 1, was a party to the contract.

After the money was paid, the defendant No. 1 failed to fulfil his promise, and gave his daughter in marriage to some one else.

[1036] The plaintiff now seeks to recover back his money, and the defendants attempt to take advantage of the illegality of the contract by way of a defence to the claim.

Under these circumstances, I consider that the case referred to, *Juggeshur Chuckerbutty v. Panch Cowree Chuckerbutty* (14 W. R., 154), is directly in point, and apart from the question whether the contract is illegal, the justice of the claim is entirely with the plaintiff.

Upon the authority of that case, therefore, and because it is manifest justice that the defendants should not be allowed to retain the money, I agree with my learned brother that the claim should be decreed.

Had the question been whether, as against the plaintiff, we could enforce payment of the Rs. 100 to the defendant No. 1, I should have doubted very much whether we ought to do so.

In England, a bargain of this kind, for payment of money to a father, in consideration of his giving his daughter in marriage, is considered to be a marriage brokerage contract, and illegal as against public policy—see *Keat v. Allen* (2 Vernon's Rep., pt. 2 558) and other cases cited in *Addison on Contracts*, 5th edition, p. 742, 7th ed., 1017.

And without going the length of saying at present that I consider such contracts to be illegal in this country, I certainly should be disposed, as at present advised, to hold that they were so far void, as to be incapable of being enforced by the rules of equity and good conscience.

In the present case the plaintiffs' suit will be decreed.

Beverley, J.—I think that the suit will lie to recover the money in question. There is nothing immoral in the contract so far as I can see. No doubt the purchase or hire of a minor girl for purposes of prostitution, or concubinage, is an immoral act, but where a legal marriage is in contemplation, the payment of money as a consideration is in accordance with the customs of the country, and therefore, in my opinion, not opposed to public policy. Besides the case cited by the Judge from 14 W. R., 154, I find that a similar view was also expressed by this Court in the case of *Ranee Lallun Monee Dossee v. Nobin Mohun Singh* (25 W. R., 32).

[1057] No doubt marriage brokerage contracts are illegal in England, but the reason of this is, that they are deemed to interfere with the free consent of the parties, which is an essential condition in the English marriage contract. But in India the consent of the parties has rarely, if ever, anything to do with the marriage contract, which is generally arranged by the parents or friends of the parties before they themselves are of an age to give a free and intelligent consent. It is opposed to English ideas of public policy that a Kulin Brahman should be paid to marry any number of Kulin girls, but so long as it is the recognized custom of the country, and is not prohibited by law, I think we should be scarcely justified in holding such marriage contracts to be illegal.

Decision reversed.

NOTES

[MARRIAGE BROCCAGE CONTRACTS—HINDU LAW—

The dictum of GARTH C J. in this case has met with judicial support in later cases although *asura* form being one of the forms of marriage recognised by the Hindu law, the marriage itself is valid, but the broccage contracts are void —

Where the marriage has been solemnised, these contracts are not enforceable. —(1893) 17 Mad., 9. 3 M. L. J. 132, (1888) 13 Bom. 126, 131,

Even at the instance of those to whom money is payable in *asura* marriages. —(1897) 22 Bom., 658; (1908) 32 Mad., 185 F. B. 18 M. L. J. 403, (1901) 23 All. 495, (1911) 15 C. W. N., 447; 9 I. C., 652, (1889) P. R., 128. See also (1889) 13 Mad., 83 which was before the Full Bench in 32 Mad., 185.

Nor are the amounts paid recoverable in those cases —*Ibid*

This is done on the ground of public policy and it is unnecessary to inquire in each case whether the contract therein is opposed to public policy or not —*Ibid*; 15 C.W N. 447 which dissents from the dictum to the contrary in 1 C. L. J. 261 founded on 23 All. 495 (see also 10 A. L. J. 159).

Similarly unenforceable is the contract to pay a certain amount on marriage not taking place between two other persons —(1912) 24 M. L. J. 310. 18 I. C. 515.

As regards the contracting parties, however, damages may be recoverable on failure of marriage:—(1896) 21 Bom. 23.

Also, a party who paid under such a contract, can recover the amount so paid, when the marriage did not in fact take place. —14 W. R. 164, 10 Cal., 1054, (1909) 33 Bom. 411; 11 Bom. L. R., 649; (1897) 22 Bom. 658; (1892) 16 Bom., 673; (1905) 1 C. L. J., 261, (1900) 3 O. C. 241. The case of (1912) 10 A. L. J. 159 16 I. C., 1004 is opposed to these cases.

This may be rested on the principle that where a plaintiff has paid money to the defendant upon an illegal executory contract, or for a future illegal object, before there has been any substantial part performance of the contract, or progress towards accomplishment of the object, there does not appear to be any good reason why he may not demand and recover back the money:—(1905) 1 C. L. J., 261, *per* MOOKERJEE, J.; see also (1903) P. L. R., 113.]

[10 Cal. 1057]
APPELLATE CIVIL.*The 26th August, 1884.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Koylash Chunder Sen (Claimant) Petitioner
*versus*Koylash Chunder Chakrabarti (Decree-holder) and Mohendro
Nath Bose (Judgment-debtor) Opposite Parties.**Civil Procedure Code—Act XIV of 1882, ss. 280, 281—Attachment—
Satisfaction of decree by private sale—Purchaser—Subsequent
attachment—Claim under s. 278.* *

A and *B* attached in execution of their decree property of *C* and his two brothers, their judgment-debtors. Subsequently *D* obtained a decree against *C* alone, and on the 11th January 1884 applied for attachment of the one-third share of *C* in the property attached by *A* and *B*, which belonged to *C* and his two brothers jointly. No order was on that date passed on the application.

On the 14th January 1884 *E* purchased from *C* his one-third share in the attached properties, and the purchase-money was, by arrangement between the brothers, applied in satisfying the debt due to *A* and *B*.

On the 28th January 1884 an order was passed on the application of the 11th January 1884 granting the attachment asked for by *D*.

And on the 23rd April 1884 *E* preferred his claim to the one-third share purchased by him, and which had been since the purchase attached by *D*. The claim was disallowed on the ground that *E* had no title to the property, he having purchased whilst the property was under attachment.

[1058] *Held*, on appeal, that the Judge should have, in accordance with s. 280 of the Code of Civil Procedure, confined himself to determining whether or no the property was in the possession of *E* on his own account, at the time that *D* attached the property.

MOTHURA MOHUN CHAKRABARTI and Radanath Bose had obtained a money-decree against Mohendro Nath Bose and his two brothers, and in execution of this decree had attached certain properties belonging to the Boses.

Subsequently to this, and on 26th June 1883, one Koylash Chunder Chakrabarti obtained a decree on a promissory note against Mohendro Nath Bose.

In execution of this last decree, Koylash Chunder Chakrabarti applied, on the 11th January 1884, for the attachment of the one-third share of Mohendro Nath Bose in the properties belonging to him and his two brothers jointly.

On the 28th January 1884 an order was passed granting the attachment of the one-third share of the properties which were already attached in the suit first above mentioned.

Subsequent to the date of the application for attachment, but previous to the 28th January 1884, *viz.*, on the 14th January 1884, one Koylash Chunder Sen purchased from Mohendro Nath Bose the one-third share (which belonged to Mohendro Nath) in the properties which belonged to the three brothers, and which were under the attachment obtained by Mothura Mohun Chakrabarti

* Rule No. 801 of 1884, against the order of Baboo Kristo Chunder Chatterji, First Subordinate Judge of 24 Pergunnahs, dated the 23rd of April 1884.

and Radanath Bose; and the purchase-money was applied by Mohendro Nath Bose in paying off the debt due to Mothura Mohun Chakrabarti and Radanath Bose.

On the 23rd April Koylash Chunder Sen (the purchaser) preferred a claim before the Subordinate Judge of the 24 Pergunnahs to the one-third share so purchased by him as aforesaid, setting out in his petition his title under his purchase, and his possession since the 14th January 1884. Koylash Chunder Chakrabarti, whose decree then remained unsatisfied, opposed the claim.

The Subordinate Judge disallowed the claim on the ground that the claimant had no title, he having purchased while the property was under attachment, and that Koylash Chunder Chakrabarti [1059] was entitled to sell the properties in execution of his decree, dated 26th June 1883, and he therefore fixed a day for the sale.

Koylash Chunder Sen then applied for and obtained a rule calling upon Mohendro Nath Bose and Koylash Chunder Chakrabarti to show cause why the order of the Subordinate Judge should not be set aside.

Mr. *Evans* (with him Baboo *Guru Das Banerjee*) in support of the rule, contended that the claim of Koylash Chunder Sen had not been properly decided upon, inasmuch as there had been no decision as to whether or no he was in possession on his own account on the date of the attachment by Koylash Chunder Chakrabarti, and submitted that sections 280, 281 of the Code should have been followed, that the purchase by Koylash Chunder Sen, during the attachment of the prior decree-holder, was not void as against Koylash Chunder Chakrabarti, although it was without leave of the Court, inasmuch as the claim of Koylash Chunder Chakrabarti was not enforceable under the attachment of the prior decree-holders.

Baboo *Chunder Madhub Ghose* and Baboo *Bhobani Charun Dutt* showed cause.

The Order of the Court was given by

Prinsep, J.—Mothura Mohun Chakrabarti and another attached certain property in execution of a decree obtained by them Koylash Chunder Chakrabarti, another decree-holder, also applied for execution of his decree, and for attachment, but it appears that no attachment was taken out by Koylash for some time. While the attachment of Mothura Mohun was in force, the judgment-debtor, without the permission of the Court specially obtained, sold their property to Koylash Chunder Sen, who is known as the claimant, and thus satisfied the decree of Mothura Mohun and Radanath, no further proceedings were taken by these decree-holders.

Koylash Chunder Chakrabarti then obtained an order for the attachment of the same property in execution of his decree, whereupon Koylash Chunder Sen preferred a claim under s. 278 of the Civil Procedure Code, alleging that he was in possession of the property under a purchase from the judgment-debtor, as just stated. The Subordinate Judge has disallowed [1060] the claim on the ground that the claimant had no title, as he purchased while the property was already under attachment.

It has been contended before us by Mr. *Evans*, that the Subordinate Judge should have confined himself to determining, within the terms of s. 280, whether the property purchased by his client was not, when it was attached by Koylash Chunder Chakrabarti, in his possession on his own account, and that his client is entitled to an adjudication on this sole ground.

It is further contended that the view taken by the Subordinate Judge of the title of the claimant is incorrect; that the claim of the decree-holder Koylash Chunder Chakrabarti was not enforceable under the attachment

obtained by Mothura Mohun and Radanath, and that, therefore, the purchase, while the property was under attachment by those decree-holders, was not void under s 285 as against Koylash Chunder Chakrabarti.

We think that, under the circumstances of this case, the first contention is good. The attachment of Koylash Chunder Chakrabarti was the sole attachment then before the Court; and it was against this attachment that the objection was raised by Koylash Chunder Sen. We are not disposed in the present case to express any opinion regarding the title of Koylash Chunder Sen. But the difficulties which would arise in summarily adjudicating on this title, in the manner in which it has been dealt with by the Subordinate Judge, are apparent from the fact that the decree of Mothura Mohun and Radanath, as stated in the affidavit, which has not been contradicted by the other side, was against three persons, and the attachment was of the entire property belonging to the three jointly; whereas the attachment of Koylash Chunder Chakrabarti was directed only to one of those three judgment-debtors, and therefore it would not follow that under s. 295 Koylash Chunder Chakrabarti would be entitled necessarily to participate in the assets realized by any sale that might have taken place in execution of a decree obtained by Mothura Mohun and Radanath. We think, therefore, that the case must be returned to the Subordinate Judge in order that he may proceed in the manner prescribed by s. 280.

The petitioner is entitled to his costs.

Rule absolute.

[1061] APPELLATE CIVIL.

The 2nd September, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE PIGOT.

Mokund Lall and others.....Defendants

versus

Chotay Lall.....Plaintiff.*

Specific performance—Delay in bringing the suit—Joinder of causes of action—Act XIV of 1882, s. 44—Joinder of a person not a party to the contract of which specific performance is sought.

A plaintiff sued on the 28th February 1881 for specific performance of a contract entered into on the 1st March 1878 by defendant No. 1, and joined in that suit as a defendant a third person, who alleged that he was the owner of the property, the subject of the contract, seeking to obtain possession and other relief as against such third person, stating that he was a benamidar of defendant No. 1.

Such third person contended in his written statement that the suit was multifarious, but the point was not decided in the lower Courts.

On second appeal, such third person contended that the discretion given to the Court under s. 23 of the Specific Relief Act ought not to be exercised, as the plaintiff had slept on his rights for nearly three years; and also contended that the suit was multifarious, and that he ought not to have been made a party thereto.

Held, that although the principle of the objection, as to the delay of the plaintiff in bringing his suit, was an important one, and one which ought to be considered by the Courts, in the exercise of their judicial discretion under s. 22 of the Specific Relief Act, yet the point

* Appeal from Appellate Decree No. 920 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated 28th of February 1883, reversing the decree of Baboo Mahomed Nurul Hossain, Second Subordinate Judge of Patna, dated the 23rd of January 1882.

not having been taken in the Courts below, and there being nothing on the record to lead the Court to presume that the ordinary rule applicable to suits of this nature had been disregarded in the Courts below, the objection ought not, under the circumstances, to be allowed to prevail in second appeal.

Held, also, per MITTER, J (PIGOT, J. dissenting), that as regards the objection to the suit for misjoinder, and under s. 44 of the Code of Civil Procedure, the Appeal Court was precluded by s. 578 of the Code from reversing the decree of the lower Court, as the error (if an error at all) could not affect the merits of the decision.

Held, also, that the principle laid down in the cases of *De Houghton v. Money* (L. R., 2 Ch. App., 166) and *Luckumsey Ookerda v. Fazulla Cassumbhoy* (I L R., 5 Bom., 177) is only applicable where from the plaintiff's case it appears that a third party, not a party to the contract, has a distinct interest from that of the other parties to the contract, which interest is sought to be declared null and void.

[1062] THIS was a suit for specific performance of a verbal contract for the sale of a certain house and land.

The plaintiff asserted that Mussamat Nanki, on the 1st March 1878, entered into a verbal contract with him to sell a certain house for Rs. 3,700, and that Nanki's son, Jaffir Hossein, received on her behalf Rs. 100 as earnest money on the contract, and granted a receipt for the same, Nanki promising to execute a regular conveyance of the house within one month's time. Nanki failed to execute any conveyance, and the plaintiff, on the 28th February 1881, brought this suit against Nanki, her son Jaffir, and one Mokund Lall, who was alleged to be a benamidar of the plaintiff [defendant, No. 1?] and to whom the house was said to have been sold in 1873. The plaintiff prayed (1) for specific performance of the contract, (2) that he might obtain possession of the house, (3) that he might be registered in the Municipal register as owner in the place of defendant No. 3. (4) that the deed of sale of 1873 might be cancelled. Nanki (defendant No. 1) denied the contract, and denied having authorized her son to receive the earnest money on her behalf, and further stated that she had sold the house in 1873 to Mokund Lall for Rs. 3,000, under a registered conveyance. Mokund Lall (defendant No. 3) contended (1) that the house belonged to him under the deed of 1873, and that the plaintiff was one of the witnesses to the conveyance, and (2) that the suit was multifarious.

The Subordinate Judge tried four issues, which issues are fully set out in the judgment of Mr. Justice MITTER, and found that the deed of sale to Mokund Lall was a mere contrivance, no consideration money having passed at the time of the sale, but that, although Nanki was not prevented by that deed from entering into a contract of sale with the plaintiff, yet the evidence did not satisfactorily prove that she had entered into a contract with the plaintiff, and that she, or any one properly authorized by her, had received Rs. 100 as earnest money, and he, therefore, dismissed the suit on these points without going into the question as to who was in actual possession of the property. The plaintiff appealed to the District Judge, who found that Nanki had entered into a contract with the **[1063]** plaintiff, and that she had authorized Jaffir to receive the earnest money of Rs. 100, and that the deed of sale to Mokund Lall was a mere paper transaction, he therefore reversed the decree of the Subordinate Judge, and ordered specific performance of the contract sued upon, and declared that as soon as the plaintiff should pay the purchase-money he should be entitled to eject Mokund Lall from the house.

The defendants, Nanki and Mokund Lall, appealed to the High Court.

Subsequently to the admission of the appeal, it appeared that Nanki, through an authorized vakeel, applied to withdraw from her appeal, and that an order was passed on her petition directing the matter to stand over to the

hearing of the appeal. The Court at the hearing allowed Nanki to withdraw, but permitted the other defendant to appeal on all the points urged in the joint grounds of appeal.

Mr. Pearson, Baboo Mohesh Chunder Choudhry and Mr. Gregory for the Appellant.

Mr. Pearson contended that the plaint distinctly stated that there were "other conditions" attached to the verbal contract, which had not been set out in the plaint, and that the Court ought not to give specific performance of a contract the terms of which could not be found with reasonable certainty, s. 21, (cl. c), of Act I of 1877.

That the plaintiff having allowed nearly three years to elapse between the date of the alleged contract and the date of the institution of the suit was, by reason of such delay, not in a position to ask the Court to give him relief. The jurisdiction to decree specific performance is in the discretion of the Court, s. 22, Act I of 1877 the Courts have always been unwilling to give discretionary relief to those who sleep on their rights.

That the plaintiff had sued to obtain possession of the house from Mokund Lall, and for specific performance of his contract with Nanki, and for registration of his name in the Municipal register, and had not obtained leave of the Court to join these causes of action; and that, therefore, under s. 44 of the Code the suit ought not to be allowed to stand, and that Mokund [1064] Lall being a stranger to the contract between plaintiff and the defendant Nanki, he ought not to have been made a party to the suit for specific performance—*Luckumsey Ookerda v. Fazulla Cassumbhoy* (1 L. R., 5 Bom., 177), *De Houghton v. Money* (L. R., 2 Ch. App., 166).

Baboo Saligram Singh, for the Respondent, contended that there being a law of limitation, the plaintiff was entitled to bring his suit at any time within the period allowed by such law, and that any delay on his part within such period allowed would not debar him from succeeding in his suit. That the case of *Luckumsey Ookerda v. Fazulla Cassumbhoy* did not apply to this case, as the cause of action against the two defendants there was a separate one, viz., against one of them for refusal to deliver up title-deeds, and against the other for specific performance.

Judgments of the Court were delivered by MITTER and PIGOT, JJ.

Mitter, J.—This appeal arises in a suit for specific performance of a contract which was alleged to have been entered into on the 1st March 1878. The suit was brought on the 28th February 1881. The first defendant, according to the plaint, was the party who was in possession of the property in dispute, and who was entitled to it on the date when the alleged contract was entered into. The plaintiff further alleges that it was the said defendant who herself entered into the contract. The second defendant, who is the son of the first defendant, is alleged to have received Rs. 100 as part of the consideration money which was fixed, according to the plaintiff, at Rs. 3,700; and the plaintiff stated in the plaint that the second defendant received the Rs. 100 in accordance with the directions given by the first defendant for the payment of that amount to her son. There is another person who was made defendant, viz., Mokund Lall. It was alleged in the plaint that the defendants Nos. 1 and 2, that is to say, the mother and her son, were dissuaded by this defendant from fulfilling the contract entered into by the defendant No. 1 with the plaintiff. It was further alleged that, after the receipt for Rs. 100, which was [1065] granted by the defendant No. 2 to the plaintiff, was registered (which registration took place after a proceeding in the registration office taken

between the plaintiff and the defendants Nos. 1 and 2), the defendant No. 1 caused a petition to be filed through her benamidar and dependent, the defendant No. 3, Mokund Lall, in the Municipal office of the Municipality within which the disputed house lies, and caused the name of the defendant No. 3, Mokund Lall, to be registered in the Municipal office in respect of the house in suit. It was further alleged in the plaint that a kobala, dated 26th March 1873, which was executed by the defendant No. 1 in favour of the defendant No. 3 in respect of this house, was a benamee transaction, resorted to for certain reasons which are stated in the plaint, and not material to be mentioned here. Upon these allegations the plaintiff claimed specific performance of the contract, and asked also for a declaration against the defendant No. 3, that he was simply a benamidar for the defendant No. 1. The suit was defended both by Mokund Lall, the defendant No. 3, and by the defendant No. 1, and various objections were taken to the claim of the plaintiff. It will be sufficient here to notice the objection in the 9th paragraph of the written statement of Mokund Lall. That paragraph is to the following effect: "The plaintiff has in law no right to sue to have a deed of sale executed in respect of the disputed house in fulfilment of the contract, to recover possession, to register his name in the Municipal tax register, and to render this defendant's purchase null and void, as against this defendant, the prior purchaser. The form in which the plaintiff has brought this suit is illegal." Four issues were framed by the Munsif. These were.—

1st.—"Whether or no Mussamat Nanki has entered into a contract with the plaintiff, and whether or no she was competent to make such a contract?" (Mussamat Nanki is the first defendant.)

2nd.—"Whether the deed of sale of 26th March 1873 is genuine, and whether, under and by virtue of it, Mokund Lall is in possession of the disputed property, or the deed of sale is a nominal transaction, and Mussamat Nanki is in possession?"

[1066] *3rd.*—"Whether the stamp of the receipt is inadequate, and whether it was registered after the prescribed time or not," and

4th.—"Whether or no, out of Rs. 3,700, the defendant has received Rs. 100 in cash, and Rs. 40 for purchase of stamp?"

The Subordinate Judge dismissed the plaintiff's suit. He came to the conclusion that the alleged contract was not established. but, with reference to the question, whether Mokund Lall, the defendant No. 3, was benamidar or not, the Subordinate Judge came to the conclusion in favour of the plaintiff, that Mokund Lall was a mere benamidar. On appeal to the District Judge, the judgment of the Subordinate Judge was reversed. The District Judge substantially found that the plaintiff's evidence with reference to the contract was trustworthy, and upon that ground he came to the conclusion that there was a valid contract of sale entered into by the defendant No. 1 with the plaintiff. He was further of opinion, in concurrence with the Subordinate Judge, that Mokund Lall, the defendant No. 3, was merely a benamidar. The District Judge gave a decree in favour of the plaintiff. Against this decree this second appeal was preferred by both Mussamat Nanki Bibee, the defendant No. 1, and Mokund Lall, the defendant No. 3, but subsequently an application was made by a vakeel, other than those who filed the second appeal, asking the Court's permission on behalf of Mussamat Nanki Bibee to withdraw from the appeal. The order passed was, that it should be considered at the time when the appeal would be heard. Now, we are satisfied, upon the materials on the record, that Mussamat Nanki Bibee has made a substantive application through a properly authorized vakeel to withdraw from the

appeal, and it does not seem to me that there is anything in the Procedure Code that would disentitle her to withdraw from it. Therefore, we must try this appeal as if it was preferred by the defendant No. 3 only. That being so, it was contended on behalf of the respondent that any objection which upon the findings of the Court below Mussamat Nanki Bibee alone could take against the decision of the lower Appellate Court could not be urged by Mokund Lall in this case. With reference to that point we felt some doubt as to whether this contention is valid. The doubt arose in this way, that as [1067] between Mussamat Nanki Bibee and Mokund Lall, the finding of the lower Appellate Court, that Mokund Lall was a mere benamidar, is not conclusive. It may be binding as between the plaintiff on the one hand and Mokund Lall on the other hand, but as the plaintiff, respondent, before us is relying upon some act of Mussamat Nanki Bibee in support of this contention, a doubt arose, whether the decision of the lower Court not being conclusive between Nanki Bibee and Mokund Lall, the plaintiff could shut out Mokund Lall from urging those points which he could have urged if his co-appellant had not withdrawn from the appeal. Entertaining this doubt, we have heard the case upon all the points urged in the petition of appeal, and after hearing the learned counsel and vakeel who appeared for Mokund Lall, we called upon the learned vakeel for the respondent to answer the appeal upon the following three points: First, whether having regard to the delay in bringing the suit, and it being discretionary under the Specific Relief Act to award a decree or not, as the Court thinks fit, whether this suit should not have been dismissed by the lower Court, and it not having been dismissed, whether or not this Court on second appeal should make that order. The second point was, that Mokund Lall, the defendant No. 3, being a stranger to the contract, whether in this suit the plaintiff could claim any relief against him, and if he could not, whether the suit as against Mokund Lall should not have been dismissed. The third objection with reference to which we called upon the learned vakeel for the respondent to answer the appeal, was that, supposing Mokund Lall was properly made a party, whether the causes of action upon which this suit was brought could be properly joined together under the provisions of s. 44 of the Civil Procedure Code. As regards the first objection, it seems to me that we cannot lay down as a hard and fast rule of law, that a suit brought after the delay which has occurred in the present suit should be dismissed. There is no doubt that, under the Specific Relief Act, the Courts are vested with a certain amount of discretion in the matter of awarding a decree for specific performance; but I am not prepared to lay down as a proposition of law, that all suits brought after the lapse of time after which the present suit [1068] was brought are all liable to be dismissed. There may be circumstances under which a Court, exercising the discretion with which it is vested under the Specific Relief Act, may think it right to dismiss a suit brought nearly three years after the contract was entered into, and there may be also circumstances which may justify a Court in awarding a decree, even when the suit is brought after such a delay; each case must depend upon its own circumstances. In this case, I do not find that this objection was taken in the lower Courts, and, therefore, I am not in a position to say that there is any ground made out upon the materials on the record which would warrant this Court, in second appeal, in directing the dismissal of the suit. I am, therefore, of opinion that this ground must fail. As regards the other two objections, which I think may be taken together conveniently, it seems to me that even if they were well founded, we should be precluded by s. 578 of the Civil Procedure Code from reversing the decree of the lower Appellate Court, as it is clear from the facts found in this case that the error complained of, if it was

an error at all, could not possibly affect the merits of the decision. But putting aside that matter, upon the merits of the objections themselves, I am of opinion that the special appeal should not succeed. In support of the objection that the suit against the defendant, appellant, should have been dismissed, two cases have been cited—*De Houghton v. Money* and *Luckumsey Ookerda v. Fazulla Cassumbhoy*. It seems to me that what is laid down in these cases is this, that if, on the face of the plaint, or of the plaintiff's case, it appears that a third party, who was not a party to the contract upon which the suit was brought, had a distinct interest, but which interest is sought to be declared null and void upon some equitable ground, such a claim against the said third party could not be made a part of the suit. In the case of *De Houghton v. Money* it was admitted by the plaintiff that there was a conveyance in favour of Money, but it was said that that conveyance was executed under such circumstances as would make it a voidable one, and in the case of *Luckumsey Ookerda v. Fazulla Cassumbhoy*, it was distinctly admitted by the plaintiff that the third party, who was not a party to [1069] the contract, had a distinct interest. That is not the case here. Referring to the plaint, I find that the plaintiff is really suing upon one cause of action. He charged the defendant No. 1 with having resorted to certain devices, in concert with the defendant No. 3, to defeat his rights arising out of the contract under which he was suing, he called the defendant No. 3 a mere benamidar, and there is no admission on the face of the plaint or in the plaintiff's case that the defendant No. 3 had a separate or distinct interest from that of the defendant No. 1. That being so, it seems to me that both the objections taken by the learned counsel for the appellant must fail, as there was only one cause of action upon which the suit was brought. It was found necessary to make the defendant No. 3 a party to the suit, because he was made use of as benamidar by the defendant No. 1 in setting up certain devices in order to defeat the right of the plaintiff. That is the distinction between this case and the cases cited. I am, therefore, of opinion that this second appeal must fail. It will therefore be dismissed with costs.

Pigot, J.—I am of the same opinion. As to the question arising under the two points which my learned brother dealt with together, the case of *De Houghton v. Money*, and the point under s. 44, I must say that I should find a difficulty in considering that this Court was precluded under s. 578 from dealing with a case in which the principle acted upon in *De Houghton v. Money* was violated. I should hesitate to say that a violation of that principle would not, in itself, affect the merits (within the meaning of this section) of any case that was entered upon in disregard of that rule, but in the present case I confess, after hearing with much attention the argument of the learned counsel, that it does appear to me that the point at which the rule in *De Houghton v. Money* would be applicable would not be reached in this case. The question is. Are not the first and third defendants identical, and that question in itself, if answered in the affirmative, as it has been, precludes the application of these cases. I may add a word as to the first question, viz., the delay. It does seem to me that that question, if properly raised, would be, as the learned counsel argued, proper matter of appeal, and might perhaps be, if properly raised, a proper matter for [1070] consideration even in second appeal; but if raised at all in this case in the Courts below it was very slightly raised, and it appears to me that we have no right to presume that the ordinary rule, applicable to suits of this nature, was neglected by the learned Judge in the Court below, or to hold, upon the presumption arising from the length of the delay condoned by him, that it was unduly disregarded. On reference to Lord Justice FRY's book on Specific Performance, ss. 1070 to 1079, where this

subject is referred to, it will be noticed that the Lord Justice mentions several cases in which very considerable delay was held in England to be fatal, but in others not so. In s. 1078, a delay of fourteen months was held not to be such a bar. In another case, three and half years was considered fatal, and in more recent cases, a delay of one and half years, and a somewhat lesser delay, was held to be fatal. In this case, the time which was allowed to elapse was so long, that under ordinary circumstances specific performance would not be granted by the Court; but it is impossible for us to say in the form in which this case comes before us in second appeal, that there may not have been circumstances in the present case that would justify the grant of a decree even after the period which has elapsed. As the point has been raised before us, I have thought it desirable to refer to one of the authorities in which the subject is dealt with, because the principle is an important one, and under the new Specific Relief Act it is a principle which ought to be considered by the Court in the exercise of its judicial discretion under s. 22 of that Act.

Appeal dismissed.

NOTES.

[Where there was nothing in the conduct of the plaintiff that could possibly be regarded as evidence of waiver, abandonment, or acquiescence, and the defendant's position was in no way altered by the delay, the delay was regarded immaterial —(1911) 13 I. C. , 879. 16 C. W. N., 247. As regards misjoinder, see also (1894) 18 Mad., 415 (417).]

[10 Cal. 1070]

APPELLATE CRIMINAL.

The 21st August, 1884.

PRESENT

MR. JUSTICE FIELD AND MR. JUSTICE NORRIS

Queen-Empress

versus

Ram Sahai Lall and another *

Witnesses, Duty of the prosecution to produce.

Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution, that they had been examined by the Committing Magistrate against the express wish of the Police officer in charge of the prosecution *Held*, that that was not [1071] a valid ground for the non-production of the witnesses in the Sessions Court.

In conducting a case for the prosecution all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined.

THE two accused in this case were charged with causing grievous hurt to one Gandauri Kahar and with culpable homicide. One Pokhan, the brother of Gandauri, laid the charge against the accused at the thanna, and, in giving certain details of what had taken place, stated that he had received the information from Jitan Singh, Chita Singh and Tiloke, who were to be his witnesses. At the preliminary inquiry the Sub-Inspector, Mohamed Baker, who had the conduct of the prosecution, objected to the examination of Jitan Singh, Chita Singh, and Tiloke on behalf of the Crown, as they had been discovered to be

* Criminal Appeal No. 441 of 1884, against the order and sentence passed by W. Verner, Esq., Sessions Judge of Monghyr, dated the 3rd July 1884.

hostile witnesses. Nevertheless, the Deputy Magistrate insisted upon their examination and recorded their evidence. The accused were committed to the Sessions Court, where the three witnesses were not produced, and the Judge expressed his opinion that the prosecution was not bound under the circumstances to ensure their attendance. The accused were convicted and they appealed to the High Court.

Mr. *Allen* and *Baboo Rajendra Nath Bose* for the Appellants.

Baboo Ram Churn Mitter for the Crown.

The Court (FIELD and NORRIS, JJ.) delivered the following **Judgments** :—

Field, J.—We have heard the evidence in this case, and have considered the arguments addressed to us by the learned counsel who appeared on behalf of the appellant, and we think that the proper course to take will be to set aside the conviction, and direct a new trial of the prisoner Ram Sahai Lall, and for this reason, Pokhan, the brother of the deceased Gandaury, gave the first information to the Police station. Pokhan was not speaking from his own personal knowledge in giving an account of the transaction which resulted in the death of Gandaury, but he did give certain details, and he stated that he had received these details from three persons, Tiloke, Jitan and Chita, and he proceeded [1072] to add that these three persons were his witnesses. These three persons were examined by the Deputy Magistrate, and their evidence did not support the case for the prosecution. It would appear, and it is so stated in the judgment of the learned Sessions Judge, that the Police officer who had charge of the case did not wish these persons to be examined, and that the Deputy Magistrate, notwithstanding this expressed wish, proceeded to examine them, and this is given by the Sessions Judge as a good reason for not calling these witnesses in the Court of Sessions, or tendering them for cross-examination in that Court. Now, it must be understood, and it has recently been pointed out in more than one judgment of this Court, that in conducting a case for the prosecution, all the persons who are alleged, or are known, to have knowledge of the facts, ought to be brought before the Court and examined. No doubt, it may happen that certain witnesses will conceal facts which they know, or alter their account of what they have seen. Nevertheless, these witnesses should be before the Court, and the Judge and the Assessors, or the Jury, if the case is tried by a Jury, should have an opportunity of forming their own judgment as to their credibility or otherwise. This course was not followed in the present case, and we think that the learned counsel has rightly pressed upon us that the prisoner has been prejudiced in his defence in consequence. On this ground we set aside the conviction, and direct that the prisoner be retried.

Norris, J.—I am of the same opinion. I would only add that I think the learned Sessions Judge has, subject to this omission, tried this case with remarkable ability, and I trust that when the case goes back to him, he will look upon it as an entirely new case, and not allow his mind to be at all prejudiced by the fact that the case had been previously tried.

• *Retrial directed.*

NOTES.

[See (1893) 16 All., 84, where a Full Bench held that it was not incumbent upon a public prosecutor to call every witness whose name is returned in the calendar; he might reject those whose evidence was, in his opinion, unnecessary.]

[1073] APPELLATE CIVIL.

The 2nd September, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Nani Bibee, on her own behalf and on behalf of her minor sons...Defendants

versus

Hafizullah.....Plaintiff.

Registration—Act III of 1877, s. 50—Optional registration—Priority—

Possession under unregistered deed—Notice

Although the mere fact of possession having been taken by a purchaser under an unregistered conveyance is insufficient, of itself, to establish a good title to a property as against a subsequent registered purchaser, and is not conclusive evidence of notice as against him, yet, in the majority of cases, such possession is very cogent evidence of notice

THIS was a suit brought by the plaintiff against defendants Nos 1 and 2 for a declaration of his rights to, and for confirmation of possession of, certain lands in Dacca.

Defendant No. 1 had obtained a decree for possession of these lands against the plaintiff and defendant No. 2 under s. 9 of the Specific Relief Act, and the plaintiff, therefore, brought this suit for the purpose above mentioned, stating that he had purchased the land for a sum under Rs. 100 from the heirs of one Ashruff in 1287 under a registered conveyance.

Defendant No. 1 contended that he had, previously to 1287, purchased the same land direct from Ashruff, and, although the deed of sale under which the purchase was made was unregistered, (the consideration being under Rs 100, and registration being optional), yet he had obtained possession of the land, and stated that the heir of Ashruff, from whom the plaintiff purchased, had been repudiated by Ashruff

The Munsif settled two issues only, viz, (1), was the suit barred by limitation, and (2) was the plaintiff's vendor heir of Ashruff, and did he convey that property to the plaintiff, or did Ashruff himself convey the property to defendant No. 1, his foster son; the Munsif found that the question of limitation did not arise, that the plaintiff's vendor was an heir of Ashruff, and had duly executed a conveyance in favour of the plaintiff in 1287, that there was not sufficient evidence to show that Ashruff had repudiated or disinherited the plaintiff's vendor. He further found that [1074] Ashruff had, six years previously to 1287, executed a conveyance of this very property in favour of defendant No. 1; and that although this was by an unregistered document, yet that he had had possession from the date of his purchase, and that there was evidence to show that he refused to give up possession to the plaintiff's vendor; he, therefore, was of opinion that defendant No. 1 had the better title to the land and dismissed the suit.

The plaintiff appealed to the Subordinate Judge, who held that the plaintiff's purchase being under a registered deed, it had priority over the defendants; under s. 50 of the Registration Act, it being immaterial, for the purposes of that

* Appeal from Appellate Decree No. 490 of 1883, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Dacca, dated the 14th of December 1882, reversing the decree of Baboo Ravati Charan Banerjee, Sudder Munsif of that district, dated the 18th of February 1882.

section, whether the defendant had obtained possession of the property or not; and that there was no evidence that the plaintiff had notice of the defendant's purchase. He, therefore, allowed the appeal.

The defendant No. 1 having died, his widow and minor sons (having been substituted on the record in his place), appealed to the High Court.

Baboo *Harī Mohun Chakravarti* for the Appellants.

Baboo *Durga Mohun Dass* and Moulvi *Serajul Islam* for the Respondents.

Judgment of the High Court was delivered by

Garth, C.J. (BEVERLEY, J, *concurring*).—We think that the Courts below have not properly appreciated the point upon which this case depends

It seems to have been virtually admitted that the person under whom the plaintiff claims was the heir of Ashruff, and, therefore, the question between the parties is the same as if Ashruff had lived, and had made a second conveyance of the property to the plaintiff, so that the point is, whether the defendant's unregistered deed, coupled with possession, is to prevail over the plaintiff's registered deed, which was executed six years after the defendant's.

The Subordinate Judge seems to have rather misunderstood what was decided in the Full Bench case of *Narain Chunder Chuckerbutty v. Dataram Roy* (I L. R., 8 Cal., 597).

[1073] The question there was, whether the mere fact of possession having been taken by the purchaser under an unregistered deed *was sufficient of itself* to establish a good title to the property as against a subsequent registered purchaser.

It had been thought by some members of this Court, that, under such circumstances, the party claiming under the unregistered deed had the preferable right, see *Dinonath Ghose v. Auluck Moni Dabee* (I. L. R., 7 Cal., 753). But the Full Bench held otherwise.

It had long been considered by this Court, and also by the Bombay High Court, that where a registered purchaser had notice that his vendor had previously conveyed away the property to some third person by an unregistered conveyance, it was contrary to equity and good conscience that his title (though under the registered deed) should be allowed to prevail. And this was also the law in England, where the language of the Registration Acts is much the same as in this country.

But then came the further question, whether the fact of the unregistered purchaser having taken possession, *was conclusive evidence of notice*, and the Full Bench decided that it was not.

But, at the same time, we all considered that such possession was in the great majority of cases *very cogent evidence of notice*; because every man, when he buys a property, is *prima facie* supposed to go and look at it, or make some enquiries about it, and if, when he makes such enquiries, he finds that somebody else is in possession, he ought to enquire how he came there; and if he finds that he is in possession under a conveyance from the owner, though the conveyance is unregistered, he is not justified in equity and good conscience in buying the property himself. If he chooses to buy under such circumstances, he runs the risk of losing his money.

Now this seems not to have been understood by the Subordinate Judge. He appears to have thought that it was not necessary to enter upon the question of notice, and he very truly says, that no evidence was given upon that question in the first Court. The truth is, that when the case came before the

first Court, the Full Bench case had not been decided, and it is very possible [1076] that neither party understood the point upon which the case should depend.

We think justice requires that the case should be sent back to the first Court, in order that the question of notice should be properly raised and tried.

The question will be, whether at the time when the plaintiff purchased in 1287 he was aware, or ought to have been aware (within the meaning of the authorities) that the defendant was in possession of the property and had purchased under the unregistered deed ?

Each party will be at liberty to give fresh evidence on this point, and the costs will abide the result.

Case Remanded.

NOTES.

[POSSESSION IS NOTICE AND NOTICE DEFEATS THE PRIORITY CONFERRED BY THE STATUTE—

For similar cases, see 27 Bom., 452, 2 Bom. L. R. 110; 9 Bom., 427 & 6 Bom. 168, 25 All. 366; 8 All. 540, 16 Mad., 148, (1900) P. R. 56; (1883) P. R. 159]

[10 Cal. 1076]

APPELLATE CIVIL.

The 5th September, 1884

PRESENT :

SIR RICHARD GARTH, KT. CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Bissesuri Dabheea and othersPlaintiffs

versus

Baroda Kanta Roy Chowdry and othersDefendants.*

Specific Relief Act, I of 1877, s. 42—Declaration of title—Suit by landlord during continuance of tenancy

It is open to a landlord, where his title is in jeopardy from the aggressions of a neighbouring zamindar, and where his title may be damaged by a denial of his rights over his land, to bring a suit for the purpose of having his rights declared as against such wrong-doer and for the purpose of being put into possession of the land as against them *Womesh Chunder Goopto v. Raj Narain Roy* (10 W. R., 15) explained.

THE plaintiffs, the *howladars* of a certain estate, had granted to certain persons a *nim-howla* in this estate. In Assin 1287 these *nim-howladars* were, after a proceeding instituted under s. 530 of the Code of Civil Procedure, dispossessed by certain persons from their *nim-howla*.

The plaintiffs being unable to recover rents from their *nim-howladars*, thereupon, brought this suit against the persons who had dispossessed their *nim-howladars*, making the *nim-howladars* also defendants, asking for a declaration of their *howlai* rights in [1077] the estate, and for possession "as before" of the lands from which they had been dispossessed, and for an order ejecting the dispossessors of their *nim-howladars*.

Those of the defendants who had dispossessed the *nim-howladars* contended, that the suit should have been brought by the *nim-howladars*, and that the land in question was within their taluq.

* Appeal from Appellate Decree No. 645 of 1883, against the decree of Baboo Kristo Chunder Chattopadhyaya, Subordinate Judge of Backergunge, dated the 30th of December 1882, reversing the decree of Baboo Jogendra Nath Mitter, Munsif of Patuakhali, dated the 31st of January 1882.

The Munsif found that the plaintiffs were the proper persons to bring the suit; and that the plaintiffs were the owners of the land, and had been in possession thereof until ousted in 1287, and he therefore gave the plaintiffs possession and ordered the ejectment of the trespassers.

The defendants appealed to the Sub-Judge, who held: (1) that the fact that the *howladars* were unable to collect their rents on account of the wrongful act of the defendants, the trespassers, was not a sufficient reason to give the plaintiffs a cause of action against them for recovery of possession, (2) that the plaintiffs' remedy was by suit against the tenants for rent, they not being entitled to possession of the land during the continuance of the tenancy of the *nim-howladars*, and that they had therefore at present no right to sue for possession, or for a declaration of their title, he therefore decreed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Srinath Das* (with him Baboo *Kashi Kant Sen*) for the Appellants, contended, that the present suit was clearly maintainable under s. 42 of the Specific Relief Act, and that the lower Court was wrong in throwing out the case on a ground which was not taken by the defendants in the Court of First Instance, and on which no issue was raised.

Baboo *Durga Mohun Das* and Baboo *Rashbehari Ghose*, for the Respondents, contended, that the present case fell within the principle of the case of *Womesh Chunder Goopto v. Raj Narain Roy* (10 W. R., 15).

Judgment of the Court was delivered by

Garth, J.—The plaintiffs are the *howladars* of a certain estate, and they have let their land to certain persons as *nim*-[1078]*howladars*, and the complaint which they make in this suit is, that the principal defendants have entered upon this land in the possession of their tenants, the *nim-howladars*, have turned the *nim-howladars* out, and are claiming the land as against them by an adverse title. Under these circumstances, as the *nim-howladars* have not brought a suit against the principal defendants, the plaintiffs have brought this suit against them for the purpose of having their title declared as against the defendants, and of being put in the same position "as before," which was a possession by receipt of rent as against the *nim-howladars*.

In order that there should be no mistake about this, the prayer in the plaint is to this effect. "That on declaration of the plaintiffs' *howlai* right to the said land, and on ejectment therefrom of the defendants Nos. 5, 6 and 7, who are trespassers therein, possession as before to the whole land, as per boundaries given below, may be awarded to the plaintiffs." Now the possession which the plaintiff had before, was not *khas* possession; it was possession by receipt of rent from the *nim-howladars*, and that is the possession which they pray should be restored to them.

The Subordinate Judge has entirely misunderstood the nature of the suit. He understands it to be a suit for *khas* possession. The plaintiff's, he says, cannot sue for *khas* possession, so long as the *nim-howladars*' title to remain in continues. He says, that, the *nim-howladars* are the persons, entitled to recover possession as against the defendants; and as this is a suit for possession and possession only, it must be dismissed.

In this we think he is clearly wrong. Under s. 42 of the Specific Relief Act, any person, entitled to any right to any property, may institute a suit against any person denying, or interested to deny, his right to that property; and the Court may, in its discretion, declare that he is so entitled, and the plaintiff need not sue for any further relief. The plaintiffs here, in fact, have

asked for the further relief, that they should be placed in the same position "as before" as regards the *nim-howladars*, that is, that they should be restored to possession as against the defendants.

It has been contended in support of the view which the Subordinate Judge has taken, that this case comes within the principle [1079] of a decision by PEACOCK, C. J., and LOCK and JACKSON, JJ., in 10 W. R., 15. The question there was of a totally different character. That was a suit brought by the plaintiff, who was the zamindar, to recover possession of a piece of land which had been let to his, the zamindar's, tenants; and while it was in the possession of these tenants, it had been encroached upon by a third person, the defendant, who had held it up to the expiration of the tenants' lease, and the answer which the defendant, the trespasser, made was, that the encroachment had taken place more than twelve years before suit, and that the plaintiff, the zamindar, was barred, because he ought to have sued within twelve years from the encroachment. But the Court said, no. The land was in possession of tenants, and if we were to hold that the landlord was barred, any tenant who had an interest in the land for more than twelve years might connive with some trespasser and so defeat the landlord's right. The landlord, if he pleases, may wait until the tenant's interest expires, and then bring an action against the trespasser.

That case is consistent with the view which we take of this case. This is not a case of that kind. Here the landlord, seeing that his title is in jeopardy by the aggression of a neighbouring zamindar, and that his title may be damaged by the defendant's denial of his rights, brings a suit for the purpose of having his rights declared as against those defendants, and of being put in possession of the land as against them.

The case must, therefore, go back for the purpose of being tried upon its merits, having regard to the view of the law which we have laid down.

The costs in both Courts will abide the result.

Case remanded.

NOTES.

[LANDLORD AND TRESPASSER DURING TENANCY—

In (1910) 8 I. C., 47. 13 C. L. J., 284, this case was held not to apply to disputes concerning whether a certain piece of land was or was not included within the holdings of two rival sets of tenants of the same landlord, as his title in either case was not in jeopardy. This case was approved in (1886) 13 Cal., 3 (10), but dissented from in (1898) 21 Mad., 288 (290), on the ground that the landlord had no right to possession even as against trespassers until determination of the tenancy.

The landlord though he is only in constructive possession can bring a suit against the trespasser even under the Specific Relief Act, 1877, sec 9 —15 C. W. N., 715 (where the previous cases holding to the contrary are noted), 28 Mad., 288; 12 I. C., 190, in (1907) 29 All., 593, the landlord was held entitled to sue the trespasser in ejectment even two years before the term; the previous authorities are collected here.

It would appear that the landlord, by suffering the trespasser to continue on the land, would be prejudicially affected in many respects, even though the right to possession of the landlord might not be affected until the determination of the term. Thus, the trespasser acquiring the lessee's interest is not subject to obligations that arise out of contract alone :—

O'Connor v. Foley (1906) I. I. R., 20, though he is subject to paramount rights. He is not regarded as an assignee from the lessee, his title resting upon the negative provisions of the Statute of Limitations.—*Tichborne v. Weir* (1892) 67 L. T., 735 C. A., *Wilkes v. Greenway* (1890) 34 Sol. Jour., 673 C. A.

As regards the applicability of the rule in *Tulk v. Moxhay*, see *Re Nisbet and Potts' Contract*, (1906) 1 Ch 386 C. A. And when the title of the trespasser as against the lessee is complete, such right of re-entry of the landlord is lost as would arise on surrender by the lessee before completion of the term of the lease.—*Walter v. Yalden* (1902) 2 K B., 304.]

[10 Cal. 1079]

ORIGINAL CRIMINAL JURISDICTION.

The 13th September, 1884.

PRESENT.

Queen-Empress

versus

Shib Chunder Mitter.*

Misdirection -- Section 26 of the Charter of 1865--Charge, Misunderstanding of.

Mere misunderstanding on the part of bystanders in Court, or Counsel engaged in a case, of expressions used by a Judge in charging a jury, [1080] (where it appears that the expressions used by the Judge were such as ought to have been understood by any reasonable man, having regard to what was proved in the case, and what was said to the jury afterwards), will not constitute misdirection.

THIS was a rule obtained under the provisions of s. 26 of the Charter, calling upon the law officers of the Crown to show cause why the prisoner Shib Chunder Mitter should not be acquitted, or why there should not be a new trial, on the ground that the learned Judge, Mr. Justice FIELD, who tried him, misdirected the jury on a point of law.

The facts were The prisoner, who was a cashkeeper in the firm of Ramsay, Wakefield & Co., was tried, at the Criminal Sessions of the High Court on the 17th July 1884, before Mr. Justice FIELD and a common jury, upon certain charges of forgery, using as genuine a forged document, and criminal breach of trust as a servant with respect to the payment by him of certain small sums of money to a Post office peon; it being alleged that certain vouchers for the same were altered into larger amounts by the prisoner, and credit taken by him for such larger amounts. The said vouchers were for the sums of 8 annas, 4 annas, and 8 annas, which sums were apparently altered into Rs. 2-8, Rs. 3-4 and Rs. 2-8 respectively. The principal question at the trial was, as to who made the alteration—the prisoner or the Post office peon.

It appeared from the evidence given at the trial that the usual course of business, with regard to the vouchers for parcels delivered by the Post office to the firm, was as follows:—

* Rule under s. 26 of the Charter on a finding and sentence passed by FIELD, J., dated 17th July 1884.

The parcel, and a yellow ticket would be presented by the Post office peon to the European assistant of the firm, who would sign the yellow ticket, and take over the parcel, leaving the yellow ticket with the Post office peon as a receipt for the parcel; that a white ticket was then made out by the European assistant, on which was stated the amount to be paid for the parcel, and it was then the duty of the Post office peon to take this white ticket to the prisoner, the cashier of the firm, and obtain the money.

The charge against the prisoner was with regard to the forging, &c., of these white tickets or vouchers.

The evidence further showed that there was a book in which [1081] the Post office peon himself entered the parcels to be delivered, and the amounts to be received for the same; and as regards this book, the sums entered for the parcels in question were 8 annas, 4 annas, and 8 annas, the peon having stated as regards the entry. "I enter the book myself, and I never alter the entries, nor were they (the entries in question) altered when in my hands. I enter the amounts in my book." He further stated that he did, in this case, take the white tickets direct to the cashier, and received the amounts entered in his book. As regards this latter point, Mr. Davis, the European assistant who made out the white tickets, said, that he did not watch the peon to see if he went straight to the cashier with the tickets.

It was also proved that the peon had a sufficient knowledge of the English characters, and figures, to enable him to make the alteration, had he the opportunity to do so.

The defence set up at the trial was, that the Post office peon might have been guilty of the offence, that there was no evidence, except that of the peon himself, to show that the peon went direct to the cashier with the white tickets; and that it was very possible that he might, after having received the white tickets from the European assistant, have left the shop and made the alterations. The prisoner was found guilty, and was sentenced to three years' rigorous imprisonment.

The petition on which the rule *visi* was obtained, stated that the exception taken to the charge of the learned Judge was that the jury was left no option but to convict, having regard to the way that the Judge directed the jury, *viz*, by saying: "There is no evidence that the peon could make the English 2's. and 3's," and that upon the prisoner's counsel drawing the attention of the learned Judge to the peon's own evidence, and of his book, and to the evidence of Mr. Davis that the peon knew the English character and figures, the learned Judge replied "I know that, still I maintain that there is no evidence that the peon could make the figures 2 and 3 in the vouchers, and could write English," or words to that effect.

At the hearing Mr. *Allen* appeared in support of the rule, and Mr. *Phillips* (the Standing Counsel) for the Crown.

Mr. *Allen* supported the rule on the affidavits of seven persons, [1082] five of whom composed in part the jury, but did not seek to use the affidavits of the jurymen, further than as the evidence of persons who heard what was said by the learned Judge, and to supplement any defect that there might be in counsels' notes of the trial; and he stated that he did not seek to use them in order to show that the jury had been influenced in the conclusion they had come to; there were also further affidavits of the attorney for the defence, and his clerk; on these materials it was contended, that when it was the contention

of the defence that the motive, ability, and opportunity of the prisoner, and the peon to commit the forgeries were the same, the opinion expressed by the learned Judge on that most vital point in the case could not have failed to affect the verdict of the jury.

[Mr. Phillips.—The note taken by the counsel for the Crown as to this point is "no evidence that the peon was able to alter the figures in vouchers, to write there 2's. and 3's. in the vouchers."]

[FIELD, J.—What I said, was, that "there was no evidence that the figures on the back of the vouchers were in the peon's handwriting."]

I never contended that there was evidence that the peon altered the figures on the back of the vouchers. My point was, that it was for the prosecution to prove that the prisoner was the man who did so, and I said that they had not proved it, because the motive in the case of both persons must be said to be equal, and the ability equal, and, under the circumstances, the opportunity equal.

[GARTH, C J.—What you fail to show to me is that the Judge conveyed, or intended to convey, to the jury that the man could not write English. What I understand him to have said was, that there was no evidence that the man could have made those alterations.]

[FIELD, J.—That was what I intended to convey to the jury.] I understood your Lordship to say that there was no evidence that he had the manual capacity to do it, knowledge of the English language to do it.

[FIELD, J.—How could I have said that Mr. Allen? What I said was, that there was no evidence that the *dik* peon did alter the figures, then you interrupted me, and said that a comparison of [1083] handwriting would show that the altered figures were more like the peon's handwriting than the prisoner's. I said "you have given no evidence to show that the figures are in the peon's handwriting. The books are there, and the jury can look at them." The jury did not look at them.]

[GARTH, C J.—Is it not because the jury misunderstood what the learned Judge said, that there is a misdirection, what do you say we ought to do?] I say the Court should order a new trial. On the question of fact there are seven affidavits which all point that the meaning of the words used by the learned Judge was, *ability to write the figures*, the affidavit of the other side does not deny this.

[FIELD, J.—If there was such a misunderstanding I should at once state that I should wish a new trial to be had.]

Mr. Phillips (for the Crown).—I don't think the Court has power to order a new trial, see the case of the *Queen v. Harribole Chunder Ghose* (I. L. R., 1 Cal., 207).

There is nothing in this proceeding which comes within s. 26 of the Charter. The Advocate-General has not certified that there is an error in point of law, but he says that the matter ought to be further considered. There was no point of law decided by Mr. Justice FIELD which this Court can interfere with; the Judge told the jury, that the peon could [not?] make the figures on the voucher—what is the point of law there? I dispute the fact that a pure point of law has been decided, it can never have been intended that the evidence in the case should be laid before the Advocate-General; he can only deal with points such as want of jurisdiction, or illegality of the sentence. As to the misdirection, I take it the statement of the learned Judge is conclusive on the point; the question is between the Judge and by-standers, and the Judge's statements must be taken to be correct. See *Reg. v. Pestanji Densha* (10 Bom. H. C., 75); *Queen v. Aaron Mellor* [27 L. J. (M. C.) 121 (131).]

The case of the *Queen v. Harribole Chunder Ghose* (I. L. R., 1 Cal., 207) is of the same description as the present; it is a question of withdrawing evidence from the jury. On p. 217 it is laid down [1034] that the Court has no power to order a new trial, and no power to send the case back to the original Court.

The misdirection imputed is absurd on the face of it, for the Judge, having started with the radical incapacity of the one to do it, then is said to have gone on to discover which of them had the best opportunity to do it.

If notwithstanding this the Court should think that there was a misdirection, then I submit your Lordships should review the case, and see what alteration in the sentence should be made. The sentence could not be diminished, and, therefore, altering the sentence must be an acquittal, for the power given to the Court in these cases is only "to deal with the sentence." The affidavits of the other side do not show that the whole charge was misleading, but only go to the effect of a particular expression used. Misunderstandings are no good ground for a new trial, for, if they were, any person friendly to the prisoner could come forward and say that he misunderstood the Judge, and obtain thus a new trial.

The following were the **Judgments** of the Court.

Garth, C.J. (PRINSEP, J., *concurring*) after stating the facts continued :--

The prisoner in his petition, in which he partly founded his application for a rule, alleged that the learned Judge, in his charge to the jury, directed them, that there was no evidence before them that the peon could make the English 2's and 3's., and that, whereupon Mr. *Allen*, prisoner's counsel, immediately drew the attention of the learned Judge to the peon's own evidence and of his *dak* book, and to the evidence of Mr Davis, that the peon knew the English characters and figures; the learned Judge replied. "I know that; still I maintain that there is no evidence that the peon could make the figures 2 and 3 in the vouchers and could write English figures," or words to that effect, and the petition further stated, that the learned Judge, throughout his charge to the jury, said nothing to alter or modify the effect of his own directions. The statements in the petition were verified, not only by the prisoner himself, but also substantially by the prisoner's attorney and his attorney's [1085] clerk, and by five of the jurymen. Having regard to the circumstances under which the charge was made, and to the obvious and acknowledged fact that the forgery of the figures must have been the work of the prisoner or the peon, the alleged misdirection, if it was one, there is no doubt had relation to a material part of the case and we have done our best to ascertain, from the notes of counsel and of the learned Judge himself, what was really said at the time of the alleged misdirection. We are bound, of course, in a case of alleged misdirection, to give all due weight to the statement of the learned Judge himself as to what he really said to the jury, and it was very remarkable how very little difference there was in the notes of counsel on one side, and the statement of the learned Judge. The learned Judge stated that what he told the jury was, that there was no proof that the postal peon did make the alterations in the vouchers, and that he meant to convey to the jury, not that the prisoner *could* not write the figures, because, it was clearly proved that the peon did know English, but that he intended to convey to the jury that there was no evidence that the peon did, as a matter of fact, make, or, by leaving the shop, have an opportunity of making the alteration in the vouchers; that it was not shown that the peon had left the shop, for an instant, or that he had access to pen and ink, or any opportunity of making the alterations in the vouchers. When we look at Mr. *Allen's* own note of the Judge's charge and alleged misdirection, we found these words: "FIELD, J., charges jury

"that no evidence that peon able to alter figures in vouchers, to write these '2's and 3's in the vouchers. *Allen* draws Judge's attention to evidence 'of peon and postman's book.' Then, further on. 'Court says no evidence that peon wrote these figures;' then Mr. *Phillips*' note is much to the same effect, and later on in his charge to the jury the Judge told them that the postman's book was on the table, and that if they thought fit they had an opportunity of comparing the writing in that book with that on the altered vouchers, and that, if they thought those altered vouchers resembled the writing in the book, they might give the prisoner the benefit of the comparison. In the first place, we have to consider what really was said by the learned Judge, and, [1086] in the next place, what any reasonable man, having regard to what had been proved, and what was said to the jury afterwards, should have understood from the Judge's charge. It is plain, we think, from Mr. *Allen*'s own note, that when the Judge told the jury that there was no evidence, he did not mean to tell them that the prisoner could not write the figures 2 and 3, because it not only appeared in the Judge's own notes that he could, and also in the postman's book written in English by the peon himself, but Mr. *Allen* called the learned Judge's attention to that fact, when the Judge, without doubting or denying it, said 'I know that, but still I maintain there is no evidence,' etc., and he afterwards left the book to the jury to draw any inference from it in favour of the prisoner they might think proper, and did not withdraw from their considerations what Mr. *Allen* contended was evidence of the peon's manual capability of writing the altered figures. It seems, therefore, that what the learned Judge told the jury, and meant to point out to them, was, first, that there was no evidence that the peon did, as a matter of fact, make the alterations, and, secondly, that there was no evidence that he could have made, that is, have had an opportunity, or facility, for making the alterations, and we think that no reasonable man ought to have construed his words in other than that sense. That being so, we consider that there was no misdirection, and, as in the case it is not shown that in his charge to the jury the learned Judge committed any error of law, we consequently discharge the rule.

Field, J.—I concur in the above judgment. I desire merely to add that I had wished to put before the jury, first, that there was no evidence to show that the *dak* peon had, as a matter of fact, made the alterations, and, secondly, that there was no evidence that he had an opportunity of making them. I understood Mr. *Allen*, who defended the prisoner earnestly and with much ability, to press upon me that the *dak* peon's book was evidence that the *dak* peon did, as a matter of fact, make the alterations in the tickets or pay orders. In that I dissented from him. It had been brought out in the *dak* peon's evidence, and in Mr. *Allen*'s address to the jury, that the *dak* peon could write English, and was manually capable of making the figures. I had thought there could be no possible doubt upon this point; [1087] but in the course of the conversation that followed, when Mr. *Allen* drew my attention to the book, I think it possible that he and I were speaking of the peon's ability to make the alterations in different senses, he having in his mind the manual ability of the peon to write the figures, I having in my mind his ability, depending upon opportunity or facility, and it was with reference to this last ability that I pointed out to the jury that there was no evidence that the peon had left the shop; while if there was such evidence, the jury would be bound to give it their careful consideration. On the whole, I see no reason to believe that I said to the jury anything that could reasonably have been misunderstood. I may observe, in conclusion, that I entertain no doubt that the verdict of the jury was correct.

Rule discharged.

[10 Cal. 1087]

APPELLATE CIVIL.

The 1st September, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Gowri Koer....Plaintiff

versus

Audh Koer and others.....Defendants.

*Res judicata— Decision on a point of law subsequently disapproved of
by a Full Bench can be pleaded as res judicata.*

Where a Division Bench of the High Court decided, as a point of law, that a property had not passed under a certain deed of sale, and, subsequently, the decision on that point of law was in another case disapproved of by a Full Bench; the decision of the Division Bench (where the same plaintiff has again sued to recover the same property relying on the same deed of sale) is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved.

THIS was a suit to recover possession of certain shares in several villages, on the allegation that the plaintiff, Gowri Koer, had purchased such shares under a *kobala*, dated the 26th July 1870, from Lalbehari and Ramkhelawan Singh. At the time of the institution of the suit, the vendors were dead, and their sons, and one Audh Koer, who was in possession of some of the property, were made defendants.

[1088] The plaintiff stated that Lalbehari Singh had acquired the disputed properties as the reversionary heir to Mussamat Narain Koer, the widow of one Jaisredut, and that he (Lalbehari), after having sold the property to her, had, on the 25th December 1881, in fraud of the sale, settled these properties on the defendants.

It appeared that in August 1872 the present plaintiff, with Ramkhelawan and Kirit Narain, had instituted a suit against Lalbehari and Audh Koer in substance to obtain, by virtue of an assignment from Lalbehari, possession of these very properties now sued for (of which properties Lalbehari had never had any sort of possession). the suit in its terms was, however, framed for the purpose of obtaining possession of a portion of the assigned properties, and also to obtain a declaration of right of ownership to another portion of which they asserted they were then in possession of. This suit was dismissed by the Court of First Instance, and, on the 11th December 1873, the High Court, on appeal, *Ramkhelawan Singh v. Oudh Koer* (21 W. R., 101), affirmed that decision stating that *Lalbehari, at the time that the assignment to Ramkhelawan, Kirit Lal and Gowri Koer had been made, had never been in possession of the properties assigned, and that he could not, therefore, pass the property; that, under such circumstances, the assignments were only evidence of contracts to be performed in the future, and upon the happening of a contingency of which the purchaser might possibly claim specific performance; that before Lalbehari could be in a position to specifically perform his contracts, he must first recover the property from Audh Koer; that possibly a Court of Equity, in order to avoid*

* Appeal from Original Decree No. 84 of 1883, against the decree of Babu Koylas Chunder Mukherji, Judge of Tirhoot, dated the 19th of January 1883.

circuity and multiplicity of actions, might rightly allow the plaintiffs in one action to sue Lalbehari for specific performance, and on the footing of his right to sue Audh Koer to cover the property necessary for the performance of those contracts, but that even if the facts had been such as to justify the Court in dealing with the suit in that way, it would have been still incumbent upon the plaintiffs to establish their right to specific performance as against Lalbehari. But inasmuch as the Court found the rights of Ramkhelawan and Kirit Narain against Lalbehari rested upon a different foundation from [1089] those of Gowri Koer, it held that the suit was bad for misjoinder of causes of action, the suit was, therefore, dismissed, as far as it regarded the plaintiffs, Ramkhelawan and Kirit Narain, they not having been in a position to obtain specific performance, inasmuch as no consideration for their alleged contracts had been proved, but as regarded the case of Gowri Koer, it having been alleged that she had paid consideration money for her contract with Lalbehari, it was held that she possibly might have been entitled to specific performance, had she brought the suit against Lalbehari and Ramkhelawan, her joint contractors, but that having only sued Lalbehari, her rights could not be adjudicated upon in that suit, and they dismissed it without prejudice to her right to bring a fresh suit upon the same cause of action.

The plaintiff, relying on her rights being reserved under the decision of the 11th December 1873, brought this present suit for the purposes firstly above mentioned, omitting to frame it as one for specific performance, and the defendants, relying on the effect of the decision of 1873 (which is fully set out in 21 W. R., 101), set up that decision as a plea in bar to the plaintiff's suit.

The Subordinate Judge held as to the question of *res judicata*, that the suit was not barred by s. 13 of the Code, for although the disputed properties had been the subject of previous litigation, and the present plaintiff's suit had been dismissed by the High Court, yet the validity of her present *kobala* had never been finally determined in that suit, the suit having been thrown out for misjoinder of causes of action, and dismissed without prejudice to her right to bring a fresh suit upon the same cause of action, but on the merits he decided the case in favour of the defendants.

The plaintiff appealed to the High Court, and the defendants cross-appealed as regarded the question of *res judicata*.

Mr. O. C. Mulluck, Babu Chunder Madhub Ghose, and Babu Koruna Sindhoo Mukerji for the Appellant.

The Advocate-General (Mr. Paul), Mr. Evans, Mr. C. Gregory, Babu Mohesh Chunder Chowdhry, Babu Umakali Mookerji and Babu Aubinash Chunder Banerji for the Respondents.

The Judgment of the Court was delivered by

[1090] **Garth, C. J.**—The plaintiff in this suit seeks to recover certain property under a deed, dated the 26th July 1870, by which it was conveyed to her by two persons named Ramkhelawan and Lalbehari.

Lalbehari, it was said, inherited it from a lady named Narain Koer, who died about the month of March 1870. Ramkhelawan had derived a portion of the property from him, and they both professed by this deed of sale to convey the property to the plaintiff.

It seems that in the year 1871, the plaintiff, as well as Ramkhelawan and Lalbehari, brought a suit against the defendant, Mussamat Audh Koer, to recover this very property, and her suit was dismissed. The case then came up before the High Court, who affirmed the decree of the Court below.

There are, therefore, at the threshold of the case, two points which the plaintiff has to establish. In the first place, she must show that the decree which was pronounced in the suit of 1871 is not a *res judicata* in this suit; and in the next place, she must show that the deed of 26th July 1870, under which she claims, is a *bond fide* conveyance.

I will deal first with the question of *res judicata*.

The suit of 1871 was brought, as I have already said, by the plaintiff and her vendors, under the deed of 1870, to recover possession of the property from Mussamat Audh Koer; and the Judges in the High Court, who heard the case, decided against the claim of the present plaintiff, upon the ground that nothing could have passed under the deed of 1870, inasmuch as the vendors had not the property in their possession. And they cited as an authority for that proposition two cases in the Privy Council—*Ranee Bhobosoonderee Dasseah v. Issur Chunder Dutt* (11 B. L. R., 36), *Raja Sahib Prahlad Sen v. Baboo Budhu Singh* (2 B. L. R., 117)—which have been since considered in this Court by a Full Bench, *Narain Chunder Chuckerbutty v. Dataram Roy* (I. L. R., 8 Cal., 577), which decided that the Privy Council did not mean to lay down any rule of the kind.

[1091] The learned Judges, however, in the suit of 1871, having decided upon this ground, go on to suggest in what way the suit might possibly have been brought.

They say that “possibly a Court of Equity, in order to avoid circuitry and multiplicity of action, might rightly have allowed the plaintiffs in one action to sue Lalbehari for specific performance of their contract with him, and also “upon the footing of his right to sue Mussamat Audh Koer to recover that property needed for the performance of the contract.”

But they go on to say that as the suit which had been brought was not of that character, and as they could not deal with the case as if it were a suit of that kind, they must dismiss the suit upon the first ground, namely, that nothing passed to the plaintiff under the conveyance of the 26th of July 1870.

At the same time they say that their decision is not to affect her right, if any, to bring a suit for specific performance, should she think fit to do so.

This we take to be the true meaning of their decision; and it, therefore, amounts to a judgment, that the plaintiff could not recover under the deed of 1870, because that deed passed nothing

It is true that since that time a Full Bench of this Court have considered that the law as laid down by these learned Judges was incorrect. We held that although a person may not have property in his possession, he is nevertheless competent to convey it; and we considered that the cases in the Privy Council were by no means opposed to that view of the law.

But although those learned Judges may have made a mistake in point of law in the decision at which they arrived in 1873, their decision upon the point at issue is nevertheless a *res judicata* as between the parties, and it is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which this Court has subsequently disapproved.

We consider, therefore, that this point must be decided against the plaintiff, and that is fatal to her suit.

[The learned Judge then entered into the merits of the case, and decided that the appeal by the plaintiff must also be dismissed on the merits.]

Appeal dismissed.

NOTES.

[ISSUES OF LAW—RES-JUDICATA—

It has been, in some cases, too broadly stated that there can be no bar of *res judicata* on questions of law, on the various grounds that a Court is not bound to repeat errors of law, 5 Mad , 304 , 11 Mad , 393 ; that there cannot be for particular parties, a different law for ever, 22 Bom., 669 , that what is law for one must be law for all , that a decision cannot alter the law of the land, 16 C. L. J. 154

In (1909) 11 C. L. J. 461 (471, 472) Mr Justice MOOKERJEE indicated the limits within which the bar of *res judicata* is applied to adjudications on issues of law " In one class, parties may seek to litigate again the same *cause of action* as had been decided between them in a prior suit , in another class, the dispute may relate to matters which have been already in controversy and formed the subject of consideration in the previous suit although the causes of action in the two suits may be distinct. In the former class of cases, the application of the rule of *res judicata* is obviously justified on principle , in the latter class of cases, the estoppel ought to be limited to matters distinctly put in issue and determined in the prior action and it should further be restricted to questions of fact or mixed questions of fact and law, for if it was extended to pure questions of law, a Court might find itself in the position that in so far as certain parties are concerned, it is irrevocably bound to adhere to a proposition of law laid down in a previous suit " This has been re-affirmed in (1910) 13 C. L. J. 119.

" Though verdict estoppels apply in a different, as well as in the same, cause of action " it must not be supposed that the parties would be estopped by a judgment in one cause of action from disputing, in another cause of action, the doctrines of law applied in the first. The facts decided in the first suit cannot be disputed, and for the purpose of the conclusiveness of those facts, but no further, the law applied must be accepted Thus, if a decree in a suit to declare a mortgage invalid proceed upon the constitutionality of a statute, the parties cannot afterwards deny the validity of the statute in question, when the mortgagee attempts to fore-close. But it could hardly be true that they could not raise the question again in a suit upon a different subject-matter , and the same would appear to be the case with regard to any other question concerning the state of the law. What is law for one must be law for all, and there could be no advantage in extending the doctrine of *res judicata* to such cases " —*Bygelow In Estoppel*, (1913) VI Edn., pp 112, 113

The decisions in the following cases either support, or, proceed upon, this distinction. Prior adjudications, *though erroneous by reason of having proceeded upon an erroneous view of the law*, were held binding in these .

- (a) that a certain clause in a *kabulyat* is valid —(1901) 28 Cal , 318,
- (b) that a certain customary due was payable in respect of a tenancy .—(1912) 15 I. C. 837 ; *see as to interest*, 32 Cal., 749, .
- (d) decision as to mode of payment of rent whether by instalments or in one lump sum annually .—(1897) 25 Cal., 571 1 C. W N. 687 ; as to whether a certain amount is payable as rent, *see*:—(1902) 16 C L. J., 124 ; and the amount of interest payable on arrears of rent is not within the rule of *res judicata* (1905) 32 Cal., 749 . 9 C. W. N., 466, nor is the limitation applicable to arrears of rent :—(1897) 22 Bom., 669 ; (1913) 19 C. L. J., 34.
- (e) that certain circumstances amounted to eviction .—(1910) 13 C. L. J.119.

(f) *Construction of documents*, that they affected or did not affect certain estates or parties or previous documents :—(1911) 16 C. W. N. 603 . 15 C. L. J. 180 . 14 I. C. 465 (construction that a document had no effectual binding power); 10 Cal. 1087 (that a certain property did not pass under a deed of sale); (1897) 21 Mad., 18 (validity of a mortgage and the extent to which it was binding); (1900) 11 C. L. J. 461 (construction of a will); *Badar Bee v. Habib Merican Noordin* (1909) A. C. 615 (*ditto*); (1911) 9 M. L. T. 319 (that a certain will did not revoke prior wills); (1901) 28 Cal. 318 (validity of a particular clause in a *Kabuliyat*) , (1906) 29 Mad., 225.

(g) finding as to the validity of adoption in a former suit (1893) 15 All. 327, approved in (1896) P. R. 55.

(h) that the Court had, or had not, jurisdiction, (1882) P. R. 64, but see *Toronto Railway v. Toronto Corporation* (1904) A. C. 809 at 815 where a Court having jurisdiction only to determine whether an assessment of certain kinds of property was too high or too low, but not to determine the liability to assessment, the fact of its having assessed a certain property was held to be no bar as regards its assessability

In the following, the bar of *res judicata* was held not to apply .—

(a) A purchaser of property having paid maintenance charged thereon recovered it from the seller who was personally bound by law to pay it. In the subsequent suit against the seller for recovering subsequent payments, this was held no bar to his pleading his non-liability .—(1907) 30 Mad. 463; 17 M. L. J. 250.

(b) In 28 Mad. 517; 15 M. L. J. 466, the difference between the subject-matter of the two suits was held to prevent the rule of *res judicata* applying. An issue in both the suits was whether a certain person, who was the plaintiff in both suits, was validly appointed co-trustee, by another who was a defendant in both the suits, the first suit was to declare that the trust property was not liable to satisfy a certain decree; the second was to declare his co-trusteeship

(c) Liability of certain property to attachment, (1912) 39 Cal. 848. 16 C. W. N. 621. 16 C. L. J. 154. 14 I. C. 124.

(d) Decision on right to partition, and subsequent suit for collateral succession .—11 Mad. 393 [*See on this Hukm Chand* (1894) p. 32].

(e) Right to erect temple etc., within the customary limits of the *tenkalis* procession.—5 Mad. 304 (this has been adversely criticised).

In a very elaborate judgment, Mr Justice SUNDARA AYYAR in (1911) 9 M. L. T. 487, fully dealt with the question of *res judicata* as applicable to **Consent Decrees** and stated that " a consent decree cannot be impeached on the ground that it was erroneous in law because it is open to parties to decide questions of law and of fact between themselves by consent in the manner they deem best," and that it was similar to the award on arbitration. *See also* 30 Bom., 395]

[1092] APPELLATE CIVIL.

The 8th August, 1884.

PRESENT ·

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Nuddyar Chand Shaha and others..... (Decree-holders) Appellants

versus

Gobind Chunder Guha.....(Judgment-debtor) Respondent *

Decree, Evidence inadmissible to explain the terms of—Evidence—Execution proceedings.

When the terms of a decree are uncertain, it is not competent to the Court of execution to make any inquiries, by taking oral or documentary evidence, to ascertain the meaning of such terms

THIS was an application for the execution of a decree passed by the High Court on the 20th December 1867. One of the objections taken by the judgment-debtor before the Court of execution (the Subordinate Judge) was that the decree was indistinct, inasmuch as it did not mention the names of the 12 tenures in respect of which the High Court had directed the apportionment of costs in the suit. The Subordinate Judge, however, was of opinion that the decree was quite clear, and that the tenures in question could be ascertained from it. With that view he proceeded to record a mass of evidence, oral and documentary, and, on the 23rd May 1882, allowed the decree-holders costs to the extent of Rs. 1,427-3 and interest thereon. On appeal, the District Judge remanded the proceedings for the trial of fresh issues, and ultimately, on the 5th January 1884, passed the following order—"Recoverable from Gobind Chunder Guha, plaintiff (judgment-debtor) by the defendants (decree-holders) or their successors whose names are mentioned in column 1 the sum of Rs. 473-2-3." Against that order the decree-holders appealed to the High Court, and it was among other things contended on behalf of the judgment-debtor in cross-appeal that the decree was indefinite, and, therefore, incapable of execution, and the lower Courts were wrong in admitting new evidence.

Bahu Durga Mohun Dass and Babu Bhobani Churn Dutt for the Appellants.

Babu Troslokya Nath Mitter for the Respondent.

[1093] The Judgment of the Court (PRINSEP and MACPHERSON, JJ.) was delivered by

Prinsep, J.—The present appeal relates to the execution of a decree of this Court, dated the 20th December 1867, passed on an application for review of judgment. Under this decree certain costs were given to the parties in a manner to which reference will be presently made. Objections have been taken by the judgment-debtor (respondent) to the right of the decree-holder to execute the decree; and as these go to the root of the present proceedings, we have to consider them before we consider the case of the appellant.

In the first place, an objection is raised that the execution of the present decree is barred by limitation.

* Appeal from Appellate Order No. 117 of 1884, against the orders of J. F. Bradbury, Esq., Officiating Judge of Backergunj, dated the 14th of September 1883 and 5th of January 1884, reversing the order of Babu Banu Madhub Mitter, Subordinate Judge of that district, dated the 23rd of May 1882

It appears that the first Court, in May 1881, held that execution was barred by limitation. But on appeal to the District Judge it was held, on the 14th June 1881, that execution could proceed: and the case was returned to the lower Court. Against that order no further appeal was made. It is now contended that it is not competent to the judgment-debtor to ask us to consider the question of limitation, his right to appeal against the judgment of the District Judge having ceased to exist. We find it unnecessary to determine this point, because, on another point, we think the execution cannot proceed.

The judgment-debtor (respondent) objects that, from the indefinite terms of the decree of the 20th December 1867, it cannot be executed

The suit was brought by the judgment-debtor (respondent) to resume certain subordinate tenures, on the ground that they had become void in consequence of his purchase at a revenue sale of an *ousul* tenure within which they were contained. There were 73 defendants in that suit, out of whom only 36 contested the suit in the Court of First Instance, and out of these 36, only 26 defendants appealed to the District Judge. In the appeal to this Court, in which the decree now under consideration was passed, only 23 defendants appealed. The result of that case was that certain tenures specified were declared to be void, and in this respect the plaintiff's case was decreed. The decree goes on to state "It is further declared that, so far as the case [1094] relates to such portion of the howlah Kaloo Seal, and the eleven remaining tenures recorded as hereditary howlah and nim-howlah tenures at the first settlement, as concerns the special appellants, the appeal is decreed": that is to say, the plaintiff's case was dismissed. "And it is ordered that the plaintiff, respondent, do pay to the defendants, appellants, in proportion to their respective interests in the claim against them, the costs incurred by them in this Court, to be ascertained by the lower Court by adding to Rs. 23-10 annas, as per details specified in the margin, the full amount of pleader's fees in Special Appeal No 2290 of 1866, and one-fourth the amount of pleader's fees in this review, and stamp for petition of appeal in proportion to the value of that portion of the 12 remaining tenures as to which this appeal is decreed, to be ascertained by the lower Court in execution." The decree of the Court, therefore, left it uncertain what were the particular 11 remaining tenures to which the order referred. It also left it uncertain what were the exact shares in those tenures which were held by the special appellants. And further it left it uncertain what the value of those shares was, so as to enable them to be taken into account as against the value of the entire claim made by the plaintiff in calculating the amount of costs due. It is true that the decree states that those 11 tenures were "recorded as hereditary howlah and nim-howlah tenures at the first settlement," but the record of that settlement concerns 24 tenures. Therefore, on the face of the decree, there are no means of ascertaining to which 11 tenures it refers. We think, therefore, that, inasmuch as it is uncertain to which 11 tenures the decree refers, the decree cannot be executed. It is not competent to the Court of execution to make any enquiries by taking oral and documentary evidence, as it has done, to ascertain the particular 11 tenures referred to. If it were necessary to offer any reason in support of this opinion, it would be sufficient to point to the protracted and elaborate enquiries which have taken place in the lower Courts, and the difference of opinion which has arisen, in ascertaining this particular point, to show how impossible it would be for a Court of execution to determine a matter of this description.

The appeal is therefore dismissed with costs.

Appeal dismissed

APPELLATE CIVIL.

[1093] *The 1st September, 1844.*

PRESENT:

Mr. JUSTICE MITTER AND Mr. JUSTICE PIGOT.

Barhamdeo Narain Sing.....(Defendant) Appellant

versus

Mackenzie and another(Plaintiffs) Respondents.*

Issue, Determination of, unnecessary, by Court of First Instance—Unnecessary issue—Civil Procedure Code (Act XIV of 1882), s. 204.

In a suit for ejectment by a landlord against his tenant the following amongst other issues were raised, *viz.*, whether the notice alleged was sufficient, and whether the defendant was entitled to a right of occupancy. The Court of First Instance dismissed the suit, finding upon the admitted facts that the notice alleged was insufficient, but also decided the other issues raised, and held that the defendant was not entitled to a right of occupancy.

Held, that the finding upon the question of notice based upon the admitted facts being sufficient to dispose of the whole case, the Court erred in proceeding to determine any other issues raised in the suit. †

THIS was a suit brought by the plaintiff, who was the ticcadar of the village, to eject the defendants, after service of notice, from some 17 bighas of land in the district of Chapra. The defendants, *inter alia*, contended that the plaintiff's alleged notice was bad and invalid, and that they had a right of occupancy in the disputed land, and could not therefore be ejected.

The Munsif dismissed the plaintiff's suit on the ground of the insufficiency of the notice, but proceeded to give his finding upon the other issues raised in the case, amongst other things holding that the defendants were not entitled to a right of occupancy in the land as alleged by them.

The defendants thereupon appealed against that finding, but the lower Appellate Court affirmed the decision and decree of the Munsif.

The defendants specially appealed to the High Court.

The question as to the sufficiency of the notice was not raised in the appeal, and the sole question argued was, as to whether the Munsif acted rightly in determining other issues in the case after he had found that the notice was insufficient, as the decision of that point was sufficient to dispose of the case.

[1096] Babu Chunder Madhub Ghose, Babu Gurudas Banerjee and Babu Degumbur Chatterjee for the Appellant.

Mr. A. P. Handley (with him Babu Sharoda Charan Mitter) for the Respondent cited and relied on *Tarakant Bannerjee v. Puddomony Dossee* (5 W. R. P.C., 63).

The **Judgment** of the High Court (MITTER and PIGOT, JJ.) was delivered by **Mitter, J.** (PIGOT, J., *concurring*).—These appeals arise out of suits instituted by the plaintiff, who is the lessor of the mouzah in which the lands in suit are situated, to eject the defendants from their holdings.

* Appeals from Appellate Decrees Nos 324—329 of 1883, against the decrees of Babu Koylash Chunder Mukerji, First subordinate Judge of Tirhoot, dated the 17th of November 1882, affirming the decrees of Babu Kopali Prosunna Mukerji, Munsif of Sitamarhi, dated the 20th of December 1881.

† Mr. Justice Saroda Churn Mitter in (1904) 9 C. W. N. 60 thus observed upon the headnote:—“I may observe that the headnote in 10 Cal 1095 is not accurate. The judgment of the learned Judges shows that the finding as to the nature of the defendants tenancy was directed to be expunged as *unnecessary and not as erroneous*.”

Amongst other pleas, the defendants pleaded want of sufficient notice, and set up their right of occupancy in bar of the plaintiff's claim for ejectment. As regards the notice, the admitted facts are these: The notice itself is dated 19th Bysack 1288, corresponding with the 3rd May 1881. The notice informed the ryot that he was to quit his holding within seven days. It was served on the ryot on the 23rd Bysack 1288, corresponding with the 7th of May 1881, and the present suits were brought on the 13th of May 1881, that is to say, one day before the term given in the notice expired. Upon both these points issues were framed by the Munsif, who came to the conclusion that the defendant's plea, as regards the insufficiency of notice, was fully made out, but the Munsif's finding was against the defendants, the ryots, upon the other issue, *viz.*, as to whether or not they had acquired a right of occupancy. The Munsif upon his findings dismissed the plaintiff's suit. It is quite clear that the order of dismissal is based upon his finding upon the question of notice. Against that decree the ryots (defendants) appealed, and the Subordinate Judge on appeal has affirmed the decision and the decree of the lower Court. One of the points raised before the Subordinate Judge was that it was unnecessary for the Munsif to record any finding upon the question whether or not the defendants had a right of occupancy, because the Munsif's finding, that the notice upon the defendants was insufficient, was quite sufficient to dispose of the case. The [1097] Subordinate Judge overruled this objection, on the ground that the Munsif, in a suit which was appealable, had ample discretion to go into the question of the defendants having rights of occupancy or not, although his finding upon the question of notice was quite sufficient to dispose of the case. In second appeal by the defendants it has been urged that upon the admitted facts of this case, it being quite clear that the plaintiff had no cause of action on the date when the suit was brought, it was unnecessary for the lower Courts to go into any other questions. On the other hand, the learned counsel for the respondent relies upon the provisions of s. 204 of the Civil Procedure Code to support the view taken by the lower Courts upon this point. Section 204 says: "In suits in which issues have been framed, the Court shall state its finding or decision, with the reason thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit." In this case the facts relating to the service of notice being all admitted by the plaintiff, it seems to us that the case clearly came within the last three lines of s. 204. It is quite clear that the finding upon the question of notice, which finding was based upon the admitted facts of the case, was quite sufficient to dispose of it finally. We are, therefore, of opinion that the objection taken before us upon this point is valid, and we accordingly set aside the decisions of the Courts below upon the question whether or not the defendants have established their right of occupancy upon the holdings in dispute.

Each party will pay his own costs in this Court and in the lower Appellate Court.

Appeal allowed.

NOTES.

[FINDINGS ON ISSUES ON WHICH DECREE IS NOT BASED—

This case has not been followed and it has been held that the Court has jurisdiction to determine *all* the issues :—(1904) 9 C. W. N., 60 (68), (1907) P. R. 121 : (1907) P. W. R. 51 ; (1908) 26 All., 234 ; 11 All., 460 at 470, 471 although the findings on issues on which the decree is not based need not be inserted in and may be struck out of the decree, 26 All., 234.]

[10 Cal. 1097]

APPELLATE CRIMINAL.

The 19th September, 1884.

PRESENT.

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Ghurbin Bind . . . Appellant

versus

Queen-Empress.... . Respondent.*

*Deposition where accused has absconded—Criminal Procedure Code,
Act X of 1882, s. 512—Record of evidence in absence of accused.*

Where an accused person has absconded, and it is intended to record evidence against him in his absence, it is requisite, under s 512 of the Code of [1098] Criminal Procedure, that the fact of the absconding of the accused should be alleged, tried, and established before the deposition is recorded.

THE prisoner, Ghurbin Bind, was charged with dacoity under s 395 of the Penal Code. It appeared that in August 1880 a gang of Binds, to the number of 12 or 13, proceeded in a boat up the river and committed a dacoity in the village of Ghatnagar in the district of Dinajpur. Property to the amount of Rs. 300 was carried off by force; but owing to a dispute about the division of the spoil, one of the gang, named Jogeshur Bind, informed the Police, upon which information some seven of the dacoits were arrested and committed to the Sessions Court, and on the evidence of Jogeshur Bind, who was one of the dacoits and had turned Queen's evidence, the prisoners were convicted and sentenced at the November Session of Maldah, 1880.

Five of the gang absconded; their names and descriptive rolls were duly published in the *Police Gazette* of the 24th September 1880, and amongst the names so mentioned was that of Ghurbin Bind. No trace of any of those who had absconded was obtained until 1884, when Ghurbin Bind was arrested in the village of Gosainpore. Subsequently to the trial held in 1880 and previous to the arrest of Ghurbin, Jogeshur Bind died.

Ghurbin was committed to the Sessions Court in July 1884, and at the trial it was proved that he had absconded from his own village at about the time of the dacoity in 1880, and had never returned there, that he went by another name at the village in which he had taken up his abode, and at which he was arrested, that his personal appearance corresponded minutely with the descriptive roll published in the *Police Gazette* of the 24th September 1880. The deposition of Jogeshur Bind taken before the Committing Magistrate in 1880 (the records of the Sessions trial held in 1880 not being forthcoming) was tendered and admitted by the Sessions Judge as evidence against the prisoner. This deposition expressly stated that Ghurbin was present at the dacoity. As regards the admissibility of this deposition, the Sessions Judge made the following remarks:—

"The deposition of Jogeshur Bind, the dacoit who was offered a pardon, and turned Queen's evidence and who is now deceased, is put

* Criminal Appeal No. 506 of 1884, against the sentence passed by F. F. Handley, Esq., Sessions Judge of Maldah, dated the 14th of July 1884

"in under* section 32, cl. 3, and section 80 * of the Evidence Act, [1099] and s. 512 of the Criminal Procedure Code. This deposition was made before the Committing Magistrate as the record of the trial before the Sessions Court was not forthcoming. It was recorded by Deputy Magistrate Kasi Kinker Sen in Bengali. It is also evidence under s. 33† of the Evidence Act. It is true the prisoner was not present when the evidence was recorded, and had not the power of cross-examining, but that was his own fault for absconding. If he had appeared and stood his trial, he would have had the right and opportunity of cross-examining the witness, Jogeshur Bind, as his fellow-prisoners had and did in the former trial, and under s. 512 of the Criminal Procedure Code, such a deposition is expressly exempted from the ordinary procedure of s. 33 in the case of an absconding prisoner. The (A) form, Exhibit D in the analogous trial to this (No. 7), in the trial of which charge this deposition was recorded, contains the name of this prisoner as an abscondee, and the evidence in this case corroborates the fact that this prisoner—Ghurbin—was an absconder. It would obviously be difficult when accused persons absconded and were not arrested for 20 years, say, to get the evidence of living witnesses. Taking then Jogeshur Bind's evidence, which the prisoner and his counsel admit was made against this prisoner, it is found that he expressly mentions this Ghurbin as taking part in that dacoity."

Upon the evidence of Jogeshur and on the other evidence mentioned, the Sessions Judge, concurring with the assessors, found Ghurbin guilty, and sentenced him to five years' rigorous imprisonment.

The prisoner appealed to the High Court.

No one appeared for either side at the hearing.

Judgment of the Court was delivered by

Macpherson, J.—The prisoner, Ghurbin Bind, has been convicted on a charge of dacoity, and sentenced to rigorous imprisonment for five years. The dacoity was committed in August 1880. Several persons were shortly afterwards charged with being concerned in it, and were tried and convicted, but the prisoner, who is said to have absconded, has only recently been arrested. The

[* Sec 80 :—Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be statement or confession by any prisoner or accused person

Presumption on production of record of evidence.

taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement, or confession was duly taken]

†[Sec. 33 —Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts, which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the

Evidence in a former judicial proceeding when relevant.

adverse party, or if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable :

Provided

that the proceeding was between the same parties or their representatives in interest ; that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused, within the meaning of this section.]

only proof against the prisoner is the deposition of one Jogeshur Bind, who was made an approver-witness in the [1100] original trial, and who is now dead, coupled with some evidence as to his absence from the village at the time of the dacoity, and as to his absconding therefrom afterwards. The Judge considers that Jogeshur's deposition is evidence against the prisoner under s. 33 of the Evidence Act, and also under s. 512 of the Criminal Procedure Code. It is clearly not admissible under the former Act, as it was not recorded in the presence of the prisoner; and it would only be admissible under the latter if the provisions of s. 512 were complied with. This section requires, we consider, that the absconding should be alleged, tried, and established, before the deposition is recorded. In point of fact, the deposition does not appear to have been recorded under that section at all, it was recorded in the ordinary course of proceedings against other persons, and is, therefore, inadmissible against the prisoner.

Even assuming that it is admissible, there is, we think, an absence of any sufficient corroborative evidence. Proof of his absconding is not sufficient. He belonged to a suspected class of persons, and when several of that class were implicated in the case, it is quite possible that he thought it advisable to leave the village. The evidence shows that he has been living honestly ever since. The conviction must be set aside and the prisoner released.

Appeal allowed.

[10 Cal. 1100]

APPELLATE CRIMINAL

The 19th August, 1884.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE NORRIS

Abbilakh SinghPetitioner

versus

Khuh Lall.....Opposite Party.*

Sanction to prosecute—Criminal Procedure Code (Act X of 1882), s. 195, clause (c), para. 2—Notice, when necessary prior to sanction

A sanction to prosecute, when applied for subsequently to the termination of the proceedings in the course of which the offence is alleged to have been committed ought not to be granted, unless the person against whom the sanction is applied for had had notice of the application and an opportunity of being heard.

THIS was upon an application for sanction to prosecute made under section 195 of the Code of Criminal Procedure. One [1101] Abbilakh Singh laid a complaint against the servants of Mr Wilson, of the Poopree factory, in the district of Durbhangah, for assault and forcible entry upon his land. The defence set up before the Deputy Magistrate was that the father of Abbilakh had, by a written *istifa* or deed of relinquishment, given up the land or jote in respect of which the complaint had been made. Thereupon Abbilakh presented an application at the Collectorate to the effect

* Revision Case No. 268 of 1884, against the order passed by J. C. Price, Esq., Officiating Magistrate of Durbhangah, dated the 16th of February 1884, awarding sanction to prosecute the petitioner. *

that the deed alleged to have been filed at the Collectorate by his father and produced by the factory people was a fabricated document. That application, together with the complaint, was disposed of by the Deputy Magistrate who convicted the accused (the servants of the factory) and pronounced the *istifa* to be a forgery. On appeal, the Judge, on the 27th November 1883, discharged the accused, on the ground that the *istifa* was a genuine document. On the 14th February 1884, an application was made by Khub Lall, one of the afore-said servants of the factory, for sanction to prosecute Abbilakh on account of his petition at the Collectorate wherein he imputed forgery to the factory servants. On the 16th February 1884, the Magistrate, without serving any notice on Abbilakh, awarded his "sanction to prosecute." Against that order Abbilakh presented a petition to the High Court.

Moulvi *Serajul Islam* for Petitioner.

Mr. C. Gregory for the Opposite Party.

The **Judgment** of the Court (FIELD and NORRIS, JJ.) was delivered by

Field, J.—This is an application under para. 4, clause (c), s. 195, of the Code of Criminal Procedure, for the revocation of a sanction given for the prosecution of the petitioner, dated 16th February 1884. The sanction is in the following words:—"Sanction to prosecute is awarded." We think that this sanction must be revoked on two grounds: The second paragraph of clause (c), s. 195, provides that the sanction "shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed." The sanction which forms the subject of this application does not comply with these provisions of the law.

[1102] The second ground upon which we think this sanction ought to be revoked is this. The sanction was not given immediately upon the termination of the proceedings in which the question of the genuineness of the *istifa* or notice of relinquishment was raised. It was given when those proceedings had terminated, and by an order of a subsequent date, which virtually re-opened the matter. We think that when a sanction is applied for under circumstances of this nature, that is, after the termination of the proceedings in the course of which the offence is alleged to have been committed, the person against whom the sanction is applied for ought to have notice and have an opportunity of being heard, and that the proceedings ought not to be re-opened in this manner to his prejudice without giving him an opportunity of appearing and being heard. Under these circumstances, we revoke the sanction so far as regards the charge under section 211. We understand that in this same record there is a charge against the petitioner under s. 500 of the Penal Code. That is an offence for the prosecution of which a sanction is not required, and, therefore, so far as regards that offence, we make no order.

Sanction revoked.

NOTES.

[In (1885) 12 Cal., 58 a Full Bench unanimously declined to follow this case as regards the necessity of notice; see also (1887) 10 Mad., 232 F. B.]

[10 Cal. 1102]
FULL BENCH REFERENCE.

The 13th September, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE PRINSEP, MR. JUSTICE TOTTENHAM,
AND MR. JUSTICE PIGOT.

Nobokishore Sarma Roy, *on his death* his legal representative, his son
Gobind Chunder Sarma Roy.... ..(Plaintiff) Appellant

versus

Hari Nath Sarma Roy and others(Defendants) Respondents.*

*Hindu law—Transfer by Hindu widow of her estate—
Consent of reversioners.*

Under the Hindu law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property.

[1103] THIS case was referred to a Full Bench by FIELD and BEVERLEY, JJ.

The question referred was whether according to the law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property?

The referring order, which contains all the facts necessary for the decision of the question, was as follows :—

“ In this case a question arises which must be referred to a Full Bench. The plaintiff seeks to recover a 4-anna share in a taluq. He is resisted by the defendant, who sets up a purchase from the widow of the former proprietor, that purchase having been assented to by the person who was at the time the immediate reversioner. The person who was thus the immediate reversioner predeceased the widow, and it came to pass that when the widow died the reversioner entitled to succeed to the property was another and a different person. The District Judge was of opinion that it is settled law that an alienation by a Hindu widow of her deceased husband's estate, made with the consent of the then next reversioner, is binding upon the persons who may be the heirs of the husband at the time of the widow's death. That proposition has no doubt authority which is to be found in the case of *Mohunt Kishen Geer v. Busgeet Roy* (14 W. R., 379), and the case of *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (7 Cal L. R., 571). The authority of the case in 14 W. R. has, however, been doubted in the cases to be found in I. L. R., 5 Cal., 44, I. L. R., 9 Cal., 463, and I. L. R., 10 Cal., 225, as also in a later case (not

* Appeal from Appellate Decree No. 2176 of 1882, against the decree of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 14th August 1882, reversing the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 11th July 1881.

reported), being appeal from Original Decree No. 172 of 1882. No doubt, according to the law as current in Bengal, the widow might retire in favour of the next reversioner, and if she did so, that is, if she abandoned her interest in his favour, the next reversioner would have as complete and absolute a title to the property as he could have on her death. But what has taken place in this case is this: The widow executed a convey-[1104]ance of the property. That conveyance recites necessity. If such legal necessity existed, the conveyance by the widow would no doubt pass a good title. With this question of necessity I shall deal presently. If, however, there was no necessity, all that the widow was competent to convey was her life-interest. The reversioner then executed a separate document, in which he assented to the conveyance by the widow, and covenanted, on behalf of himself and his heirs, that he would not lay claim to the property at any future time. No doubt if the reversioner who executed that document had survived the widow, and had, as the actual reversioner, become entitled to inherit upon her death, he would have been estopped from setting up a claim to the property. But a different state of things here occurred. That reversioner died, and the person entitled to succeed on the death of the widow was another person, who cannot be in any way bound by the covenants executed by the previous reversioner. If the last reversioner is to be bound, we must treat the conveyance by the widow and the *ekrarnama* executed by the other reversioner as having the same effect as a transfer by the widow to the reversioner, and a second transfer by the reversioner to the person now in possession. No doubt, as I have already said, the parties might, at the time, have executed such a transfer and second transfer, but they did not do so, and, as at present advised, we do not see how the effect of a double transfer can be given to two documents different in their nature and contents. We therefore in this case refer to a Full Bench the question whether, according to the law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property?"

"If this point should be decided by the Full Bench in the negative, it will then become necessary to deal with the question of legal necessity. The Subordinate Judge found that there was no legal necessity. The District Judge says in his judgment: I do not find that it (that is, the *kobala*) has the defects concerning legal necessity, or improper influence [1105] imputed. We think this is not a sufficient finding as to whether there existed legal necessity for the conveyance or not, and if the point referred to the Full Bench should be decided against the defendant, it will then be necessary to remand the case in order to have the question of legal necessity properly tried."

Baboo *Karuna Sindhu Mookerjee* (with him Baboo *Degumber Chatterjee*) for the Appellant.—The *Dayabhaga*, chapter XI, s. 1, paras 61, 62, 63 and 64, shows what are the widow's powers over the estate of her husband.

IO I contend that such a transfer by a widow does not create a title which cannot be impeached by a remote reversioner, merely because it has been made with the consent of the next reversioner to the estate. See *Ramphal Rai v. Tulu Kuari* (I. L. R., 6 All., 116). Such a conveyance is the conveyance of the widow's life-interest only—*Ram Chunder Poddar v. Hari Das Sen* (I. L. R., 9 Cal., 463).

Assent implied by attestation by the next heir of a conveyance by a widow has been held not to be conclusive in law as to the necessity—*Madhub Chunder Hajrah v. Gobind Chunder Banerjee* (9 W. R., 350). The case of *Mohunt*

Kishen Geer v. Busgeet Roy (14 W. R., 379) has been disapproved of in *Ram Chunder Poddar v. Hari Das Sen* (I. L. R., 9 Cal., 463).

The case of *Gopeenath Mookerjee v. Kally Doss Mullick* (I. L. R., 10 Cal., 225) shows that the Court was prepared to hold that such an alienation, if made without the consent of subsequent reversioners, would not be binding on the latter.

The case of *Sreemutty Jadomoney Dabee v. Sarodu Prosono Mookerjee* (1 Boul., 120) shows that the principle of Hindu law on this point is that where the widow's conveyance is executed with the consent of all the nearest heirs living at the time of the conveyance, and there are no other heirs of preferable or equal degree living at the decease of the widow, then the Hindu law considers the whole estate in possession, and the reversion has been sufficiently represented for the purposes of such conveyance, and the conveyance itself is valid.

The case of *Varjwan Rangji v. Ghelyi Gokaldas* (I. L. R., 5 Bom., 563), where [1106] the widow alienated with the consent of her daughter (the nearest in succession after her) shows that such consent is not sufficient to give an indefeasible title to the alienee. In that case the question as to who are such heirs as can consent to such an alienation was gone into, and the Privy Council case of *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (13 Moo. I. A., 209, 228), was referred to as answering that question. The case of *Ram Anand Kunwar v. The Court of Wards* (I. L. R., 6 Cal., 764) shows who can sue in such cases as the present.

The cases against me are *Rajbullub Sen v. Oomesh Chunder Roop* (I. L. R., 5 Cal., 44) and *Trilohun Chuckerbutty v. Umesh Chunder Lahiri* (7 C. L. R., 571).

But the cases of *Kartick Kumokar v. Dhunno Monce Goopto* (W. R. 1864, 268), *Mohun Lall Khan v. Fancee Siroomunee* (2 Sel. Rep., 32), *Sheikh Mutteooollah v. Radhabinod Missur* (S. D. A. of 1856, p. 596), *Kaler Mohun Deb Roy v. Dhunumoy Shaha* (6 W. R., 51) are in my favour.

Baboo *Guru Das Banerjee* (with him Baboo *Grish Chunder Chowdhry*) and Baboo *Dwarkanath Chuckerbutty* for the Respondents.

The *Daya Crania Sangraha*, Chapter I, s. 2, p. 6, lays down that a widow may sell. See also the *Dayabhaga*, Chapter XI, s. 1, paras 61 and 63. The case of *Doe dem. Goluckmoney Dabee v. Diggumber Day* (2 Boul., 193), shows that a Hindu widow's estate is greater than a life estate. *Doe dem. Muddoosoodun Doss v. Mohender Lall Khan* (2 Boul., 40), shows what is the effect of a conveyance by a Hindu widow, with the approval of the remaindermen. In our case the reversioner wrote on the *ekrar* itself the words "I give consent to the transfer entered into." The note to p. 27, chapter 3, s. 1, of the *Vyavastha Darpana*, p. 42, shows what the widow's position has been held to be. See also Morley's Digest, vol. 2, p. 198, also 2 Strange's Hindu Law, 410. The case of *Beer Inder Narain Chowdree v. Sutbhoma Dabee* (6 Sel. Rep., 36) [1107] shows that a widow can alienate with the consent of the next reversioner. The case of *Gunga Pershad Kur v. Shumbhoonath Burman* (22 W. R., 393) shows what is the effect of relinquishment by a Hindu widow. The case of *Sia Das v. Gur Sahai* (I. L. R., 3 All., 362) refers incidentally to such a conveyance as the present, and the cases of *Raj Bullub Sen v. Omesh Chunder Roop* (I. L. R., 5 Cal., 44) and *Trilohun Chuckerbutty v. Oomesh Chunder Lahiri* (7 C. L. R., 571) are strongly in my favour, also *Mohunt Kishen Geer v. Busgeet Roy* (14 W. R., 379). The case in I. L. R., 6 All., 116, is a North-Western Province case, and the law there may not be the same as the law in Bengal, the same (observation applies to the case of *Koer Goolab Singh v. Rac Kurun Singh* (11 Moo. I. A., 176).

Colebrooke first laid down the rule that I contend for, and that view has been affirmed by *Jadomoney Dabee v. Saroda Prosono Mookerjee* (1 Boul., 120) and as this has been the rule for so long a period, the Courts could hardly alter it now.

Garth, C.J.—The only difficulty, if there is any, which we have to deal with in this case, arises from the anomalous character of a Hindu widow's interest. I have no doubt that Mr. Justice DWARKANATH MITTER was perfectly right, [in the Full Bench case of *Kery Kolitany v. Mooneeram Kolita* (13 B.L.R., 1)] in describing that interest as having been originally a mere trust for the benefit of her deceased husband. But it has been found so impossible in practice to carry out that idea, that this Court, as well as their Lordships of the Privy Council, have for many years past considered and treated her estate as an absolute one, subject only to certain conditions.

In the case of *Phool Chand Lall v. Rughoobuns Suhaye* (9 W. R., 108) Sir BARNES PEACOCK describes it thus: "It is not," he says, "an absolute estate for all purposes, and it is not merely an estate for life, but she takes the estate of her husband for the benefit of her husband (which includes her maintenance and the performance of her religious duties) rather than for the benefit of those who may become the heirs of her husband upon her death."

[1108] As therefore the widow represents the whole inheritance, and her interest is not merely that of an estate for life, it is obviously incorrect to speak of her "*surrendering*" her estate (which is the expression often used) to the reversionary heirs of her husband.

A surrender, strictly speaking, can only be made by one who has a particular estate, (such as an estate for life), to the person who has the reversion, or remainder immediately expectant, on the determination of that estate.

What is usually therefore called a "*surrender*" of a Hindu widow's estate is more properly a *relinquishment* of it in favour of her husband's heirs. If she died a natural death, those heirs would succeed; or if she were to become a *byragee*, or otherwise die a civil death, the result would be the same. And as I take it to be clear that when her husband died, she might, if she had so pleased, have disclaimed her estate, there would seem nothing wrong or objectionable in her relinquishing her estate at any time in favour of her husband's heir for the time being, after she had once accepted it.

But there is no concealing the fact, that although such a relinquishment may be made by a widow in perfect good faith, and even under such circumstances, as to be a meritorious self-sacrifice, it is nevertheless possible and, indeed, it not unfrequently happens, that a widow who is anxious to turn her husband's estate into money, may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit.

They may both share in the profits of such a transaction; and it sometimes happens, that in this way the estate is alienated from the husband's family, so that the person who would be the next male heir at the widow's death, is virtually deprived of his rights.

But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make. And it seems equally impossible to deny, that for a long series of years this Court has treated and considered such alienation as lawful. [1109] See *Shama Soonduree v. Shurut Chunder Dutt* (8 W. R., 500), (JACKSON

and DWARKANATH MITTER, JJ.) *Mohan Kishen Geer v. Busgeet Roy* (14 W. R., 379) (BAYLEY and MARKBY, JJ.), *Gunga Pershad Kur v. Shumbhoonath Burmun* (22 W. R., 393). [This last case was decided by Mr. Justice ROMESH CHUNDER MITTER sitting alone, but was appealed under the Letters Patent and confirmed on appeal by Sir RICHARD COUCH and Mr. Justice AINSLIE—Letters Patent Appeal 1990 of 1873.]

Besides these reported cases, which represent a long current of authority in this Court, there are also several unreported cases to the same effect, and the doubt which has arisen in later days is not so much as to the correctness of these authorities, as upon the question whether a conveyance by the widow, *with the consent only of the next reversionary heir*, is equivalent to a relinquishment by the widow in favour of such an heir, or a conveyance by them both to some third person.

To allow the widow to relinquish her estate to the next male heir of her husband, is one thing, but to allow her to sell the whole inheritance, without any legal necessity, *merely with the consent of the next male heir*, so as to bar the rights of other heirs of her husband in the future, is another thing.

I confess, if we were now considering this last question for the first time, I should have great doubt whether the mere consent of the next heir to an absolute transfer by the widow ought to give such effect to that transfer, as to make it valid as against the person who may be the heir of the husband at the time of the widow's death. It would, of course, bind the person so consenting to it, and all persons claiming under him, but whether it ought to bind any other heirs of the husband is another matter.

But it seems to me that there is such a long course of authority in this Court in favour of both propositions that we cannot, and ought not, at the present day, to decide the contrary [see *Rajbullub Sen v. Oomesh Chunder Roos* (I. L. R., 5 Cal., 44) JACKSON and TOTTENHAM, JJ., and *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (7 C. L. R., 571), PRINSEP and MACLEAN, JJ.].

We must not forget, that upon the faith of these authorities [1110] many thousands of estates have been bought and sold in Bengal during the last twenty years; and I think, that we should be doing a grievous wrong to the purchasers of those estates, if we were to overrule the law thus laid down by this Court for a great many years, and so disturb the titles which have been acquired upon the strength of that law.

I think, therefore, that the question referred to us should be answered in the affirmative, and that the appeal should be dismissed with costs. I also think that the plaintiffs should pay the costs of this reference.

Tottenham, J.—I concur in this conclusion, upon the ground, that a long course of decisions seems to me to sustain it, and that it would be unjust to throw a cloud now upon titles acquired by virtue of those decisions.

Mitter, J.—I am also of opinion that the question referred to us should be answered in the affirmative. Whatever conflict there may be upon the question whether a Hindu widow may sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, there is no conflict in the decisions, since the case of *Jadomoney* was decided in the late Supreme Court of Calcutta, upon the question whether the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid or not. Such relinquishment by the widow has been held for a long series of years to be valid. It would be unjust now to disturb a rule of law settled by a long course of decisions. But, if the widow is competent to relinquish her

estate to the next male heir of her husband, it follows, as a logical consequence, that she can alienate it merely with his consent without any legal necessity. I entirely concur in the reasons given in the case of *Mohunt Kissen Geer v. Busquet Roy* (14 W. R., 399) to show that the one proposition follows as a logical consequence of the other.

Prinsep, J.—After hearing the arguments in this case, I am confirmed in the correctness of the opinion expressed by a Division Bench, of which I was a member, in the case of *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (7 C. L. R., 571). Their Lordships of the [1111] Privy Council in *Rajluchhee Dabee v. Gokool Chunder Chowdhry* [13 Moo. I. A., 209, (228)] state that "they do not mean to impugn those authorities which lay down that a transaction of this kind (a deed of gift) may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffice to raise a presumption that the transaction was a fair one, and one justified by the Hindu law."

I do not understand this to mean, that the consent of all the reversionary heirs must be obtained, but, that as laid down in the case of *Jadomoney Dabee v. Saroda Prosono Mookerjee* (1 Boul., 120), the consent of all those of equal or superior degree is necessary. But since the decision of the case of *Jadomoney* it has been settled law in Bengal that a Hindu widow by relinquishing her rights in favour of the heir to her husband's estate accelerates his inheritance, and that the effect of a conveyance by her and such heir is to convey the absolute estate.

In the case now before us the widow and the heir have, on the same day, executed separate conveyances in favour of the same person, and these must be regarded as a conveyance of the entire estate.

I should, moreover, not be disposed to hold otherwise after a series of decisions of our Courts for about thirty years, unless the opinion of the Privy Council were expressed in clear and unmistakeable terms.

Garth, C. J. (*for* PIGOT, J.)—I am authorized by Mr. Justice PIGOT to say, that, although he considers that the principles upon which this decision is founded are open to great objection, he is content to waive those objections in consideration of the view taken by the rest of the Court (who have had more experience than himself on the Appellate Side), that to decide otherwise would have the effect of disturbing a great number of titles.

Appeal dismissed.

NOTES.

[1. THIS CASE IS NOT AN AUTHORITY FOR THE VALIDITY OF ALIENATIONS MADE WITH CONSENT OF REVERSIONERS, OF PART OF THE ESTATE—

In the Full Bench case of *Debi Prasad v. Golap Bhagat* (1913) 40 Cal., 721. 17 C. L. J. 499 : 17 C. W. N., 701, an argument to this effect was based upon Mr. Banerjee's description of this case in (1894) 22 Cal., 354. The records of the case were examined, and it was stated, as a result thereof, by JENKINS, C.J., and by MOOKERJEE, J., that it was not so. "Mr. Justice BANERJEE, who when at the Bar successfully argued the case of 10 Cal., 1102, on behalf of the respondent, stated in the case of 22 Cal., 354, that the principle of the Full Bench decision is applicable to transfers of part of the estate as of the whole, and this was subsequently accepted without question in 35 Cal., 939. 12 C. W. N., 837 : 8 C. L. J., 280. An examination of the record, however, in the case of 10 Cal., 1102, does not confirm the view taken by Mr. Justice BANERJEE; on the other hand, so far as I can gather, the alienation in controversy covered the entire estate and was made with the consent of the entire body of immediate reversioners." The two points which were considered by the Full Bench were in essence

these, namely, *first*, whether a transfer by the widow with the consent of the immediate reversioner could be treated as equivalent to a transfer by the widow to the reversioner followed by a transfer by the latter to the alienee, and, *secondly*, whether a transfer by the widow to the immediate reversioner stood on the same footing as a real relinquishment by her. Upon the first, it was ruled, in consonance with previous decisions, that the question was one of form rather than of substance, and upon the second, the transfer, though not deemed to be on the same footing as the relinquishment, was upheld on the ground of *stare decisis* per MOOKERJEE, J., in *Debi Prasad's* case

II. ALIENATIONS BY A LIMITED OWNER WHEN BINDING ON THE ACTUAL REVERSIONER—

In *Debi Prasad v. Golap Bhagat* this subject was argued by Mr S. P. Sinha and Dr. Rash Behari Ghosh before a Full Bench of five Judges, and all the previous authorities were fully discussed. In the words of Sir LAWRENCE JENKINS, C J, in that case, "to uphold an alienation by a widow of her deceased husband's estate, where she is his heir, it should be shown (1) that there was legal necessity, or, (2) that the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed, or (3) that there was such consent of the next heirs, as would raise a *presumption*, either of the existence of the necessity or of reasonable enquiry and honest belief as to its existence, or (4) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and the consequent relinquishment of the interest of the consenting heirs. Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estate, but where the fourth alone is proved, then the alienation must be of the whole."

The case of (1907) 30 All., 1 (*Bayrang's* case), as well as 10 Cal., 1102, and (1891) 19 Cal., 236, have been regarded as authority for the fourth proposition [see also (1914) 27 M. L. J. 24; 21 Mad., 128; 1902 P.R. 17, 12 C.W.N. 49, 19 Bom., 809, at 820; 31 Mad., 366, 14 Cal., 401, *contra* 25 Bom., 129]. The *third* is finally laid down in *Debi Prasad's* case, 40 Cal., 721, (*overruling* 35 Cal., 939, 14 C.W.N. 401, 13 C.W.N. 931 see 17 C.W.N., 1062, 17 Cal., 896; 8 O.C. 21; 9 O.C. 104, 6 C.W.N. 905), and is now supported by the Privy Council of *Byoy Gopal v. Grunda Nath* (1915) 11 C.W.N. 673, where the view is accepted of consent being *presumptive evidence* of necessity. In (1894) 22 Cal., 354, it was held that the widow cannot enlarge her estate by devices of alienation with the consent of reversioners, however effective they may be as regards others, see also 31 Mad. 366 18 M. L. J. 309.]

[1112] APPELLATE CIVIL.

The 22nd July, 1884.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Mullick Abdool Guffoor and another.....Plaintiffs

versus

Muleka and others.....Defendants.'

*Mahomedan law—Gift of zamindaries let out on lease, and malikana rights—
Mooshaa as applied to gifts of unpartitioned and undivided lands.*

The rule of Mahomedan law that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made has relation, so far as it relates to

* Appeal from Original Decree No. 230 of 1882, against the decree of H. Beveridge, Esq., Judge of Patna, dated 20th January 1882.

land, to cases where the donor professes to give away the *possessory interest* in the land itself, and not merely a reversionary right in it.

What is usually called possession in this country is not only *actual or khas possession*, but includes the receipt of the rents and profits.

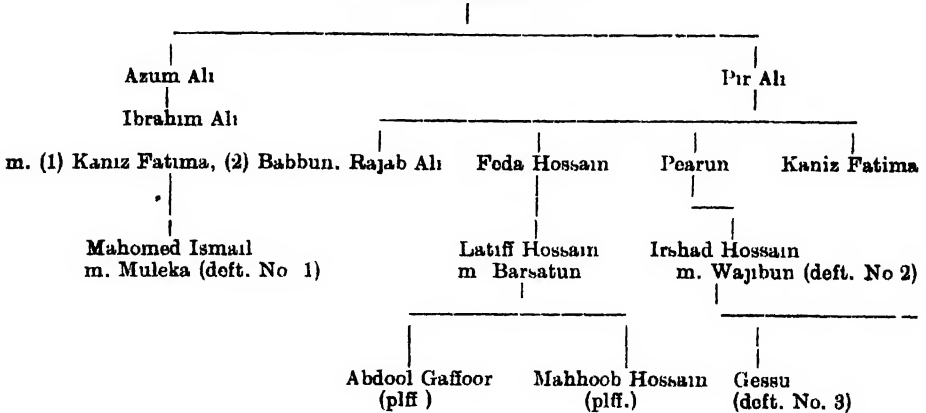
There is nothing in Mahomedan law to make the gift of a zamindari, a part or the whole of which is let out on lease to tenants, invalid. Nor is there any principle by which to distinguish malikana rights from the right to receive rents or dividends upon Government securities, and gifts of such a nature may be legally conferred under the Mahomedan law.

The doctrines of Mahomedan law which lay down that a gift of an undivided share in property is invalid, because of *mooshaa* or confusion on the part of the donor; and that a gift of property to two donees without first separating or dividing their shares is bad, because of *mooshaa* on the part of the donees apply only to those subjects of gift which are capable of partition.

THE plaintiffs, the two minor sons of Latiff Hossain, by their mother as their next friend, brought this suit *in forma pauperis* to recover possession of certain properties from which they had been dispossessed.

The following genealogical table will show the position of the different parties to the suit so far as is necessary for the purposes of this report:—

MULLICK RAHAM ALI.



[1113] The plaintiffs stated that Ibrahim Ali died in 1858, leaving him surviving Mahomed Ismail, his son, and two wives; and that although, according to Mahomedan law, the son was entitled to a 14-anna share in Ibrahim's estate, and the two wives to a 1-anna share each, yet, under an arrangement to which Mahomed Ismail had consented, Babbun, who was a *nacca* wife, took as her share mouzah Mora and a *mocurrari* of mouzah Morari, and the rest of Ibrahim's estate fell to the share of Kaniz Fatima, over which she had a lien for her unpaid dower to the amount of Rs. 40,000.

They further stated that Mahomed Ismail died in 1862, leaving as his heirs his mother, Kaniz Fatima, his widow, Muleka, and his father's cousin, Rajab Ali; and that at this time Ibrahim's estate still remained in the possession of Kaniz Fatima; that Mussamut Pearun, a cousin of Ibrahim Ali and sister of Kaniz Fatima, died in 1876, leaving a son, Irshad Hossain; and that Kaniz Fatima died in 1876, leaving as her heirs the plaintiffs, the grandsons of her brother Feda Hossain, and they submitted that on her death the whole of her estate vested in them.

They also contended that an allegation made by Mahomed Ismail, defendant No. 1, in certain prior legal proceedings, to the effect that Kaniz Fatima had executed an *ikrarnamah*, dated the 18th July 1873, declaring that

the share in Ibrahim's estate was a 12-anna share, the remaining 4-anna share belonging to Muleka was untrue; and asserted that Irshad Hossain had fabricated a deed of gift, dated the 25th October 1875, purporting to be executed by Kaniz Fatima, and to assign in gift all her property to her daughter-in-law, Muleka (defendant No 1), and to Irshad Hossain, the ancestor of defendants 2 and 3; they denied the signature of Kaniz Fatima, and contended that even if it had been executed by her, the gift was invalid, inasmuch as it purported to be a gift of a joint undivided property under which the donees had never taken possession.

The property, the subject of the gift, consisted of several zamindaries and shares in zamindaries let out to tenants, certain lakheraj properties leased out to tenants, certain malikana rights, and a considerable quantity of house property and garden lands. With regard to mouzah Morari, the *mocurrari* of which has been granted by Ibrahim Ali to Mussamut Babbun for her life, they asserted [1114] that, on her death, the mouzah reverted to Ibrahim Ali, and that, therefore, a 4-anna share therein passed to Kaniz Fatima, and a 12-anna share to them (the plaintiffs), and that on the death of Kaniz Fatima they became entitled to the entire 16 annas, and that the defendant No 1 and Irshad Hossain had never been in possession of this mouzah, it having been rented to defendant No. 6 under a *dur-mocurrari* by defendants 4 and 5, the heirs of Mussamut Babbun.

They, therefore, brought this suit (stating that the defendants had dispossessed them on the 1st Magh 1285, F. S., from certain of these properties, and had obstructed the collection of rents from others of them on the 5th Falgoon 1285, F. S.) to have it declared that they were entitled to the estates in which Mussamut Babbun had a life-interest, and for possession of the estates belonging to Kaniz Fatima as her heir-at-law, and for the cancelment of the deed of gift, dated 25th October 1875.

The defendants contended that mouzah Morari had been granted to Mussamut Babbun from generation to generation under a deed, dated the 30th August 1850, that the *ikrarnamah* of the 18th July 1873, and the deed of gift of the 25th October 1875, were both valid, and they asserted that they had been put in possession under the latter, and that the plaintiffs' suit as regards any disturbance of these documents was barred by limitation.

The Subordinate Judge found (1) that the plaintiffs were the grandsons of Kaniz Fatima; (2) that the *ikrarnamah* and *hibanamah* were both executed by Kaniz Fatima; (3) that the defendants had been in possession under the *hiba* during the lifetime of Kaniz Fatima, (4) that the *mocurrari* granted to Mussamut Babbun was not limited to her life only, (5) that the suit was not barred as regarded the *hiba*, although it was so barred as concerned the *ikrarnamah* of 1873; (6) that the estate given by the *hiba* was an undivided estate, of which the collections were separate, and that gifts of defined shares were not liable to the objection of *mooshaa*, (7) that the *hiba* defined the share to be given to each donee, and that there being no precedent exactly in point, and the Mahomedan doctors having disagreed as to whether a gift to two persons was invalid, the rule to be applied must be that of equity and good conscience (the case not being necessarily governed by [1115] Mahomedan law, inasmuch as s. 24 of Act VI of 1871 did not apply to gifts) and that, according to that rule, there was nothing inequitable in the gift by Kaniz Fatima to her sister's son, and her son's widow; he therefore dismissed the suit.

Plaintiffs appealed to the High Court.

Mr. Twidale, Moulvi Mahomed Yusuf and Babu Saligram Singh for the Appellants.

Mr. Twisdale.—The gift under the *hiba* is *mooshaa*, as being a gift of undivided property, the Privy Council case of *Mussamat Ameeroonissa Khatoon v. Mussamat Abedoonissa Khatoon* (23 W. R., 208) is distinguishable, as the estate there was separate, and had separate collections and separate numbers. I admit that our rents are also separately collected, but the donees take the whole of the property. In vol. III, *Hamilton's Hedaya*, pp. 293, 294, 295, *Shafai* is quoted as laying down that a gift of an undivided property is invalid. *Baillie* in p. 520, 2nd ed., says that a gift of that which does not admit of partition is invalid, even if possession is taken. In *Macnaghten's Mahomedan Law*, chap. v, s. 6, it is said that "a gift of property which is undivided and mixed with other property is void."

[GARTH, C. J.—That evidently refers to the donor retaining a portion in his own hands.]

The precedent cited at p. 199, *Macnaghten*, "of a Musalman dying leaving three wives," is an example of our case. Also see case 8 on p. 203, and the case on p. 214, question 4.

A gift of an undivided share is invalid—see *Mussamat Banoo Beebee v. Fukherrodeen Hossein* [2 Select Rep., 180 (183)]. I distinguish the Privy Council case in 23 W. R., because there they go upon the definition of the word "estate" under the Bengal Act and Regulations, and here we have no question of a revenue-paying estate.

The case of *Neermullee Bebee Chowdhraim v. Assudonissa Bebee* (6 Select Rep., 286) decides that a gift without seizin is invalid, the villages being divided. [GARTH, C. J.—It does not appear that possession was taken.] Possession was ordered to be given, see p. 289.

As to a gift to two persons, see *Hedaya*, vol. III, bk. XXX, p. 298, *Baillie's Mahomedan Law*, 2nd ed., pp. 524-525. The donor [1116] in our case gave 8 annas to one person and 4 annas to the other. This is invalid. See *Hedaya*, vol. 3, bk. XXX, ch. I, p. 295.

The case of *Mirza Kasim Ali v. Mirza Muhammad Hosen* (5 Select Rep., 213) shows that between the Sunis and Sheahs there is a difference as to this point. We are Sunis, and they say such a gift is invalid.

The case of *Azeemoodin v. Fatima Beebee* (1 Select Rep., 24) shows that a gift of a portion without division is invalid. [BEVERLEY, J.—That is a gift to only one person.] In *Baillie*, 2nd ed., pp. 516, 529, it is laid down that if a man gives property with crops upon it, and gives the land without the crops or crops without the land, it is invalid, the gift is of such a nature in our case.

Moulvi Mohamed Yusuf on the same side

The title which the plaintiff seeks to enforce is that of an heir, and the defendants resist his title by setting up a title derived from the ancestor without any consideration. The Mahomedan law is opposed to an owner defeating the law of inheritance—*Ranee Khujooroonissa v. Enayut Hossein* (L. R., 3 I. A., 291), *Abedoonissa Khatoon v. Ameeroonissa Khatoon* (9 W. R., 256). Where an owner parts with his property without consideration the law steps in, he can only will away $\frac{1}{3}$ of his estate, and where the heirs are poor it is not right for him to make a will at all. This also applies to gifts. See *Enya*, vol. III, p. 21. In our case the appellants are so poor that they sue *in forma pauperis*, and defendant has by means of a gift done what she could not do by will. A gift is *tumleek* (the conferring of the right of ownership) over *mal* (property) without any exchange or consideration, and in order to be valid it must be perfected by possession. Under Mahomedan law there is only one way of enjoying possession, and that is by being actually in possession, i.e., in *khas* possession, and therefore

if your lessees are in possession you cannot be said to be in possession. You are said to be in possession if at any time that you are inclined to enter into your property no person could prevent you. Possession by a trustee or agent is possession of the owner, but possession by a usurper is not so, but as under the Mahomedan law there is no such thing as limitation, there is not therefore any necessity for a distinction between adverse possession and [1117] possession that is not so. *Macnaghten, Mah. Law*, ch. XII, para. I.

As regards such of the gift, in the present case, as was of property let out on lease, I say that in the case of a lease, an owner is not in possession under the Mahomedan law, though he is rightfully entitled to it. I also say that *mal* or *ayn* does not include incorporeal property, and it only means property of which the owner is in possession, and mere rights cannot be said to be *Mal*. See *Barlie's Mah. Law of Sale*, introductory p xli, pp 50 and 51 notes, whatever could be the subject matter of a sale can be the subject matter of gift. The sale of fish not yet caught is null (see *Hedaya*, vol 2, p. 432), so is grass growing on a common (435) Mere rights are not property. *Hedaya*, vol. 2, pp. 440, 441, shows that a right of way cannot be the subject of sale or gift, because it is not property. In this case some of the lands which are given are tenanted lands, and as such they cannot be the subject of gift, as the owner is not in possession, and he cannot put the donee into possession. See *Barlie's Digest*, 2nd Ed., 538, *Hedaya*, Bk. XXX, p 291, *Macnaghten's Mah. Law*, p. 240, and p 202 (note) case VI, p 205. The case of *Mohinudin v Manchershah* (I. L. R., 6 Bom., 650) shows that a person cannot make a gift of property in the hands of a mortgagee. See also *Nizamuddin v Zabeeda* (6 N. W. P., 340), *Syad Kasum v. Shaista Bibee* (7 N. W. P., 314).

[GARTH, C. J.—The donor can give the right to receive the rents, and that is all that purports to be conveyed in this case.]

The rents are not ear marked, how can they be the subject of gift. A person can't even make a gift of lease-hold property. There are original Arabic authorities in support of my contention, viz., *Dorrul Mokhtar Book on Gift*, 635, *Tuhtawee*, vol III, *Book on Gift*, 398, explains the last text, and clearly states that a gift of property in the hands of lessee, is bad, *Futawa Alumgiri*, vol. IV, *Book on Gift*, chap VI, 546; *Barlie's Digest*, 529, *Hamawi Book on Gift*, 443; *Futawa Engrawi*, vol. II, *Book on Gift*, 259; and the marginal note to *Futawa Engrawi*, vol II, 259, and *Aynee*, a commentary on the *Kanzood Daquaiq Book on Gift*, 283.

As to the properties held by tenants on the Bhooli tenure, the "hiba" is invalid on two grounds (1) because the owner had a [1118] share in the crop which the deed does not purport to give, and which therefore is not given; and (2) because on account of the ryots' share of the crops the rights of third parties were concerned in the subject of gift. As to the first ground see *Barlie's Digest*, 528; and as to the second ground see *Barlie's Digest*, 529; as to the invalidity of a gift of a thing occupied with the property of the donor, see *Inayah*, vol. IV, *Book on Gift*, 23, *Kufayah*, vol III, *Book on Gift*, 677; *Tuhtawee*, vol. III *Book on Gift*, 397, *Futawa Kaze Khan*, vol. IV, chapter on *Gift of Mooshaa*, 175; *Futawa Alumgiri*, vol. IV, *Book on Gift*, 521, and Pt. II, p. 529; *Futawa Qmya*, *Book on Gift*, 215. *Futawa Engrawi*, *Book on Gift*, vol. II, 271; *Futawa Fusool Emadee*, vol II, 757, *Futawa Engrawi*, *Book on Gift*, 263.

As to the property included in the gift, which consists of an undivided share in certain villages, such a gift is invalid on the ground of *Mooshaa*, see *Barlie's Digest*, 2nd Ed., 523 chap II, *Dorrul Mokhtar, Book on Gift*, 633, *Ruddul Mokhtar*, vol. IV, *Book on Gift*, 785, *Shareh Vekaya Book on Gift*, 293, *Futawa Kaze Khan*, vol. IV, on *Gift of Mooshaa*, 172, 174, *Futawa Hemadaya*

Book on Gift, 705. The reason for such a gift being invalid is, that the owner is not able to give possession of undivided shares to the donees.

As to the properties in which the donor had only a lessee's rights, such an interest, *viz.*, that of a ticcadar, is not *mal*, the subject of the gift was not in existence, and therefore could not be given away. (See *Tahtawi*, vol. III p. 4).

As to the gift of the *malikana* rights, the *malikana* was not in existence at the time of the gift, it is on that ground invalid. It is not a debt due to the donor which is specially validated owing to necessity, see *Bairie's Digest*, chap. III, 532, the capacity to produce it is existent, but not the thing itself. There is no analogy between the gift of a debt and the gift of *malikana*. See as to the gift of debts, *Ruddol Mokhtar*, vol. IV, *Bk. on Gift*, *Miscellaneous*, 795; *Futawa Hemadya*, *Bk. on Gift*, 714; *Futawa Engrawi*, vol. II, *Bk. on Gift*, 258; *Futawa Engrawi*, vol. II, *Book on Gift*, p. 263.

As regards the gift of cultivated lands, the gift is bad, as in giving two bighas out of 20 bighas, the donor has specified these two [1119] bighas by giving only the boundaries of the 20 bighas, and the subject of the gift is therefore indeterminate and undefined.

The whole gift is also bad as being made in favour of two persons. The "confusion" in such a gift is on the part of the donee, as to this, Aboo Haneefa holds it invalid, and the *Futawa* is according to this view, *Ruddool Mokhtar*, vol. IV, p. 780-781. *Doorrull Mokhtar*, p. 8, and *Tahtawi*, vol. III, p. 176: whilst Mahommed says it is valid. When the donor has a share; and gives it to two persons there is confusion on both sides; as to this there is no difference of opinion. See *Bairie's Digest*, 524 and n. 525; *Hedaya*, vol. III, *Bk. on Gift*, 298; *Aynee*, vol. IV, *Bk. on Gift*, 599; *Inayah*, vol. IV, p. 30; *Natayejolafar*, vol. III, *Bk. on Gift*, 672, *Shareh Vekaya*, *Bk. on Gift*, 292-293.

Can then such a gift as the present be rendered valid by possession? I say no, because the gift is "confused" on both sides. See *Bairie's Digest*, 523-524.

Mr. Evans, Mr. Amir Ali and Mr. C. Gregory for the Respondents.

Mr. Evans.—This is the first time such objections have been taken to a gift or sale of property in the hands of ryots. As to the practice of *hubba*, it is prevalent amongst Mahomedans in order to avoid the Mahomedan law of inheritance. It is pointed out in 11 Moo. I. A., 517, that although Mahomedan law is strict with regard to the law as to wills, it is not improper to make a *hubba*. [Moulvie Mohamed Yusuf—That is a Sheah case.] The Sheah law makes no difference as regards seisin; at all events, any difference that there may be, was not brought to the notice of the Privy Council. As to gifts of tenanted lands being valid, see *Jaffer Khan v. Hubshee Beebee* (1 Sel. Rep., 12); there the land was in possession of ryots, and the question whether the attornment by ryots to the husband was sufficient, and it was held it was; also *Nunda Singh v. Meer Jaffer Shah* (1 Sel. Rep., 5) a case as to the validity of the gift of a village. Also *Casim Ali v. Fuzund Ali* (1 Sel. Rep., 113) where there was a gift of an undivided share to two people jointly of certain tenanted lands, and it was held a good gift. And the [1120] question of *mooshaa* was not even raised in the case. See also the case of *Anundchund Rai v. Kishen Mohun Bunjola* [1 Sel. Rep., 115. (note)].

The case of *Mussamat Mahtab Khatoon v. Mussamat Munajat Khatoon* (S. D. A. of 1856, p. 750), was a gift of large zamindari, the land must have been tenanted.

In *Amina Bibi v. Khatija Bibi* (1 Bom. H. C., 157), there were rented houses given; and it was there also considered that seisin by collection of rents was good seisin.

As regards the texts cited by the other side, I do not consider that they refer to the transferability of rights, of incorporeal rights, but if they do, then such views are now obsolete. *Bailee* in his Introduction to the Ed. of 1865, p. 23, points out that the law of sale has become obsolete as to certain texts.

The objections raised by the other side were not raised in the cases of *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (L. R., 2 I. A., 87), *Muhammad Farzahmad Khan v. Ghulam Ahmed Khan* (I. L. R., 3 All, 490); or *Haji Mahomed Faiz Ahmed Khan v. Haji Golam Ahmed Khan* (L. R., 8 I. A., 25).

In *Abedoonessa's* case the Privy Council expressly say that defined collection of rents may be the subject of gift; and the Allahabad case shows that there cannot be *mooshaa* where there has been a gift of defined shares in zamindaries with separate and defined rents. Undivided property may be given to two persons, see *Bailee*, p. 33, Introd. Ed. 1865, and the case in Sel. Rep., 115 (note) I *Bailee*, p. 524, also shows that possession prevents the gift being void.

Mr. *Amir Ali* on the same side As regards difference of opinion between Haniffa and his two disciples in some of the texts quoted, the rule to be followed is: Where there is a difference in the opinion of Haniffa and the two disciples, Haniffa's opinion is to prevail in devotional matters, and that of the disciples in worldly matters. Where the opinion of the disciples differ there the opinion which agrees with Haniffa is to be adopted. Where Haniffa's opinion differs from his two disciples, then if the difference relate to matters of justice in a worldly Court of [1121] justice, the opinion of the two disciples will be adopted, and in other matters the opinion of the two disciples [Haniffa?] is to be adopted. See *Fatawa-i-Kazi Khan*, 1, V. A judge may, when both disciples dissent from Haniffa, decide as he thinks most just. See *Sir William Jones' work*, vol. III, 510, and *Morley's Digest*, vol. I, p. CCLXII, Introd.

The case of *Shahazadee Hazara Begum v. Khaja Hossein Ali Khan* (12 W. R., 498) shows that a *waqf* was made of a right of redemption, which is not a tangible thing, and as to gifts of *choses in action*, see *Bailee*, 531, *Hedaya*, 698. As to a gift of shares in properties, see *Kasim Husain v. Sharifunissa* (I. L. R., 5 All, 285). As to delivery of possession *Ranee Khujooroonissa v. Roushun Jehan* (L. R., 3 I. A., 307), as to the seisin of Mahomedan law see *Amna Bibi v. Khatija Bibi* [1 Bom. H. C., 157 (161)]

Where a man makes a gift of a moiety of his houses to two persons, and delivers the same to both simultaneously, it is a valid gift, but if the delivery to one is before the other it would not be good, although Haniffa says it is not valid in either case, *Fatawa-i-Kazi Khan*, 282. A gift of a house to two persons is not valid according to Abu Haniffa, but the two disciples say it is valid. See *Fatawa-i-Kazi Khan*. The Sheahs do not allow the invalidation of a gift by *Mooshaa*, see *Shami* p. 511, where it is laid down. "If the donor or his deputy makes a division, or if the donor authorises the donee to make the division with his partner, this makes the gift complete"

Judgment was delivered by—

Garth, C. J., (who after stating the facts, of the case, continued). The main question in the case is the validity of this deed of gift. There is no doubt that but for this deed the plaintiffs would be the heirs of Kaniz Fatima, at least to the main portion of the property. But they deny the validity of the deed on several grounds.

(1st) That Kaniz Fatima never executed it, (2nd) that if she did she was not of sound mind when she did so; and (3rd) that the deed is invalid by the rules of Mahomedan law.

[1122] The Judge in the Court below has found entirely in favour of the defendants. He considers, that the execution both of the *ikrarnama*, and of the deed of gift has been clearly proved, and that there is no legal objection to the validity of the deed of gift. He also finds, that the *mocurrari* to Babbun was a permanent lease, and he has dismissed the plaintiff's suit with costs.

In this Court, the main contention has been with reference to the validity of the deed of gift, and we may say at once, that we have not the least doubt as regards the execution of this deed, or as to Kaniz Fatima being perfectly well aware of what she was doing when she executed it.

We think this appears very clearly from the plaintiff's own evidence.

It is no doubt very natural for the plaintiffs, who are not in good circumstances, to struggle hard against an alienation of so large an inheritance, but on the other hand, we cannot fail to see that the probabilities are greatly in favour of the gift, because it was only likely that Kaniz Fatima, who had lived with Muleka (her daughter-in-law), and Irshad Hossein on terms of affection and intimacy for many years, should do all she could to secure to them her wealth, instead of allowing it to descend to distant relations, of whom she knew little or nothing.

The question therefore in this Court, so far as this deed is concerned, has been, whether having regard to the subject-matter of the gift, and the fact of there having been no actual partition made of it at the time when the deed was executed, as between the two donees, the transaction is valid in law as against the plaintiffs.

This question has been argued before us at some length, and we are much indebted to the learned counsel on both sides for the pains which they have taken to refer us to all the authorities upon the subject. But having heard the matter fully argued, we are satisfied that the gift is valid, and that the conclusion at which the lower Court arrived is just.

The property which is the subject of the gift consists of several zamindari, and shares in zamindari, let out to tenants and ryots, as such estates usually are; a good many lakheraj properties [1123] also let out to tenants, several *malikana* rights of some value, and a variety of house property in Patna, and elsewhere, consisting of houses, sheds, roads, gardens, etc.

There is no satisfactory evidence as to how this latter property was occupied or utilized at the time when the gift was made.

The arguments on the part of the plaintiffs resolve themselves into three main points:

(1st) That by Mahomedan law a gift cannot be made of lands which are not in the possession of the donor, nor of incorporeal properties, such as rents, *malikana* rights, and the like, (2nd) that an undivided share of a house or a zamindari cannot be made the subject of a gift; and (3rd) that a gift to two persons without previous division and separation is invalid.

In dealing with these points we must not forget that the Mahomedan law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Bagdad, and other Mahomedan countries, under a very different state of laws and society from that which now prevails in India; and that although we do our best here in suits between Mahomedans to follow the rules of Mahomedan law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Mahomedan law ordinarily current in India, namely, Abu Haniffa and his two disciples.

We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded, and to administer it with a due regard to the rules of equity, and good conscience, as well as to the laws, and the state of society and circumstances which now prevail in this country. *

Having premised thus far, we think that the first of the above points, although it has occupied some time in argument, may be very readily disposed of. In fact, it appears to us to have been already settled.

We have been referred to several authorities, and, amongst others, to *Dorrul Mokhtar, Book on Gift*, p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of a *usurper* (or *wrong-doer*), or of a *lessee* [1124] or *mortgagee*, it cannot be given away, because in these cases the donor has not possession of the thing which he purports to give.

But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away *the possessory interest* in the land itself, and not merely a reversionary right in it. Of course, an actual seisin or possession cannot be transferred, except by him who has it for the time being.

It is possible, too, that these texts may be explained by what we are informed was the law in Bagdad in early times with reference to land let on lease, we are told that an *iyara* lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of Bagdad, a lease of the land itself or its usufruct, and that the owner of land having made such a lease, could not by law transfer his reversionary interest, so as to give the transferee a right to receive the rent from the *iyaradar*. (See *Futawa Alumqiri*, vol. III, *Book on Gifts*, p. 521.)

Whether this is the real meaning of the authorities may be doubtful, but, it is certain, that such a state of the law in this country would render the transfer by gift of a zamindari and other landlord's interest simply impossible: lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zamindar and the occupying ryot. What is usually called *possession* in this country, is *not actual or khas possession*, but the receipt of the rents and profits, and if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of zamindari properties would be invalidated. If we were disposed to agree with this novel view of Mahomedan law, (which we are not), we think we should be doing a great wrong to the Mahomedan community, by placing them under disabilities with regard to the transfer of property, which they have never hitherto experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Sudder Dewany Adawlut (under the advice of the Kazis), and also by this [1125] Court (see 1 Select Reports, 5, 12, and 115 note; 1 Bombay High Court Reports, 157, 16 W. R., 88, and 12 W. R., 498), and it is directly opposed to the case of *Amrinnessa v. Abedoonnessa* (23 W. R., 208) decided by their Lordships of the Privy Council. *

In that case a gift of large zamindaries was held to be valid, although it is clear that they consisted, as such estates generally do, of tenures and interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and indeed, so far as it appears, that point has now been taken for the first time.

Similarly, as regards the *malikana* rights, we are not aware of any reason, why rights of this description should not be made the subject of a gift, in the same way as rents or other incorporeal property of that nature. We have

already decided that reversionary interests, carrying with them the right to receive rents, may be thus transferred; and it is clear that debts and Government notes and other *choses in action*, which give the parties entitled to them the right to receive money from the Government or third persons, may be made the subject of a gift.

A *malikana* right, is the right to receive from the Government a sum of money, which represents the *malik's* share of the profits of a revenue-paying estate, when, from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into the *khas* possession of Government, or transferred to some other person, who is willing to pay the rate assessed. There is nothing in principle, so far as we can see, to distinguish a *malikana* right from a right to receive rents, or the dividends payable upon Government paper.

The second and third points contended for by the plaintiffs, have reference to the doctrine of *mooshaa* under the Mahomedan law. It is urged: (1) that a gift of an undivided share in any property is invalid because of *mooshaa*, or confusion, on the part of the *donor*; and (2) that a gift of property to two donees without first separating and dividing their shares is bad, because of confusion on the part of the *donees*.

[1126] But it must be borne in mind that this rule applies only to those subjects of gift, which are capable of *partition*. See the *Hedaya*, vol. III, *Book on Gift*, p. 293, where the rule laid down is to the effect that—"a gift is not valid of *what admits of division* unless separated and divided." See also *Balee's Mahomedan Law*, 2nd Ed., p. 520. *Futawa Alumqiri, Book on Gift*, p. 521; *Macnaghten's Mahomedan Law*, p. 201.

The rule, therefore, applies only to gifts of such property as is capable of division; whereas reversionary interests, or *malikana*, or other *choses in action*, are not capable of division.

It is said that one main reason for this rule, which applies only to *gifts*, and not to sales, is to protect a man's heirs against gifts made in defeasance of their rights. We were referred to certain texts which apparently favoured that view, and it is also probable that another reason for the rule was to protect creditors against fraudulent gifts made by debtors, it being a well-known test of the *bona fides* of a gift, whether possession of the thing given has passed to the donee.

It has been urged upon us very strongly, that according to this rule of *mooshaa*, the gift, which was made to the defendants in this case, is wholly void, because, the gift being of lands, no partition of such lands was made; and even supposing the gift to be valid, as regards the zamindari properties which were let out on lease, it would still be invalid as regards the house property, gardens, sheds, etc., which are not shown to have been let out on lease, and which were capable therefore of actual partition.

We think, however, that this objection is not well founded, as regards any part of the property in question.

As regards the zamindaries, the estate of the donor, as we have seen, was an interest in reversion, and the property which was transferred by the gift of these zamindaries was merely that sort of estate which entitled the donees to receive the rents and profits. We find from the evidence of the defendants, (which was so clear upon this point that the Judge in the Court below desired to hear no more than that of the first two witnesses), that during Kaniz Fatima's lifetime she and Muleka were in separate collec-[1127]tion of the rents, and that immediately upon the gift being made, the possession was transferred, in the only way in which it could be transferred, to the two donees.

The Mussumat dismissed all her servants, and from that time the

tehsildars were employed and paid by the donees, and collected the rents for them. An equal division was made between them of the rents collected ; and, as regards part of the property, it appears that, from the year 1281, the collections were made separately.

It is said, however, that as regards the house property no division of it has been proved, and that, for aught that appears, that property might have been in the *khas* possession of the Mussumat, but no point was made of this in the Court below. No issue was framed for the purpose of raising it, nor was there any evidence given on the part of the plaintiff, nor any cross-examination of the defendant's witnesses with reference to that point, no distinction appears to have been made (either in the Court below, or even in the grounds of appeal to this Court), between the different kinds of property, and the strong probability is, that the house property which belonged to the Mussumat was let out in lease in the same way as her other properties.

We think, therefore, that we ought not to allow an objection of this kind to prevail, or even to be raised, at this stage of the case founded merely upon a conjectural distinction between these two classes of property, and even if we thought otherwise, we certainly should not give effect to such an objection without sending the case back to the Court below, to have the true state of things ascertained.

Upon the whole, therefore, as regards the deed of gift, we are of opinion that it effectually transferred to the donees the properties which were detailed in the schedule to that deed.

It now only remains to deal with mouzah Morari which, as we have seen, was granted under a *mocurrari* lease to Mussumat Babbun by Nazir Ibrahim Ali.

The plaintiffs admit in their plaint that Mussumat Babbun executed a *dur-mocurrari* lease of this mouzah, on the 22nd of [1128] September 1873, to the defendant No. 6, Moulvie Fuzul Hossein, and that, in that *dur-mocurrari*, she stated the lease to be a perpetual and heritable one ; whereas, the plaintiff's case is that it was only for her life, and that as upon her death, on the 25th of October 1875, the mouzah reverted to Ibrahim Ali's heirs, the plaintiffs are entitled, as two of his heirs, to a share in that mouzah.

On the other hand, the defendant No. 6, alleges that the *mocurrari* granted to Babbun was a permanent and heritable one, and he has filed and produced the *mocurrari* lease itself, which he says was given to him by Babbun at the time when he obtained his *dur-mocurrari*.

The Court below has also found against the plaintiffs upon this point ; and the only difficulty we have had upon this part of the case arises from the somewhat loose way in which the *mocurrari* lease has been proved in the Court below.

It appears from the petition of the defendant No. 6, dated the 20th of September 1881, that he filed this *mocurrari* lease in Court ; and that it was duly registered.

The deed appears to have been admitted by the Court below, and no objection has been taken in the grounds of appeal that it was improperly admitted. It has been sent up here with the record, and it has been produced and examined before us in this Court.

It is argued by the plaintiffs that this is not the real deed which was granted to Babbun ; and they say that the real deed was one for life only, but they have given no proof of this.

It is, of course, an admitted fact on both sides that there was a *mocurrari* deed of some kind duly executed by Ibrahim Ali to Babbun.

The deed, which is now in evidence was duly filed and produced at the trial by the defendant No. 6, as being the deed given to him at the time when he obtained his *dur-mocurrari*.

The Judge has found this to be the deed which was granted by Ibrahim Ali to Babbun ; and there is no doubt that this deed does confer a permanent and heritable *mocurrari*.

[1129] We see no reason to believe that the finding of the learned Judge is otherwise than correct. If he made a mistake at all, it was in receiving the deed in evidence without examining Fuzul Hossein, who appears to have been in Court, or requiring some further or other proof of its identity.

But there is no point of this kind taken in the grounds of appeal ; and, if we considered that there was any weight in the objections now made by the appellants, we should certainly not give effect to them, without sending the case back to the Court below to examine Fuzul Hossein and his witnesses ; because the Judge thought his case so clear as to this deed, what he told him it was unnecessary to call any witnesses.

We therefore decide the case on all points against the appellants.

The only remaining question is as to the costs.

We find that in the Court below the defendants Burkut and Zukiran were allowed their full costs, and that Ali Hossein, who was a pleader, and who apparently had nothing to do with the case, was also allowed a separate set of costs.

The ground on which Ali Hossein was allowed these costs, was that he was said to have made an arrangement with the plaintiffs by which the plaintiffs were enabled to carry on the suit, and part of the arrangement was, that in the event of the plaintiffs succeeding, Ali Hossein should be entitled to a share in the property.

Under these circumstances, the plaintiff desired that Ali Hossein should be made a defendant. But Ali Hossein himself disclaimed having anything to do with the arrangement, or having any share in property.

Why, under these circumstances, he should have been allowed such a large sum for costs we cannot understand, nor do we understand why Burkut and Zukiran (who were merely made defendants, because their names were said to have been used in making the arrangement, instead of that of Ali Hossein) were also allowed their full costs, because their interests, if they had any, were precisely the same as those of Ali Hossein, and any contention which [1130] they might have raised, must have been in the same interest as that of Ali Hossein.

We think that the only sum which ought reasonably to have been allowed to them, would merely be one for their first appearance in Court ; instead of the fee therefore which has been allowed by the Court below, we allow only Rs. 100 to Ali Hossein, and a like sum to the other two plaintiffs.

As regards the costs of the principal defendant, we think that the defendant No. 6, whose contention was of an entirely different character from that of the others, should have his costs of the appeal proportionate to the value of his *dur-mocurrari*, and that the other defendants should get their costs upon the balance.

Appeal dismissed.

NOTES.

[GIFT UNDER MAHOMEDAN LAW, DELIVERY OF SEISIN—MUSHA—

The judgment of Sir RICHARD GARTH, C.J., in this case has been received as authoritative, as the following cases show.

The doctrine relating to the invalidity of gifts of musha is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules :—(1889) 11 All.,

460 at 475 P. O. It would be inconsistent with 11 All., 460 to apply a doctrine which in its origin applied to very different subjects of property, to shares in companies and freehold property in a great commercial town. The argument of the appellant was not that the law of *musha* did in fact embrace (in the sense of having been applied to) such property, but that, if the same aspect of life and things were logically applied, it involved the invalidity of the gifts in dispute. But this is not the true criterion.—(1907) 35 Cal., 1 at 23, 24 P. O

A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee is void under the Mohamedan Law.—(1888) 11 All., 1.

In (1911) 35 Mad., 120 at 130, 131 Mr. Justice ABDUR RAHIM declined to extend the principle of these Privy Council cases to uphold the gift of property in the possession of a stranger or a trespasser. Possession taken under an invalid gift of *musha* transfers the property according to both the Shiah and the Sunni schools (1899) 11 All., 460 at 475; 6 Bom., L. R. 1043 (1050).

A gift may be made of right to property which had been under attachment for arrears of revenue. 'The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such rights as he himself has, but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives.—(1896) 21 All., 165 (170, 171).

Land in the occupation of tenant passes by attornment —(1892) 16 Mad. 43 (48).

A deed of gift of a house followed by delivery of possession is not invalid merely by reason of the donor continuing to remain in it —(1884) 9 Bom., 146 at 150, *see also* 28 All., 147; 6 Bom., L. R. 983 *contra*, 19 Mad., 343, (1907) 30 Mad., 519. Nor is the retention by the donor of his effects in the house a circumstance invalidating the gift.—(1905) 29 Bom., 468 at 478, on appeal from 6 Bom., L. R. 983, especially so is this the case when the donor is *in loco parentis* to the donee —(1905) 29 Bom., 468 at 479.

As regards gifts of equity of redemption, see the discussion in *Wilson's Anglo-Muhamadan Law*, III Edn., (1908) pp. 327-329.

ARCHAIC RULES OF MAHOMEDAN LAW—MODERN CONDITIONS—

The observations of Sir RICHARD GARTH, C. J., in 10 Cal., 1112 at 1123 have now the support of similar observations by the Judicial Committee.—25 Cal., 9, 11 All., 460; 35 Cal., 1, 25 All., 236; *see also* 30 Mad., 519 at 522, 6 Bom., L. R. 983, on appeal 29 Bom., 468. Mr. Justice ABDUR RAHIM in his *Tagore Lectures on Mahomedan Law* (1911) p. 44 thus sums up the tendencies of Courts in enforcing Mahomedan Law: "In the domain of law governing domestic relations and succession, the Courts have allowed themselves a much narrower margin of freedom, if any freedom at all, in applying the rules laid down in books written by mediæval writers to the altered circumstances of modern world than in matters relating to dispositions of property such as by gift, *waqf* or will."

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CONTAINING CASES DETERMINED BY THE
HIGH COURT AT CALCUTTA AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM
ALL OTHER COURTS IN BRITISH INDIA NOT
SUBJECT TO ANY HIGH COURT.

CALCUTTA—Vol. XI—1885.

PRIVY COUNCIL.

The 11th June, 1884.

PRESENT

LORD WATSON, SIR B PEACOCK, SIR R P COLLIER, SIR R. COUCH
AND SIR A. HOBHOUSE.

Narpat Singh.Plaintiff

versus

Mahomed Ali Hussain Khan....Defondant.

[On appeal from the Court of the Judicial Commissioner of Oudh]

*Survivorship—Rights of widow—Grant by Government for maintenance
of family*

The lands of three brothers, having been confiscated, the Government afterwards assigned revenue-paying lands for the benefit, in certain proportions, of the minor son of the eldest brother, also of the widow, minor son, and daughter of the youngest brother (both these brothers being then deceased), and the second brother, who survived, was put into possession of a proportionate part of the property.

Held, that the widow of the youngest brother, on the deaths of his son and daughter, became, by survivorship, sole owner of the estate so assigned for their and her benefit, so that an alienation of part if made by her could not be set aside at the instance of the second brother, who failed to show, on the above state of things, that the estate was heritable property of the son, as whose uncle and heir he claimed.

APPEAL from a decree (18th March 1882) of the Judicial Commissioner of Oudh, affirming a decree (3rd August 1881) of the District Judge of Sitapore.

The suit, out of which this appeal arose, was brought by the appellant to obtain the proprietary right in mauza Sarayan, in [2] the Sitapore district, from the respondent, who had purchased it from a widow; the latter having sold it under circumstances not justifying a sale by a person holding the usual estate of a widow under the Hindu law. The appellant, as nearest heir of the last male owner, sued after her death to set aside the alienation. Both Courts in India having held that the widow had an absolute, and not merely a limited, interest in the estate, the principal question on this appeal was

whether they were right. Of three brothers, Beni Madho Singh, Narpat Singh and Jagraj Singh, insurgents in 1857, the first and last were killed about that time, and the properties of all the three were confiscated. In 1860, provision was made by the Government for Narpat Singh and for the son of Beni Madho ; also for the widow, minor son and minor daughter of Jagraj. From the assignment then made of lands for the support of this latter family arose the present claim, and no formal grant having been made by the Government, the nature of the interest taken by each member of the family appeared mainly from the official proceedings set forth in their Lordships' judgment.

Narpat Singh received possession of the property assigned to him ; and the name of Hanuman Singh, the minor son of Jagraj, was entered in the settlement record as answerable for the Government revenue on the property assigned for the benefit of his mother and sister and himself, which, however, was under the management of the Court of Wards. Hanuman Singh died in May 1863, and it was thereupon ordered in the District Collectorate that the names of his mother and sister should be substituted for his, the management of the Court of Wards continuing.

The daughter also died in 1865, and on the 21st December 1877, the widow sold mauza Sarayan, part of the property assigned as above stated, to the respondent for Rs. 11,000, the revenue authorities afterwards granting *dakul kharij* in the name of the vendee. The widow died in 1878, leaving the respondent in possession. This led to the present suit by Narpat Singh, who claimed the property on the ground that the widow, as heiress of her son, had only a limited interest in the estate, and no power to dispose of it for more than her life, the reversion [3] belonging to himself as uncle and heir of the deceased, Hanuman Singh.

The defence was that the grant was to the widow, son and daughter in equal parts, and that on their deaths the widow had become exclusively entitled.

The District Judge of Sitapore dismissed the suit. He held that the property granted by the Government vested in the widow on the deaths of both the son and daughter of Jagraj. Whether the widow's estate, as against the Government, was absolute or limited, the Government alone could interpose to prevent such an alienation as that which she had made, and it had not done so.

An appeal against this decision was dismissed by the Judicial Commissioner of Oudh.

Mr *J D Mayne*, for the Appellant, argued that the assignment having been made by the Government for the benefit of the families of the brothers, the estate assigned to the family of Jagraj Singh vested in Hanuman Singh, his son, who was recorded proprietor. The mother and sister, as female members of the family, obtained only the rights of females. It was as the heir of Hanuman Singh, whether by Hindu law or custom, that the widow on the death of her son succeeded him. She, however, took only a qualified estate. Her power to alienate having been exceeded, the appellant was entitled, as heir of the last male owner, to have the conveyance set aside, as to so much of it as was in excess of the widow's power.

Mr. *J J W Sykes* for the Respondent was not called upon.

Their Lordships' **Judgment** was delivered by

Sir B. Peacock. - Their Lordships see no reason to think that the judgments of the two Courts below are erroneous.

The plaintiff is suing to recover possession of certain property, and he must recover upon the strength of his own title. He claims as reversionary heir of Hanuman Bakhsh, the son of Jagraj. In order to succeed he must show that the estate was the heritable property of Hanuman Bakhsh. On looking at the letter of the Chief Commissioner of the 13th February 1860, it appears to their Lordships that it was the intention of the Gov-[4]ernment to make provision for Jagraj's widow and family. The Chief Commissioner, in his letter, says "The party consists of Beni Madho's son, a boy of about 13 or 14 years of age, and his betrothed wife, the widow, [son?] and daughter of Jagraj Singh, brother of Beni Madho, killed with him the son and daughter are children, Narpatt Singh, brother of Beni Madho, and his wife and daughter, the latter aged 10 years. They are all at present living with a relative,"-- and so on. "Jagraj Singh and Narpatt Singh held up to annexation, landed property quite distinct from that of Beni Madho. The estate of the first named"--that is, of Jagraj--"was assessed at about Rs 25,000, and of the latter at about Rs 16,000. Both estates have been confiscated. The Chief Commissioner proposes to assign for the support of the family confiscated lands in the Sitapore district assessed at Rs 11,100, and in the following proportions-- Beni Madho's son, Rs 6,000, Narpatt Singh, Rs. 2,500, Jagraj's widow and his family, Rs. 2,500." Then he goes on to say, at paragraph 8, "The two boys, viz, the son of Beni Madho, and of Jagraj, should reside at Sitapore for the benefit of the education that is afforded at an excellent school lately established there for the education of the sons of taluqdars, and in the meantime the land can be managed by the local authorities, who can remit the proceeds monthly," that is, for the benefit of those entitled. "The widow of Jagraj Singh, and his daughter, had better reside at Sitapore with the boys. When the education of the brother is completed"--that must refer to the brother of the daughter of Jagraj, it could refer to no one else. "When the education of the brother is completed, they"--that is, the persons for whose benefit the property was to be assigned, namely the widow and the family,--"can be placed in possession of the properties now assigned to them. The Chief Commissioner has proposed a liberal provision for the members of this family not only because they are objects of compassion in themselves, but also because he is convinced that this generous treatment of the family of so determined an enemy as Beni Madho will be regarded by the Oudh taluqdars as a most magnanimous act on the part of the British Government, and will earn for it enduring popularity."

[5] The Government assented to this proposal of the Chief Commissioner, and their Lordships are of opinion that it was the intention of the Government that the land assessed at Rs 2,500 should be assigned for the benefit of Jagraj's widow and his family as joint tenants, and not as tenants in common or to the son separately. The Judicial Commissioner, in his judgment, appears to their Lordships to have put the case very clearly. He says "As to the position of Mussammat Shahzad Kunwar. The grant was made to the family of Jagraj Singh jointly. As the Government in no way defined the rights assigned to each grantee, the three persons who composed the family must be held to have been joint owners, and on the death of the two children their mother, as survivor, became sole owner. The Government, when assigning the land, did not restrict Mussammat Shahzad Kunwar's right to a life interest only, and as she acquired possession, not as heir to her son, but as the survivor of three joint owners, her proprietary right was absolute. The fact that the name of Hanuman Singh only was at first entered in the Collector's *malquzar* register is unimportant, and cannot affect the rights of the joint owners." It is unnecessary to determine whether the Government did intend to give life

interests only or absolute interests. The plaintiff must recover upon the strength of his own title. The Government has never claimed to resume the land.

It appears to their Lordships that the judgment of the Judicial Commissioner was correct; and their Lordships will, therefore, humbly advise Her Majesty to affirm it. The appellant must pay the costs of the appeal.

Solicitors for the Appellant: Messrs. *Van Sandan, Cumming & Armitage*.

Solicitor for the Respondent: Mr. *W. Buttle*

NOTES.

[GRANT TO HINDU WOMEN—NATURE OF ESTATE—

In (1896) 23 Cal., 670, P C, it was held overruling 11 Mad., 258, that when a grant was made to both males and females together, each takes an absolute estate although the grant was mentioned to be for maintenance. See also (1902) 27 Mad., 498. The enfranchisement by Government of an inam held by a limited owner does not enlarge the estate held by her therein.—(1906) 30 Mad., 434, F B. Where a grant is made to a Hindu female after a confiscation or resumption as in 9 M. I. A 589, 12 M. I. A 1; 2 Mad., 128, the grant becomes a fresh title, the old title discontinues—*per* BHASHYAM AYYANGAR, J., in (1902) 26 Mad., 339 at 352, 360, even though the grantee may have been selected in consideration of the family services.]

[6] PRIVY COUNCIL

The 20th June, 1884

PRESENT.

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE

Amir Hassan Khan.... Plaintiff

versus

Sheo Baksh Singh..... Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Construction of s. 622 of Act X of 1877, as amended by s. 92 of
Act XII of 1879.*

A Court that has decided a suit over which it had jurisdiction, cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally, or with material irregularity, within the meaning of s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879.

APPEAL from a decree (7th February 1880) of the Judicial Commissioner of Oudh, reversing a decree (5th September 1879) of the District Judge of Sitapur, which confirmed a decree (25th June 1879) of an Extra Assistant Commissioner in that District.

The suit out of which this appeal arose was commenced in the Court of an Extra Assistant Commissioner having jurisdiction under Act XXXII of

1871 (The Oudh Civil Courts' Act then in force), in the Sitapur District of Oudh. The Raja, Amir Hassan Khan, the appellant, sued Sheo Baksh, the respondent, to obtain possession upon redemption from mortgage of a three-fourths' share in a taluq named Khanpur, comprising six villages in Sitapur, on payment of the mortgage debt alleged to be Rs 1,710. This property was mortgaged in 1849 by eight co-sharers therein, and the right to redeem was afterwards contested both in the settlement and in the Civil Courts.

The present suit raised questions as to whether it was not barred under ss. 13 and 43* of Act X of 1877, also whether the plaintiff was entitled to represent the mortgagors, and whether it was competent to him to claim to redeem the mortgaged property.

The District Judge of Sitapur having maintained a decree made by the Extra Assistant Commissioner in favour of the plaintiff, a petition was presented by the defendant, on the 12th December 1879, to the Judicial Commissioner, praying him to call [7] for the record of the suit, and to exercise, in reference to this case, his powers under s 622 of Act X of 1877, as amended by s 92 of Act XII of 1879. The Judicial Commissioner thereupon called for the record, and having heard the parties, reversed, in the judgment now under appeal, the decision of the Court below, dismissing the suit.

On this appeal—

Mr *J. Graham*, Q. C., and Mr. *J. T. Woodroffe*, appeared for the Appellant. The Respondent did not appear.

For the appellant, reference was made to s 21 of Act XIII of 1879, the "Oudh Civil Courts' Act, 1879," whereby the decision of the District Judge, not having modified or reversed the order of the Extra Assistant Commissioner, was final, save so far as that it was subject to the provisions of the Code of Civil Procedure, s 622. And it was submitted that the words of s 622 as they stood originally, and also as amended by s 92 of Act XII of 1879, did not authorize the Judicial Commissioner to interfere in such a case as the present. The words "act illegally, or with material irregularity" did not comprehend cases of erroneous decision as to the powers of superintendence of the High Court, under s 15 of the Statute 24 and 25 Vic, c 104, that Court was not authorized to interfere with the order of a Court subordinate to it on the ground of error in law or in fact, unless in due course of appeal—*Tej Ram v Harsukh* (I. L. R., 1 All, 101), in a note to which case the authorities in regard to the interference of the High Court under s. 15 were collected. *Monmohinee Dasse v. Khetter Gopaul Dey* (I. L. R., 1 Cal, 127) was also cited.

Their Lordships' Judgment was delivered by

Sir B. Peacock.—The question in this case depends upon the proper construction to be put upon Act X of 1877, s 622, and upon Act XII of 1879, s. 92, by which the former section was amended. According to Act XIII of 1879, s. 21, there was no appeal in this case from the lower Court of Appeal to

Suit to include the whole claim.

Relinquishment of part of claim.

A person entitled to more

Omission to sue for one of several remedies

* [Sec. 43.—Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

If a plaintiff omit to sue for, or intentionally relinquish, any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished.

A person entitled to more than one remedy in respect of the same claim may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.]

the Judicial Commissioner. But s. 622 of Act X of 1877 enacted that "the High Court"—and in this respect the Judicial [8] Commissioner exercises the same powers as the High Court—"may call for the record of any case in which no appeal lies to the High Court if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested and may pass such order in the case as the High Court thinks fit." By s. 92 of Act XII of 1879 that section was amended by the insertion after the words "so vested" of the following words, "or to have acted in the exercise of its jurisdiction illegally or with material irregularity." The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

Their Lordships, therefore, think that under s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879, the Judicial Commissioner had no jurisdiction in the case. Under these circumstances, their Lordships will humbly advise Her Majesty to allow this appeal, and to reverse the judgment of the Judicial Commissioner, and to order the respondent to pay the costs incurred before the Judicial Commissioner. He must also pay the costs of this appeal.

Solicitors for the Appellants Messrs *Watkins and Lattey*.

NOTES.

[1. SCOPE OF THE RULE IN THIS CASE—JURISDICTION TO DECIDE WRONGLY AS WELL AS RIGHTLY—NEGATIVE RULE LAID DOWN IN THIS CASE—

This leading case has been the subject of much comment, but no clear rules appear to be deducible from the case-law

The legislative history of sec 622, C P C., 1877, 1882 C. P C., 1908, sec 115, was sketched by MAHMOOD, J, in 7 All., 345 at 348 *et seq*

In 16 Cal., 749; 20 Cal., 8, the Privy Council had this section before them, and also this case; while in 25 Bom., 397 at 347 (a case of wrong man being brought on record as legal representative) their Lordships again adverted to this maxim.

There have been some attempts at understanding the meaning of the word '*jurisdiction*' in that section, and as used in this case of 11 Cal., 6, the interpretation of MAHMOOD, J, in (1886) 8 All., 519, (1885) 7 All., 345, 8 All., 111, is particularly noteworthy

The third clause of sec. 622 (C. P C., 1882) was, in the light of this decision, deemed to refer also to questions of jurisdiction.—(1886) 8 All., 111; (1886) 8 All., 519, or to errors of procedure in relation to such questions, 11 Mad., 220; but this view was given up and '*perverse*' decision, *i.e.*; a decision in conscious violation of a rule of law or procedure was made the test of interference, (1894) 17 Mad., 410.

In the case of 1 C.W.N., 617, [*see* also (1897) 1 C.W.N., 633] this Privy Council decision was explained to lay down merely a negative rule that *not* every error of decision in law or fact is the subject-matter of revision, and nothing more; and for a positive test, it was laid down that decisions *grossly or palpably erroneous* might be revised. This position was not approved by MACLEAN, J., in 3 C.W.N., 581. *See* also (1912) 24 M. L. J., 112, per SUNDARA AIYAR, J.; (1910) 14 C.W.N., 703.

In (1904) 2 L. B. R., 383 (834) this case was thus explained. "The test is whether the lower Court has applied its mind to the law and the facts and come to a decision after due consideration; or whether it has failed to take into account some proposition of law or some fact in evidence which ought to affect its decision. If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally, and its decision may be revised."

"It would be otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeded to determine an issue which did not really arise in the case, and based its decision of the case on its determination of that issue. If, for instance, it took a view of the facts contended for by neither of the parties, and which was palpably wrong, then, whether its application of the law to those assumed facts were right or wrong, it would not be an application of the law to the facts of the case before it, and would be outside the case altogether"—(1887) 12 Bom. 617

The scope of this case was explained in (1896) 1 C W N, 617, by BANERJEE, J., where previous cases were also considered. "*Amir Hassan Khan's* case helps us in answering the question only to this extent, namely, that it settles that it is not every wrong decision on a point of law that comes within the clause * * *. In 7 All., 336 and 8 All., 111, the High Court of Allahabad held that the effect of the decision of the Privy Council in 11 Cal., 6, was that only questions relating to the jurisdiction of the Court could be entertained under sec. 622. With all respect for the learned Judges who decided these cases, we think this view is incorrect. There is nothing in the judgment of the Privy Council to warrant this view, and it would render the third clause of the section (622) superfluous

"In 13 Cal., 225, this Court held that the Small Cause Court in wrongly applying sec. 295 of the Code of Civil Procedure, 1882, to a case to which it did not apply, had acted illegally or with material irregularity, within the meaning of sec. 622, and in 15 Cal., 47, it was held that the Court below in applying sec. 188 of the Bengal Tenancy Act to a case to which it did not apply, had acted illegally or with material irregularity, and the case came under the third clause of sec. 622. There can be no doubt that these two cases come within the scope of sec. 622, but having regard to the view taken by the Privy Council in 20 Cal., 8, it might be said that they come within the first clause of the section rather than the third

"In 17 Mad., 410, the majority of a Full Bench of the Madras High Court held that the third clause of sec. 622 contemplates a perverse decision on a question of law or procedure, that is a decision involving a conscious departure from some rule of law or procedure. But as the learned Judges who were in the minority point out, there is nothing in the section to warrant such a construction.

"In 16 Cal., 749, the Privy Council simply followed 11 Cal., 6 and in 20 Cal., 8, their Lordships held that the Subordinate Judge in refusing to confirm a sale under sec. 312 of the C.P.C., 1882, which applied to the case, and in setting it aside under sec. 313, which did not apply to it, declined to exercise a jurisdiction which he had, and exercised one which did not belong to him, and consequently his judgment was liable to be reviewed by the High Court under the 622nd section of the C P C * * * .

"The clause is evidently intended to authorise the High Courts to interfere and correct gross and palpable errors of Subordinate Courts so as to prevent grave injustice in non-appealable cases; and it seems advisedly to have been expressed in indefinite language, from the difficulty of defining exactly the classes of cases which may stand in need of such extraordinary interference. The question whether any case comes under the clause has in our opinion to be determined with reference to the grossness and palpableness of the error complained of and to the gravity of the injustice resulting from it."

I.L.R. 11 Cal. 8 AMIR HASSAN KHAN v. SHEO BAKSH SINGH [1884]

As regards the powers under the Charter Act, *see* (1886) 9 All., 104; 16 Cal., 749; (1909) 10 C. L. J., 407.

Revision under sec. 25 of Act IX of 1887.—*See* (1895) 21 Bom., 250; (1894) 16 All., 476; (1898) 15 All., 139; (1904) P. R., 66.

II. INSTANCES—

The following cases illustrate the difficulty in the application of the rule, opposite conclusions having been sometimes reached.—

Res judicata —11 Cal., 6; (1887) 11 Bom, 488, (1885) 9 Bom, 432

Limitation —(1885) 7 All., 345, 11 Bom, 488 at 492, (1886) P. R. 22; (1887) 12 Bom., 617; (1894) 17 All., 422, (1897) 20 All, 78 17 A. W. N., 168, (1912) 15 I. C., 547 (Cal.); (1913) 17 C. W. N., 667

Cause of action .—(1885) P. R., 64; (1903) 25 All., 509 (524)

Jurisdictional facts or interpretation —(1887) 15 Cal., 47, (1887) 11 Mad., 220, (1888) P. R. 105.

Interlocutory order without jurisdiction —(1887) 14 Cal., 768

Admissibility of evidence and appreciation thereof —(1912) P. R., 102. (1912) P. L. R., 207 (1912) P. W. R., 213. 15 I. C., 839 (wrong *onus*) also (1885) 7 All., 336 F. B., (1909) 6 N. L. R., 49 6 I. C., 429 (*misappreciation*), (1898) 23 Bom., 177; (1899) 3 C. W. N., 581 (*admissibility*), (1909) 13 C. W. N., 797 10 C. L. J., 33 (rejection of ledger, but as the other grounds related to rejection of other relevant evidence, revision was allowed).

No proper consideration of materials placed before the Court.—(1909) 13 C. W. N., 797. 10 C. L. J., 33, (1885) 7 All., 336 F. B., (1912) 17 C. W. N., 160. 15 I. C., 46, (1912) 17 C. L. J., 593.

Setting aside ex parte decree without notice --(1913) 24 M. L. J., 482.

Refusal to allow amendment of plaint —(1911) 22 M. L. J., 136.

Decree giving wrong relief .—(1887) 11 Mad., 303.

Amendment of decree.—(1892) 16 Mad., 424, (1886) 8 All., 519

Erroneous application of the C. P. C.—(1911) 14 C. L. J., 50, (1886) 13 Cal., 225.

Issues .—(1911) 16 C. W. N., 424, (1912) 17 C. W. N., 526, 529

Remand—(1912) 24 M. L. J., 112 F.B., (1901) 28 Cal., 324, 5 C. W. N., 509, (1886) 8 All., 111.

The refusal of the issue of execution on the application of an assignee.—(1888) 15 Cal., 446.

Delivery of property under sale certificate .—(1885) 7 All., 407.

Claim petition.—(1897) 1 C. W. N., 633

Application as to execution sale.—(1905) 28 All., 84. 2 A. L. J., 711; (1905) A. W. N., 198, 16 Cal., 749

Review application —(1904) 26 All., 572, 1 A. L. J., 298

Rateable distribution—(1898) 4 M. L. J., 87; (1903) 27 Mad., 504.

Pauper applications—(1885) 7 All., 661; 10 All., 467, 13 Bom., 126, 19 Mad., 197, 4 Mad., 323 (dissented from), (1898) 2 C. W. N., 474, (1898) 20 All., 299.

Misconduct in arbitrator .—(1903) 30 Cal., 397

Contravention of the Land Acquisition Act, 1870, sec. 24 :—(1890) L. B. R., (1872-92) Vol. I, p. 509

Contravention of sec. 17 of Act IV of 1869 .—(1899) 22 All., 270

Making an issue of certificate under the Succession Certificate Act, 1889, conditional upon security :—(1894) 19 Bom., 790.

An erroneous decision as regards *dispossession* within sec. 9 of the Specific Relief Act, 1877 .—(1909) 13 C. W. N., 835 10 C. L. J., 30 referring to (1897) 13 C. W. N., 303, (1892) 19 Cal., 544, (1912) 17 C. W. N., 501

Decision under Punjab Courts Act, XVIII of 1884, sec. 70 (1) *a* cannot be interfered with .—(1911) P. R., 4 (1911) P. L. R., 45 9 I. C., 674 following (1886) P. R., 46]

[11 Cal. 8]

CRIMINAL REFERENCE

The 11th October, 1884.

PRESENT

MR JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Basaruddin Bhuiah. Complainant

versus

Bahar Ali Opposite Party.

Right of way used by the public—Public right of way—Criminal Procedure Code, Act X of 1882, ss 133, 134, 135, 136, 137

The powers embodied in ss 133, 134, 135, 136 137, of the Criminal Procedure Code, with regard to the obstruction of public ways, are not intended to be exercised where there is a *bona fide* dispute as to the [9] existence of the public right Where there is such a dispute, the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal

THIS was a reference made by the Sessions Judge of Dacca to the High Court under s. 438 of the Criminal Procedure Code.

It appeared that one Sheikh Basaruddin presented a petition to the Deputy Magistrate of Munshigunge complaining that Bahar Ali and others had

* Criminal Reference No. 144 of 1884, made under s. 438 of the Code of Criminal Procedure, by W. H. Page, Esq., Officiating Sessions Judge of Dacca, dated the 8th of September 1884, against the order of the Deputy Magistrate of Munshigunge, dated the 1st of August 1884.

obstructed a public thoroughfare; the Deputy Magistrate ordered an enquiry to be held by a resident of the neighbourhood, and on his report passed the following order: "Notice to issue to the persons complained against under s. 133 of the Civil Procedure Code to remove the obstruction, or show cause within seven days." *

In accordance with this order two persons, Bahar Ali and Karim, appeared to show cause; and the Deputy Magistrate, after recording the evidence, found that about a year previous to the complaint Bahar Ali had raised an objection to the village cattle crossing the *khal* at his *ghât*, that in consequence of the objection the zamindari amlah had come to the *ghât* and had given the villagers a new *ghât*, viz., that of Karim, that Karim had now obstructed his *ghât*, so that the complainant and his fellow-villagers were unable to take their cattle across the *khal* either at the *ghât* of Bahar Ali or that of Karim. He further found that the *ghât* of Bahar Ali was a public thoroughfare until a year ago; but that the disuse of a public thoroughfare for a year only would not deprive the complainant and his fellow-villagers of the right of using it, and came to the conclusion that the obstruction made by Bahar Ali was illegal.

The order recorded by the Deputy Magistrate, after coming to the above conclusion on the facts, was—"the order against Karim is cancelled. I make the order against Bahar Ali absolute under s. 137 of the Procedure Code."

The Sessions Judge was of opinion that this order was bad in law, because a road through the land of a private person, given up a year ago in pursuance of an arrangement made by common consent of the villagers could not be said to be a public [10] thoroughfare, and that, therefore, the Deputy Magistrate had no jurisdiction. He further was of opinion that the limit of time specified in s. 147 should have been applied, and that the Deputy Magistrate should have referred the parties to the Civil Court. He, therefore, referred the case to the High Court.

No one appeared on the reference.

The Order of the Court was delivered by

Wilson, J.—We think the order of the Deputy Magistrate cannot be supported. It has been more than once held by this Court that the powers now embodied in ss. 133 to 137, with regard to the obstruction of public ways, are not to be exercised where there is a *bonâ fide* dispute as to the existence of the public right. In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to, until the public right has been established by proper legal proceedings, civil or criminal.

Order reversed.

NOTES.

[A *bonâ fide* claim of title in respect of an obstruction is a fit matter for inquiry by a civil court and the provisions of the Criminal Procedure Code ought not to be set in motion until then:—11 Cal., 8; 12 Cal., 137, 696; (1897) 22 Bom., 988. See also 2 Bom., L. R., 818; 4 Bom., L. R., 687; *Ratanlal*, 378.

It is for the Magistrate to say whether the claim is *bonâ fide* or not:—(1890) 17 Cal., 562. The C. P. C., 1908, by sec. 91 provides a new mode of procedure as regards public nuisances, see 9 Mad., 463.]

[11 Cal. 10]

APPELLATE CRIMINAL.

The 18th October, 1884

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Leiu Tu and six others.....Petitioners

versus

Queen-Empress.*

*Misdirection of Jury—Jury trial—Burmah Courts Act of 1875, s. 80—
Reference to High Court.*

Three persons, who were attacked and wounded in an affray, informed the police on the same day that the persons who had attacked them were A, B, and C. Eighteen days afterwards the same complainants gave to the Magistrate inquiring into the case the names of four other persons who they said, with the three persons first accused, formed the attacking party. The seven accused were tried jointly for the offence before the Additional Recorder of Rangoon and a jury. In his charge to the jury the Additional Recorder omitted to call their attention to the fact that four out of the seven accused had not been mentioned by the prosecutors until after eighteen days had passed over. The prisoners were convicted.

Held, that the Additional Recorder misdirected the jury, that under the circumstances the misdirection prejudiced the four persons last accused, and that the verdict must be set aside as far as they were concerned.

[11] THIS was a reference to the High Court under s. 80 of the Burmah Courts Act of 1875. The facts of the case are stated in the judgment of the Court. The point referred was as follows --

Whether or not, in this particular case, the learned Additional Recorder misdirected the jury, so far as appellants Nos 4 to 7 inclusive are concerned, in that he did not point out to the jury the omission on the part of the complainants to charge the appellants with having assaulted them until 18 days after the assault took place, and if there has been a misdirection, whether or not such misdirection should be held to have so prejudiced these appellants as to justify this Court in setting aside the verdict of the jury so far as they are concerned.

Mr. W. Jackson for the Appellants.

The Judgment of the Court was delivered by

Wilson, J.—The case in which this reference has been made arose in this way: It appears that on the evening of the 6th of April, the three complainants went into a house in Rangoon occupied by certain actresses, that the persons said to be the seven accused came in afterwards, that a quarrel arose in which injuries were inflicted (it is alleged by the seven accused persons or some of them) upon the complainants, that on the evening of the occurrence, or immediately after it, the complainants, who had gone to the *thannah*, pointed out two of the accused persons, who had also gone there, as amongst the persons who had assaulted them, and on the same evening they mentioned

* Criminal Reference No 2 of 1884, made under s. 80 of the Burmah Courts Act, by the Special Court of British Burmah, consisting of the Judges, W. E. Ward, Esq., and R. S. T. McEwen, Esq., dated September 15th, 1884, against the order of the Additional Recorder of Rangoon.

the name of the third, but at that time they said nothing about the appellants whose case is now before us—the accused persons 4, 5, 6 and 7. The complainants were the same evening taken to the hospital, where the police officials followed them, and made endeavours to obtain from them the names or identification of any other persons amongst their assailants, in addition to the two who had been identified, and the one who had been named; but the police officials failed to obtain any further information then. Eighteen days after the occurrence, and about four days after some of the complainants had come from the hospital, a petition was presented, not through the police, but to the Magistrate who was then investigating the case in which the four appellants, accused Nos. 4, 5, 6 and 7, were said to have been amongst the assailants. All the seven persons were accordingly committed for trial. The case came on for trial before the Additional Recorder of Rangoon and all the seven accused were convicted. On appeal to the special Court, objections were taken to the summing up of the Additional Recorder to the jury, and the two members of the special Court, viz., the Judicial Commissioner and the Additional Recorder, having differed in opinion, this reference has been made. The point referred is this: Whether or not in this special case the learned Additional Recorder misdirected the jury in so far as the appellants Nos. 4 to 7 inclusive are concerned.

Now, in explaining his summing up and its bearing upon the case, the learned Additional Recorder says this: “The seven accused were identified by the various witnesses as well as by the complainants, and the share taken by each man was spoken to. So complete was the evidence of this identification, that the appellants’ advocate made a strong point of it in their favour and pointed out to the jury that the witnesses should not be believed because of the very completeness of their evidence.” It is thus clear that in the view of the learned Additional Recorder, the evidence of identification against the whole seven accused persons, including the appellants, was of an exceptionally clear, specific and strong kind. If that was so, it appears to us that it was of the very first importance to point out to the jury, that as to four of these people, the story originally told to the police did not touch them at all, but that all this exceptionally clear story was heard of, for the first time, eighteen days after the occurrence. That seems to us to be not a small circumstance which the Judge might fairly pass by, or assume that the jury would give full weight to. It was a matter of so much moment that in an ordinary appeal from a conviction by a Judge with assessors, it would probably be sufficient to upset the conviction. Then there is another aspect of the case, viz., that the attention of the jury was not drawn to the material difference that existed in the evidence as against the two sets of accused persons. So far as we can see from the statement of the Additional Recorder, he left to the jury the case against all the seven accused men as if there was substantially the same case against them all. We think that [13] there was a very great difference between the two cases. The charge against the first three accused persons was made immediately after the occurrence. The charge against the other four was made for the first time eighteen days afterwards. We think that the omission to call the attention of the jury to this vital matter was a defect so serious as to amount to misdirection within the meaning of that word as construed in the cases cited by the Judicial Commissioner and the Additional Recorder. We further think that, under the circumstances of the case, these four persons were prejudiced by the mode in which the matter was left to the jury. Indeed, it could not be otherwise. We are of opinion, therefore, that the point referred to this Court must be answered in this way: that the learned Additional Recorder did misdirect the

jury in the manner indicated in the reference, and that this misdirection did so prejudice the appellants 4, 5, 6, and 7 as to justify the special Court in setting aside the verdict of the jury so far as regards these four prisoners.

NOTES.

[See also 4 C W N 196]

[11 Cal. 13]

CRIMINAL REFERENCE

The 24th October, 1884.

PRESENT

MR JUSTICE WILSON AND MR JUSTICE MACPHERSON

Queen-Empress

versus

Ishwar Chandra Sur . Accused

Criminal Procedure Code—Act X of 1882, ss. 109, 110, 112—Security for good behaviour.

Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence; and that he should be clearly informed of the accusation which he has to meet.

ONE Ishwar Chandra Sur was reported to the Magistrate of Dacca as being "a notorious bad character", the Magistrate ordered the arrest of Ishwar, and on his appearance took the evidence against him, informing the accused that the order would, if passed, "be under s. 110 of the Code, for one year," and called upon him to show cause why he should not give security and bail for his good behaviour. After recording the answer of the accused the Magistrate passed the following order "He will furnish Rs. 50 [14] *muchulka*, and Rs. 50 surety for six months under s. 109 of the Criminal Procedure Code, and in default to be rigorously imprisoned for that period, or until he furnish security." There was, however, a note written on the order in the Magistrate's own handwriting to this effect, "under s. 110 for a year"

The officiating Sessions Judge considered that the order was bad in law, for the following reasons, *viz.*, (1) because no order was recorded in writing by the Magistrate, as directed by s. 112 of the Code, (2) because it was not clear under what section or for what term bail and security were demanded from him; and (3) because the accused had not been given an opportunity of entering upon his defence, or of stating whether he would call witnesses. On those grounds, the Sessions Judge, after forwarding to the High Court the Magistrate's explanation, recommended that the order should be set aside.

* Criminal Reference No. 160 of 1884 made under s. 438, by W. H. Page, Esq., Offg. Sessions Judge of Dacca, dated 10th October 1884, against the order of P. Weyer, Esq., District Magistrate of Dacca, dated the 27th August 1884.

The Opinion of the Court was delivered by

Macpherson, J.—We think the Sessions Judge is right and that the order must be set aside. The record does not show, and the Magistrate in his explanation does not say, that the accused had an opportunity of entering upon his defence or of citing witnesses.

It is, moreover, by no means clear that the accused knew whether the accusation which he had to meet was one under s. 109 or s. 110 of the Criminal Procedure Code.

Order set aside.

NOTES.

[See also 6 All 214 (218)]

[11 Cal. 14]

APPELLATE CIVIL.

The 19th August, 1884.

*

PRESENT

MR. JUSTICE MACPHERSON AND MR. JUSTICE BEVERLEY

Koonari Bibi.Defendant

versus

Dalim BibiPlaintiff.

Mahomedan law—Distant kindred share in the "return" in preference to a widow of the deceased—Distant kindred are heirs.

Under the Mahomedan law a widow has no claim to share in the "return" or residue of her deceased husband's estate as against other heirs

[15] THIS was a suit brought by one Dalim Bibi (who was the paternal aunt of the half-blood of one Jonab Ali Lasker, deceased), to recover by right of inheritance one-half of the plots of lands left by Jonab Ali Lasker, as against the widow of Jonab Ali Lasker, Koonari Bibi, and Akbur Mollah, the maternal uncle of the said Jonab Ali Lasker. The plaintiff claimed to inherit as coming under the class of "distant kindred" of the deceased. Koonari Bibi alone appeared in the suit, and she contended that the plaintiff was not entitled under the Mahomedan law to obtain by right of inheritance any part of the property of Jonab Ali Lasker, and that a portion of the land claimed by the plaintiff was land that had been given to her, Koonari, as dower, and as such was in her possession.

The Munsif held that there was no doubt but that Koonari, as the widow of the deceased, was entitled to a one-fourth share in his estate; and on the question as to whether she would be entitled to the residue of the estate of the

* Appeal from Appellate Decree No 322 of 1883, against the decree of Baboo Bulloram Mullick, Second Subordinate Judge of 24-Pergunnahs, dated 23rd August 1882, modifying the decree of Baboo Brojo Behari Shom, Third Munsif of Diamond Harbour, dated 20th September 1881.

deceased (there being admittedly no other heirs nearer than those coming under the class of distant kindred), he found on the authority of the case of *Mussamaut Soobhanee v. Bhetun*, and Ramsay on Mahomedan Inheritance, p. 15, that the widow was entitled to the residue in addition to her prescribed share; and as regards the portion of the land which Koonari stated to be her dower, he found that the plaintiff had failed to rebut the defendant's case on that point, and he, therefore, found that that portion formed no part of the estate left by Jonab Ali Lasker, it being in the possession of Koonari as her dower; he, therefore, dismissed the suit.

The plaintiff appealed to the Subordinate Judge, who held, on the authority of Bailie's Digest, pp. 685 and 715, that "distant kindred" were classed as heirs, and that the husband and wife were "disqualified from taking the return"; that the plaintiff's kinship not having been denied, there was nothing to prevent her from recovering her share of the "return." But as regarded the portion of the estate claimed by Koonari as dower, he agreed with the finding of the Munsif; he, therefore, allowed the appeal and modified the decree of the lower Court, and ordered that the plaintiff should recover possession of an eight-[16]anna share in the estate of the deceased. The defendant appealed to the High Court.

Baboo *Jadub Chunder Seal* for the Appellant contended that the widow was entitled to the "return," and cited *Mussamaut Soobhanee v. Bhetun* (1 Sel. Rep., 346), *Mahomed Arsad Chowdhry v. Sajida Banoo* (I. L. R., 3 Cal., 702), and argued that those who had a share in the "return" would take in preference to "distant kindred," and that therefore the widow must be preferred to the distant kindred.

Baboo *Gruja Sunkur Mozondar* and Baboo *Pran Nath Pandit* for the Respondent relied on Bailie's Digest, pp. 685, 716, and Tagore Lectures for 1873 by Shama Churun Sircar, p. 232.

Judgment of the Court was delivered by

Macpherson, J.—One Jonab Ali Lasker died leaving a widow (defendant 1), a maternal uncle (defendant 2), and a paternal aunt (plaintiff), and the sole question raised in this appeal is, whether under Mahomedan law the widow takes the whole estate of the deceased to the exclusion of the maternal uncle and the paternal aunt, who belong to the class of "distant kindred."

It is contended on the authority of the cases reported in 1 Select Reports, 346 and I. L. R., 3 Cal., 702, that the widow is entitled to the "return," and it is ingeniously argued that, as those who share in the "return" take in preference to "distant kindred," so the widow's claim must be preferred to that of the "distant kindred."

But we think that neither the cases cited nor the authorities go to this extent. What the cases decided was, that in the absence of other heirs (and "distant kindred" are heirs) the widow is entitled to the "return" as against the *bat-ul-mal*, or public treasury. And this is in accordance with authority.

Originally, it would seem, the widow was not entitled to share in the "return" at all, and an exception was only made in her favour as against the public treasury. But she has no claim to the "return" as against any of the heirs. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This has been applied in (1903) 30 Cal., 683; see also 3 Cal. 702]

[17] APPELLATE CIVIL.

The 30th July, 1884.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Hajon Manick.....Plaintiff

versus

Bur Sing.....Defendant.

Cherrapoonjee Raj—Public and private rights—Code of Civil Procedure, Act XIV of 1882, s. 431, cl. (b)—Foreign State—Succession to land in India—Intestate Succession—Succession Act, Act X of 1865, s. 5.

The "private rights" spoken of in s. 431, cl. (b) of the Code of Civil Procedure do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of justice, as distinguished from its political or territorial rights, which must from their very nature be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals, as distinguished from rights which one State in its political capacity may have as against another State in its political capacity.

The Emperor of Austria v. Day (30 L. J. Ch., 690, 2 Giff., 628), *United States of America v. Wagner* (L. R., 2 Ch., 582), approved of.

There is nothing to prevent a foreign or feudatory State from holding immoveable property in British India, and to such property the rule of intestate succession laid down in s. 5† of the Succession Act (Act X of 1865) does not apply. The State must be regarded as a *quasi* corporation which continues to exist as a State so long as it is recognized as such by Her Majesty, whatever the rule of succession to it may be and whatever may be its form of government.

Case in which it was found on the facts that certain immoveable property situated in British India, which had formerly belonged to the State of Cherrapoonjee, having been granted by a former Raja of that State to the defendant, was still the property of the State, on the ground that the Raja was not competent to alienate it, and that the defendant's plea of adverse possession and limitation was not supported by the evidence.

THIS was a suit by the Raja of Cherrapoonjee for possession of certain lands held by the defendant. The plaint stated that the Raj of Cherrapoonjee was governed by Rajas who were elected by the representatives of twelve *doloyes*, i. e., communities or clans, and who have no power to alienate any property appertaining to the Raj, that the lands in dispute were part of the Cherrapoonjee [18] Raj, and as such up to the year 1282 (B.S.) had been in possession of the then Raja of Cherrapoonjee, Raja Ram Sing, whose *Jubraj*, the defendant was; that on the death of Raja Ram Sing in 1282 the defendant, though *Jubraj*, was excluded from the Raj, which was conferred upon the plaintiff; and that the defendant "having the papers in respect of the time of

* Appeal from Original Decree No. 13 of 1883, against the decree of Baboo Ram Coomar Pal Chowdry, Rai Bahadur, Subordinate Judge of Zillah Sylhet, dated the 29th September 1882.

† [Sec. 5.—Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.]

the preceding Raja in his own hands, and having gained over the officers of the time of the former Rajah to his side, and having wrongfully obtained rent decrees by bringing rent suits against the tenants of the lands in plaintiff's possession and having succeeded in the rent suits brought by the plaintiff against the tenants in occupation of the land in his (the plaintiff's) possession, by colluding with the tenants and causing them to put in false answers, has, notwithstanding plaintiff's attempts, gradually dispossessed plaintiff from the lands in suit on various dates from the 12th of Jeyt 1282 (25th of May 1875) to the 13th of Assar 1287 (26th of June 1880), and has been holding unlawful possession thereof without allowing the plaintiff to take possession of the same."

The defendant in his written statement alleged that the property in dispute had been the private property of Sobha Sing, a former Raja of Cherrapoonjee, who made a gift of it to the defendant in 1249 B. S., that the property had never been part of the Raj of Cherrapoonjee, that the defendant had been in adverse possession of it since 1249 B.S., and he pleaded limitation. The Court of First Instance dismissed the suit with costs. The plaintiff appealed to the High Court. All other facts material to this report will be found in the judgment of the Chief Justice.

Mr. *Evans*, Baboo *Srinath Dass* and Baboo *Bussunto Kumar Bose* for the Appellant.

Baboo *Mohiny Mohun Roy* (with him Baboo *Joygobind Shome*, and Baboo *Anando Gopal Palit*) for the Respondent, raised two preliminary objections: (1) that the suit being one to recover possession of immoveable property for the State, it could not be said to be a suit to enforce a private right, and therefore it would not lie under s. 431 of the Code of Civil Procedure; (2) that the property in suit being situate in British India, the rule of succession applicable to it, should be that laid down in the Indian Succession Act, s. 5, and not a rule of a Foreign State, which is repugnant to the Laws of British India.

The **Judgment** of the Court was delivered by

Garth, C.J.—This suit was brought by the Raja or Chief of the State of Cherrapoonjee in the Khasia Hills to establish his title to, and to recover possession from the defendant of two villages, *viz.*, mauzas Futtehpore and Augarpur, situated in the district of Sylhet, upon the following allegations:—

It is said that these two villages formerly belonged to the Raja or Chief of Jyntia (whose territories in the plains were confiscated by the British Government in 1835), that in or about the year 1810 they were ceded by the then Raja of Jyntia to the Chief of Cherrapoonjee in consideration of certain assistance rendered to him by the latter Chief in a war between the Raja of Jyntia and a third Chief, the Raja of Khyram, that from that date the villages in question formed part of the State of Cherrapoonjee and were in the possession of successive Chiefs of that State down to the death of Raja Ram Sing on the 12th Bysak 1282; that during the reign of Ram Sing the defendant was appointed *Jubraj* or heir-apparent, and in that capacity had the management of these villages; and that on the plaintiff's accession he, the defendant, being disappointed at not being himself elected Raja refused to make over these villages to the Raj and retained them in his own possession.

The defence is, that the villages in question were never the property of the Cherrapoonjee State as such, but were granted to the Chief of that State as his own private property; and that in Bhadro 1249 (corresponding with

September 1842) the then Chief Sobha Sing by a *hibanamah*, or deed of gift, transferred them to the defendant; and that from that time the defendant has been in possession.

Eleven issues were framed in the lower Court, but the essential points in the case appear to be three only :—

(1) Whether the villages in suit were the public property of the State of Cherrapoonjee, or the private property of the Chief to whom they were given?

[20] (2) Whether, supposing them to be the property of the State, they could be alienated by grant from the Chief? and

(3) Whether, assuming them to be the property of the State, the defendant has been in adverse possession for more than twelve years before the institution of this suit, and the plaintiff's suit is thus barred by limitation?

The lower Court, in a very lengthy and elaborate judgment, has found for the defendant both on the merits and on the plea of limitation. The Subordinate Judge comes to the conclusion that the villages in suit were the private property of the Chief, and that they were granted to the defendant by Sobha Sing, and have been in his exclusive possession since the date of that grant.

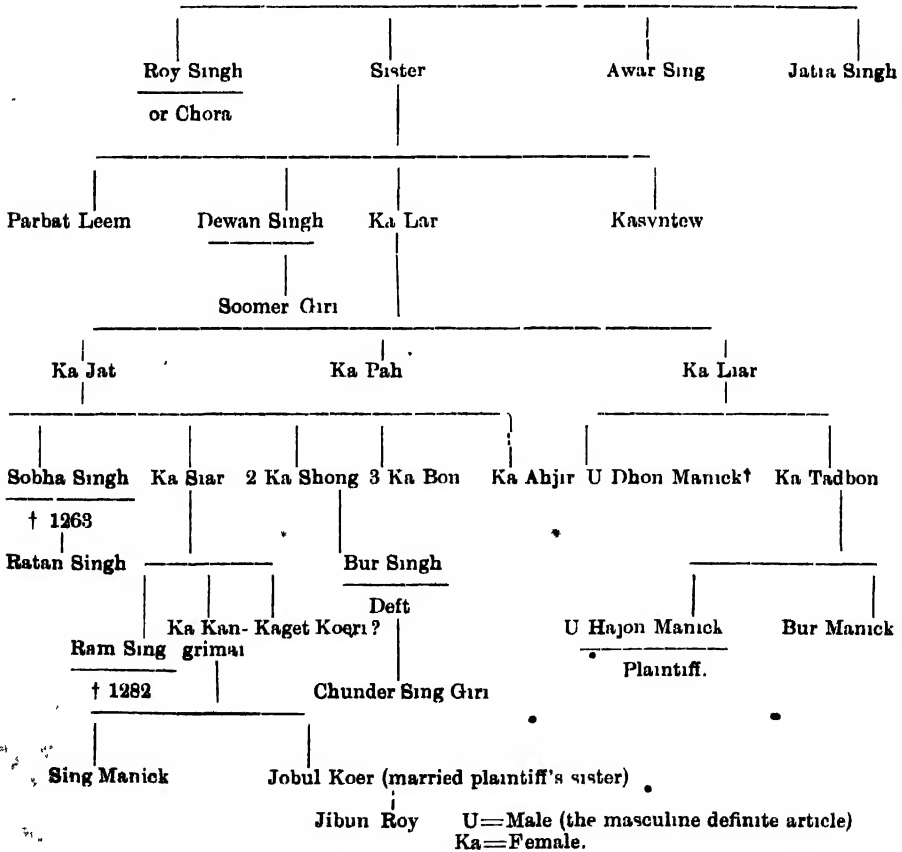
The plaintiff is accordingly the appellant in this Court.

Before entering on the particular questions involved in the case, it may be useful to consider a few facts relating to the history and circumstances of the Rajas or Chiefs of Cherrapoonjee.

Cherrapoonjee is one of several small semi-independent States situated in the Khasia and Jyntia Hills, which separate the valley of the Brahmaputra from the Bengal districts of Sylhet and Cachar. The State is governed by a Raja or Chief (called in the Khasia language the *Leem*), acting in conjunction with the heirs (or *Jubrajes*), the ministers (or *muntries*), and the headmen (or *doloys*). The succession to the Raj or Chiefship is regulated partly by inheritance and partly by a system of election. The ordinary rule of inheritance is based on descent through the female line, or, in other words, succession to property is traced through females, and not through males. If a male dies possessed of property which he has acquired, it will go, if he is unmarried, to his mother and her issue, if married to his wife and her issue, and if there is no issue to her, mother and her mother's issue. An exception is made in the succession to the Raj and the Chief offices of State, the reason for the exception probably being, that such offices must be held by a male. But even in these cases the succession is not from father to son, but through the mother, that is to say, a deceased Raja is succeeded by his uterine brother, or the son of his maternal aunt or his sister's son. All persons standing in [21] such relationship to the reigning Chief are possible heirs and are styled *Jubrajes*, and on the death of a Chief, his successor is elected from among the *Jubrajes* by the twelve *doloys* or headmen of the State. Thus the succession to the Raj, although confined to one family, and ordinarily to an established rule of inheritance in that family, is nevertheless subject to a power of veto vested in the *doloys*, who can apparently pass over the nearest heir in favour of one more remote. It has been contended for the defendant in this case that this practice of election has been introduced only recently by the British Government, but from a consideration of the agreements with the Chiefs of the Khasia Hills, published in Aitchison's Treaties (vol. 1, pp. 88, 95, 99, &c.,) and other evidence, we think that all that the British Government has done has been to attempt to give validity and permanence to customs of old standing, and we find good grounds for supposing that the practice of electing the Chief from among the *Jubrajes* is a custom of old standing.

The genealogical table annexed has been drawn up from the oral evidence taken in the case. This table will be found useful not only as indicating generally the manner in which the succession to the Raj has been regulated, but as showing particularly the relationship which exists between the parties to this suit. In respect of one or two of the details shown in the table, the evidence is somewhat contradictory, but on the whole the table is sufficiently accurate for all practical purposes. It appears that Roy Sing, who was the reigning Chief at the time these mauzas were acquired from the Raja of Jyntia, was succeeded by his sister's son, Dewan Sing. Dewan Sing died before 1830, and was succeeded by his sister's daughter's son, Sobha Sing. Sobha Sing died in 1856/1263, and was succeeded by his sister's son Ram Sing. On Ram Sing's death in 1875/1282, the nearest heir would appear to have been the defendant Bur Sing, who is Ram Sing's mother's sister's son, but Bur Sing had embraced Christianity, and the *doloy*s, therefore, vetoed his succession, and elected the plaintiff, Hajon Manick, who, it will be seen, belonged to a more distant branch of the family, his maternal grand-mother being a sister of Ram Sing's maternal grand-mother. We are inclined to attach

[22] GENEALOGICAL TABLE OF THE RAJ FAMILY OF CHERRAPOONJEE



considerable importance to this circumstance, and we think that it has not been sufficiently taken into account by the lower Court. The Subordinate

Judge seems to have thought that the plaintiff and the defendant stood in the same degree of relationship to the late Chief Ram Singh, but this was not so. The plaintiff, it will be seen, belongs to a branch of the family [23] quite distinct from that to which Sobha Sing, Ram Sing, the defendant Bur Sing and his witness Sing Manik belonged. And this fact will be found to be of great importance, when we come to consider how far the defendant held and managed these mauzas in his own right, or in conjunction with, and on account of, the reigning Chiefs Sobha Sing and Ram Sing. It is in evidence, that Sobha Sing, Ram Sing, the defendant and Sing Manik all lived together, whereas the plaintiff belonging as he did to a different branch of the family lived elsewhere. It is true that during the lifetime of Sobha Sing, Dhon Manick was an heir and *Jubaj*, and used to take a part in the management of affairs, but he seems to have died before Sobha Sing, and after his death the *Jubajes* were Ram Sing and the defendant. And it further appears from the evidence of one of the defendant's own witnesses (p. 258) that Ram Sing lived generally in the house of his father's siter at some distance and only came occasionally to Cherra, the business of the State being chiefly conducted by the defendant. And the defendant seems to have retained this position during Ram Sing's reign being occasionally assisted by Ram Sing's nephew, Sing Manick. This at once explains the reason, why the defendant should be in a position to adduce evidence of his possession of the mauzas in dispute before the plaintiff's decession; and why the plaintiff's evidence of the possession of his predecessors in the Raj should be far less satisfactory. The persons who collected the rents were all practically in the employ or acting under orders of the defendant.

Before proceeding, however, to deal with the case on its merits, it will be convenient to dispose of two preliminary objections that were raised at the hearing on the part of the respondent.

The first objection is, that the present suit will not lie under the provisions of s. 431 of the Code of Civil Procedure. That section enacts that "a foreign State may sue in the Courts of British India, provided that (a) it has been recognized by Her Majesty or the Governor-General in Council, and (b) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State." It is contended that when the object of the suit is to recover immoveable property for the State, such suit cannot be said to be brought for the enforcement of a private [24] right. But this contention appears to us to be based on a misapprehension of the section in question. The "*private rights*" there spoken of do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals, as distinguished from rights which one State in its political capacity may have as against another State in its political capacity.

The rule laid down in s. 431 is only an enactment of that which prevails in England; and as the plaintiff here represents the Government of an independent State, recognised as such by Her Majesty's Government, and is suing to recover from a private individual in this country those mauzas, which (although situate in British territory) are claimed to belong to the plaintiff as the head of the State, we consider that this case comes clearly within the rule [see *Emperor of Austria v. Day* (30 L. J. Ch., 690; 2 Giff., 628), *United States of America v. Wagner* (L. R., 2 Ch. App. 582)].

The second objection taken was to the effect that the property in suit being situated in British India, the rule of succession applicable to it must be that laid down in the Indian Succession Act (s. 5), and not a rule of a foreign State which is repugnant to the laws of British India.

This point was argued by Baboo Mohini Mohun Roy for the defendant with great ability, and at some length, and it is admitted that there would be considerable force in it, if the mauzas in question were found to be the property of a private individual. In that case the succession to the property would no doubt be governed by the *lex loci*. If, for example, these two villages were found to be the private property of the defendant, and he should die intestate, the villages would probably pass to his heirs, as defined by the Indian Succession Act, and not to those who would be his heirs under the rule of succession obtaining in the Khasia States. But if, as the plaintiff contends, the villages [23] in question are the property of the Cherrapoonjee State, we think that the objection ought not to prevail. As Mr Evans has pointed out, the State must be regarded as a *quasi* corporation, which continues to exist as a State so long as it is recognized as such by Her Majesty, whatever the rule of succession to it may be, and whatever may be its form of government. (See *The United States of America v. Wagner*.)

So far as we are aware, there is nothing to prevent a foreign or feudatory State from holding land in British India. The Raja of Tipperah holds land in British India, as well as in Independent Tipperah, and it has been decided that the property which he holds in British India follows the succession to the Tipperah Raj, and is not governed by the British law of succession—*Neelkrishna Deb Burmono v. Beerchunder Thakoor* (12 Moo, I A. 523), *Beerchunder Manikkya v. Rajcoomar Nobodeepchunder Deb Burmono* (I L R, 9 Cal., 535), *Maharajah Beerchunder Manikkya v. Ishanchunder Thakur* (3 I L R., 417). We think this is the true view of the matter, and we are confirmed in this view by a consideration of the document at p. 122 of the printed book. That is a receipt or release executed by Raja Ram Sing in favour of the British Government acknowledging that he had received two villages, Gosainpur and Burnugar, situated in British territory, in exchange for certain lands at Cherrapoonjee, which he had ceded to the British Government, and the document goes on to say —“I and my heirs and successors to the Raj will own and possess the lands of those mauzas as zemindars under the British Government”, that is to say, the mauzas are declared to appertain to the Raj as represented by the Raja for the time being. The question of intestate succession, therefore, does not arise, and this objection falls to the ground.

We proceed now to consider the case on its merits, and we will first deal with the title set up by the defendant.

His case is that the mauzas in suit were a gift to Roy Sing personally, for services which he had personally rendered, and that they descended to Sobha Singh as his private property. He then says, that in or about the year 1840 the British Government [26] assessed them with revenue, as part and parcel of the Jyntia State, which had been confiscated. Upon that, Sobha Singh, he says, wanted to appeal, but he was unable to do so for want of funds. He accordingly called all his nephews together and told them —“I am unable to defray the expenses of the case, you had better prosecute the litigation and pay the expenses” (pp. 176, 239). The defendant, however, according to his own account, was the only one of them willing to undertake the business, and, accordingly, he says, with the consent of the others, the deed of gift printed at page 261 was executed in his favour. This deed runs as follows.—

"To the well-behaved Bur Sing Raja, inhabitant of Cherrapoonjee: I, Sobha Sing Raja, of the above place, do execute this *hibanamah* to the following effect:

"The Deputy Collector of Sylhet having assessed rent, as included in the territory of the Jyntia Raj, upon my two *bustis* of Augarjore and Futtehpore, *appertaining to my Raj of Cherrapoonjee*, I have preferred an appeal to the Revenue Commissioner of Dacca in dissatisfaction of the said order. Whereas you are my sister's son and an heir presumptive to my throne, and as I cannot conduct the said litigation, and defray the expenses thereof, I, therefore, of my own accord, make a gift to you of all the lands of the said two *bustis* Augarjore and Futtehpore, you will defray the expenses of the said litigation from your own pocket, and, after the case is decided, take possession of the said two *bustis*, and continue to enjoy the same *with power to alienate by sale or gift*. To this, *I relinquish my own right* and bestow it on you, *you and your heirs will be entitled to alienate it by sale or gift* and to enjoy the same To this purport, I execute this *hibanamah*, dated Bhadro 1249 B.S."

Having obtained this deed, the defendant proceeded to borrow money from Colonel Lister, the Political Agent, and his *sherishtadar* Manick Chunder Hoom, and went to Dacca to get the mauzas exempted from payment of revenue. Notwithstanding the statement, that none of the other nephews would undertake the business, it is admitted (pp. 177, 242, 258) that Ram Sing on this occasion accompanied the defendant, and it is also a significant fact that the proceedings were conducted, *not in the [27] defendant's name, but in the name of Sobha Sing*. The appeal was successful, the mauzas were declared to be revenue-free, and a sum of about Rs. 4,000 was refunded as mesne profits. From this money Colonel Lister and Manick Chunder Hoom were repaid, and a certain amount was admittedly paid to Sobha Sing. The defendant says that he paid him the profits accruing prior to the date of the gift. But Manick Chunder Hoom gives a different account of what took place. He says: "Bur Sing Raja went to Sobha Sing Raja with that money. The next day I also went there Sobha Sing Raja had contracted with me in writing that he would pay me a 6-anna share of that money. Sobha Sing and Bur Sing were both present, and they paid me my 6 annas share. Sobha Sing paid some money to Charkha Dolay as reward. The remaining 10 annas share he took to Cherrapoonjee. Out of that the Colonel Saheb's loan was repaid" (p. 258). Charkha Dolay also says (p. 242) that it was Sobha Sing who repaid Colonel Lister's loan. From that time to the present the defendant says that he has been in possession of these mauzas.

In support of these allegations the defendant has filed, among other documents,—

(a)—a purwanah, dated 5th May 1851, addressed by the Political Agent to Sobha Sing, which purports to show that the Agent at that time recognized these villages as the property of the defendant (p. 263),

(b)—an account and receipt of Manick Chunder Hoom for moneys said to have been paid to him by the defendant on account of the appeal at Dacca (pp. 270, 271),

(c)—some reports which are filed to show that even after the cession of these mauzas to Roy Sing, they continued to be part and parcel of the Jyntia State, and were never incorporated with the Cherra Raj (pp. 272 to 275); and

(d)—a large number of zemindari papers and accounts, showing that for some years past the rents have been paid to the defendant.

The execution of the deed of gift by Sobha Sing has not been seriously disputed in this Court, nor is it denied that the defendant has been in ostensible possession and receipt of the [28] rents. But it is contended that the gift was

not intended to operate as an alienation of the property from the State; that the defendant was at the time a *Jubraj* with every chance of succeeding to the Raj. And it has been argued by Mr. *Evans*, with considerable force, that this deed was really only executed in order to enable the defendant to raise money for the purpose of prosecuting the appeal and of appearing in person before the Commissioner as the appellant, and not with the intention of creating in him any rights antagonistic to those of the State

As regards his possession, it is contended that it was permissive and not adverse to the reigning Chief, and that the defendant as *Jubraj* and heir was allowed to manage the properties, but that the real beneficiary owner was the State.

We now proceed to examine the plaintiff's case, which is to the effect—

- (1)—that the mauzas in suit are the property of the State,
- (2)—that, and such, they could not be alienated by any Chief for the time being, and
- (3)—that the defendant's possession was only the possession of a *Jubraj* on behalf of the State, and not adverse thereto

(1) On the first point it seems to us that these lands having been ceded by the Raja of Jyntia for services rendered to him in time of war by the Cherrapoonjee Raja and his followers, the probability is that they were ceded to the Cherra State, and were not a gift to the Chief personally. It appears, moreover, that these mauzas were held by Dewan Sing and Sobha Sing as successive Rajas, whereas there is evidence to show that, *had they been Roy Sing's private property they would have descended to other heirs*. It is admitted by the witnesses on both sides that there is one rule of succession to the private property of a Chief, and another to the property of the State, and, clearly this must be so, inasmuch as the State property must follow the rule of succession to the Raj or State itself, and that rule, as we have seen above, is first subject to the condition that the Chief must be a male, and secondly, to the principle of election. As regards the private property of a Raja, however, the rule of succession is stated to be as follows—The property would ordinarily go to a sister and her daughters, in default of daughters, to a son for life, and after [29] him to the Raja. If the deceased Raja left no sister or sister's issue, the property would descend to his successor in the Raj (pp. 82, 86, 91, 93, 101, 109, 113). Now, there is evidence on the record (pp. 97, 101, 247) that Roy Sing left female heirs, who would have succeeded to these mauzas had they been private property. But be this as it may, there can be no doubt that even if they descended properly to Dewan Sing as private property, Dewan Sing left sister's daughters surviving him (pp. 82, 86, 97, 101), Ka Jat and Ka Pah would, under ordinary circumstances, have been Dewan Sing's private heirs. This is admitted by the defendant (pp. 175, 176) and Sing Manik (p. 248), but they try to get over the difficulty by pretending that the sisters had separated from Dewan Sing, and so were incapacitated from succeeding. We are unable to consider this explanation either sufficient or satisfactory.

In the next place there is evidence to show that these mauzas were dealt with as an appanage to the State. The official documents printed at pp. 120, 272, 275, of the paper-book, show conclusively that *Sobha Sing claimed these villages as part and parcel of his territorial dominions*, and there is oral evidence to show that he and his predecessors had exercised sovereign jurisdiction therein down to the year 1838 (pp. 13, 23, 35, etc.). In the deed of gift itself we have the villages described by Sobha Sing as "*appertaining to my Raj of Cherrapoonjee*,"

On the whole evidence, therefore, we have no hesitation in coming to the conclusion that the two villages in suit were the property of the Cherra Raj, and not the private property of Sobha Sing.

Then the question arises, was Sobha Sing capable of alienating these villages by gift or otherwise? And on this point we must also find for the plaintiff. Putting aside the mass of oral evidence upon the point, it seems clear that if the mauzas were ceded to the State, as many of the witnesses say they were, and as we find to be the fact (pp. 81, 84, 88, 93, 96, 103), and if the Chief is, as we have already decided, an elected Chief (though always elected from the same family), he would have no authority to alienate these lands, and confer them as private property on another member of the family. An attempt has been [30] made to prove that other Raji lands have been alienated by various Chiefs, but we think the attempt has failed. The grants to the British Government were either made in exchange for other lands, or for other consideration. The alleged grant of Chandpur by Dewan Sing to his son Sowargiri is not a case in point, for the defendant admits that this property (though acquired by Dewan Sing himself) descended to Sobha Sing and Ram Sing and is now in the plaintiff's possession (pp. 178, 179, 250). The Bimanna lands said to have been given by Ram Sing to his daughter were lands purchased by himself (pp. 238, 243). The Chakla lands given by Ram Sing to his son were similarly acquired, and improved out of his private means (pp. 238, 245), and it also appears that rent is paid to the State in respect of those lands (p. 250). On the whole, we consider the defendant has failed to prove any other instance in which Rajgi property has been alienated by the reigning Chief; and looking at the constitution of the State as described above, and the limited power possessed by the Chief, we concur with the lower Court in finding that he had no authority to alienate the property of the State.

Then, lastly, we come to the question of limitation. And as to this we must hold that the defendant's possession has not been a possession in his own right adverse to the State. In the first place we think that the *hibanamah* was not intended to alienate these properties from the State. We have seen that at that time the defendant occupied the position of *Jubraj* and presumptive heir to the Raj. We have seen that Ram Sing accompanied him to Dacca to procure the release of these properties from the assessment that had been imposed upon them by the British Government, and we have also seen that the defendant was all along living in the same family with the reigning Chief, and that up to the death of Ram Sing it was apparently expected that he would himself one day succeed to the Raj. Moreover, we find that even after the deed of gift, Sobha Sing and Ram Sing treated these mauzas as if they were the property of the State.

For instance, the official documents printed at pp. 115 to 118 show that it was *Sobha Sing, and not the defendant*, who moved the Collector in 1846-47 to have the river Kapua included [31] within the limits of mauza Futtehpur, and so also it was *Ram Sing and not the defendant* who prosecuted the cases regarding Mr. Howard's tea garden, Mr. Foley's garden and other claims to lands said to be included within these mauzas (pp. 123 to 140). It seems to be admitted, even by the defendant's own witnesses (pp. 231, 223), that those cases were not only conducted in Ram Sing's name, but by his servants, and, amongst others, by one Bongo Chunder Sen, who was admittedly the Raja's *Am-Muktear*.

Everything in fact was done in the Raja's name (p. 258). In the document printed at p. 122, the defendant is himself described as *the attorney for*

Ram Sing. It is admitted that Ram Sing himself used at times to visit these mauzas. The persons who collected and remitted the rents admittedly collected and remitted the rents both of the Rajgi property and of the defendant's private property (Nowagaon and Sandorgaon). The only evidence there is of the defendant's possession is, the use of his name in the zemindari papers; and of this, we think, there is a sufficient explanation. The management of these estates was entrusted to him as *Jubraj*, he was living with Ram Sing, and his acts were no doubt looked upon as Ram Sing's acts. The papers were all in his custody, and he could keep back or make away with any that did not favour his own pretensions. On the other hand, the plaintiff, as we have seen, belonged to a different branch of the family, and though a possible heir, it is not proved that he took any part in the management of affairs before his election to the Raj. It is most difficult for him, therefore, to produce papers or give any evidence that Ram Sing was actually in possession or shared, as we quite believe he did, the rents and profits of these mauzas.

Then we have the fact that on the occasion of Sobha Sing's *sradh*, the tenants from these villages, as from other villages belonging to the Raj, attended at Cherrapoonjee with presents of goats and other things. This fact is admitted (pp. 177, 246), although the defendant attempts to put his own interpretation upon it, but it seems to us that the natural inference to be drawn from it is, that these villages were at that time recognized as an appurtenance to the Raj, and that the tenants attended [32] with their offerings on that occasion as the tenants of the Raja, and not as the tenants of the defendant.

The lower Court seems to have been of opinion that if the mauzas in suit were really the property of the State, the defendant's possession might be taken to be the possession of the Chief.

In paragraph 49 of his judgment, the Subordinate Judge says. "Then the plaintiff's pleader contends, that when it appears from the evidence on the side of the defendant, that Sobha Sing had granted the *hiba* with the consent of Ram Sing Raja, then the possession of the defendant, even if such possession be granted for argument's sake, being held with the consent of Ram Singh Raja, and a period of 12 years not having elapsed since the time when the plaintiff became the Raja in immediate succession to Ram Sing, the plaintiff, under these circumstances, cannot be barred by the possession of the defendant." It appears to me that this argument of the pleader for the plaintiff would have been to a great extent effective, if the disputed property had been proved to be a part and parcel of the state of Cherrapoonjee. But when, for the reasons alluded to above, the property in question, instead of being an integral portion of the Cherrapoonjee State, has been proved to be the exclusive estate of the Rajas in their individual rights, and that the same was capable of transfer, then such consent on the part of Ram Sing served only to extinguish his own rights, and the plaintiff on this ground cannot derive much benefit from that argument. We have, however, arrived at the conclusion, for the reasons which we have already given, that the mauzas in suit were the property of the Raj, and not the personal property of the Chief, and that the Chief had no power to alienate them by deed of gift. We find, too, upon the evidence, that the defendant was in possession as *Jubraj* in trust for, and on behalf of, the reigning Chief, and that the plaintiff is, therefore, not barred by such possession from recovering the properties. We accordingly reverse the finding of the lower Court and decree the plaintiff's claim to these two mauzas.

The only question which remains is as to the costs.

Under ordinary circumstances, as the plaintiff is the successful party, we should have given him his costs. But this is a peculiar [33] case. The circumstances under which the grant was made to the defendant, the form of the

grant itself ("to him and his heirs"), the fact of its being made with the consent of the other members of the reigning family, and that the defendant has had the management, and probably shared the profits of the property from that time to the present, might well have induced him honestly to suppose that he had a right to retain possession, at any rate during his own life. He had, moreover, good reason to expect that he himself would have become the Raja on the death of Ram Sing, and the change in his religion appears to have been the only reason why his claims have been set aside. It seems to us, therefore, that he was fully justified in taking the opinion of the Court, before giving up the property; and, as the judgment of the Subordinate Judge was in his favour, he should not be made responsible for the costs of this appeal.

We think, therefore, that this case should be made an exception to the general rule, and that each party should pay his own costs in both Courts.

Appeal allowed.

NOTES

[Upon this subject of jurisdiction, see *Gurdial v. Raja of Faridkot* (1894), 22 Cal., 222; *Dacey on Conflict of Laws*, II edn., p. 195, *et seq*. The change in the language of sec 431, C. P. C., 1882, with reference to 'private right' in the C. P. C., 1908, sec. 84, may be noted.]

[11 Cal. 33]

The 29th August, 1884.

PRESENT

MR. JUSTICE MACPHERSON AND MR. JUSTICE BEVERLEY.

Lutifunnissa Bibi and others. (Defendants) Appellants
versus
 Nazirun Bibi. (Plaintiff) Respondent.†

Mutwāl, Suit by—Religious Trust—Charitable Trust—Civil Procedure Code (Act XIV of 1882), ss. 30, 539—Act XX of 1863.

The plaintiff sued to recover possession as *mutwāl* of certain parcels of land, alleging that they were dedicated as *wuqf* and that the profits were "applied to the feeding of wayfarers and travellers, to lighting the mosque and shrine in the evening, and to meeting the expenses of repeating prayers on the occasions of *Id* and *Bakhrud*, and that the said profits were never spent for personal purposes." The plaintiff based her right to sue upon the fact that her deceased husband had been *mutwāl*, and she prayed that the property in suit might be declared *wuqf*, and that certain alienations made by her step-son, since her husband's death, might be set aside.

[34] *Held*, that the trust to which the suit related was one partly for charitable, and partly for religious, purposes. As far as it related to the former, it was governed by s. 539 of the Civil Procedure Code, and if viewed in the light of the latter, by Act XX of 1863, and that the suit, not being properly framed in compliance with the provisions of either of those enactments, was not maintainable.

Held, further, that even supposing the endowment alleged was neither a public charity within the meaning of s. 539 of the Civil Procedure Code, nor a religious endowment to which Act XX of 1863 applied, the plaintiff was not entitled to sue alone, as it was clear upon the face of the plaint that others were interested in the subject-matter of the suit, and therefore that she could only sue on behalf of all who were so interested, having first obtained the leave of the Court, and having otherwise complied with the provisions of s. 30 of the Civil Procedure Code.

† Appeals from Appellate Decrees Nos. 188, 189 of 1883, against the decree of F. W. Badcock, Esq., Officiating Judge of Hooghly, dated October 10th, 1882, affirming the decrees of Baboo Kedar Nath Mozoomdar, Second Subordinate Judge of that district, dated September 16th, 1879.

THE facts of this case are sufficiently stated for the purpose of this report in the Judgment of the High Court.

Baboo Uma Kahi Mookerjee for the Appellants.

No one appeared for the Respondent.

The Judgment of the High Court (MACPHERSON and BEVERLEY, JJ.) was delivered by

Macpherson, J.—In this case the allegations of the plaintiff are to this effect: She states in her plaint that the resumed mehal Harishpur, and four parcels of *lakheraj* land in four other mauzas were dedicated as *wuqf* by a former Maharajah of Burdwan, and that the profits were ever since "applied to the feeding of wayfarers and travellers, to lighting the mosque and shrine in the evening, and to meeting the expenses of repeating prayers on the occasions of *Id* and *Bakhrad*, and that the said profits were never spent for personal purposes." She then goes on to say that after the death of her husband, Syed Mokram Ali, the defendant No. 1, who is her step-son, sold the mehal Harishpur and granted a *mocurrari potta* of the four parcels of *lakheraj* lands to defendant No. 2, ostensibly in the name of defendant No. 3, and that defendant No. 2 accordingly took possession of all the properties in Bysack 1274. She therefore prays that the properties in suit may be declared to be *wuqf*, that the sale and lease may be set aside, that the connection of defendant No. 1 with the properties [35] may be terminated on the ground of his having committed waste, and that she herself may be put in possession as *mutwahi*.

The defence was that the properties in question were not *wuqf* at all, but the ancestral property of Mokram Ali and his brother Koim Ali, by whose heirs they had been transferred to defendant No. 2 and his wife Lutifunnissa Bibi.

[The learned Judge here stated the names of the properties in suit and the dates of certain sales and *mocurrari pottas* connected with these properties.]

The present suit was instituted on 3rd March 1879, but Lutifunnissa Bibi was not made a party till 19th May 1879.

The material issues fixed in the case were these.

Has the plaintiff a cause of action?

Is the claim barred by limitation?

Are the properties *wuqf* or the ancestral heritable property of the family?

On these issues the first Court held that the plaintiff as widow of the late *mutwahi* had a right to bring this suit, that the suit was not barred by limitation, that there was no satisfactory evidence that mehal Harishpur was *wuqf*, but that the four parcels of *lakheraj* lands were *wuqf* "for the purpose of carrying on the rites of religion and for feeding the poor," and a decree was accordingly given to the plaintiff for possession of these four properties as *mutwahi*.

Against this decision both defendant No. 2 and his wife appealed to the Judge, but their appeals were unsuccessful. They have now preferred a second appeal to this Court.

No one having appeared for the respondents, the appeals have been heard by us *ex parte*.

The appeals only relate to the four parcels of *lakheraj* land granted in *mocurrari* lease to defendant No. 2, Sheikh Parbuddin, and his wife Lutifunnissa. In appeal 188 Parbuddin is the appellant, and in appeal 189 Lutifunnissa.

Several points have been raised before us.

The suit having been instituted against Parbuddin on 3rd March 1879, it is contended that so much of it as relates to Niyamatunissa's share, leased to him on 20th January 1867, is barred [36] by limitation. Again, Lutifunnissa not having been made a party till 19th May 1879, it is contended that the suit is barred as regards the share of the properties leased to her by Mahafiz Hosein on 5th March 1869. It is further urged that there is no sufficient evidence that the property in question was ever dedicated as *wuqf*, and, more particularly, that the excess lands 12*b*, '3*c*, 1*c*, in mehal Gangeswar were improperly found to form part of the endowment.

The main contention, however, is, that the plaintiff had no right to bring this suit at all, and, we think, the case may be disposed of on this ground without going into the other questions raised.

It is urged that if this endowment is a *public* charity, the suit should have been instituted under the provisions of s. 539, Civil Procedure Code, by two or more persons directly interested in the trust with the written consent of the Collector. If, on the other hand, the endowment is a religious trust, it is contended that the suit should have been brought under Act XX of 1863, after sanction obtained under s 18 of that Act. In either case, it is said, the plaintiff had no sufficient interest to entitle her to sue, nor could she sue to obtain for herself possession of the properties.

According to the plaint in this case, the trust is one partly for charitable, and partly for religious, purposes. So far as the trust was "for the feeding of wayfarers and travellers," it was a trust for the benefit of a considerable portion of the public answering a particular description, and was therefore a trust for a public charitable purpose. The object of the plaintiff's suit was to oust the *mutwals*, get herself appointed in his place, and have the properties vested in her. Section 539^a of the Code applies to a suit of this nature, which is really one for the administration of the trust, and such a suit can only be brought in accordance with the provisions of that section.

But even supposing that the endowment in this case was neither a *public* charity within the meaning of s 539 of the Civil Procedure Code, nor a religious endowment to which Act XX of 1863 is applicable, the plaintiff was not entitled to sue alone to be appointed *mutwal* and to obtain possession

*[Sec. 539.—In case of any alleged breach of any express or constructive trust created for public charitable or religious purposes, or whenever the direc-

tion of the Court is deemed necessary for the administration of any such trust, the Advocate-General, acting *ex-officio*, or two or more persons having an interest in the trust, and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) appointing new trustees under the trust ;
- (b) vesting any property in the trustees under the trust ;
- (c) declaring the proportions in which its objects are entitled ;
- (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged ;
- (e) settling a scheme for its management, or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Act No. X of 1840, Section 2, is hereby repealed.]

of the property. The first Court [37] holds that she was entitled to bring this suit because she was a wife of Mokram Ali, the late *mutwali*, but we cannot agree that this is a sufficient reason. Even if we regard her as suing as a person interested in the trust, then on the face of the plaint there are other persons interested, and she could only sue on behalf of all who were so interested, and in order so to sue, she should have obtained the permission of the Court, and otherwise complied with the provisions of s. 30 of the Civil Procedure Code, not having done so, we think, she had no right of action. In whatever light the suit be regarded therefore, we think it clear that it was not properly framed and will not lie. The decree of the lower Appellate Court is accordingly reversed, and the suit dismissed with costs in all the Courts.

Appeal allowed.

NOTES.

[The C. P. C., 1908, sec. 92 sub-clause (2) enacts that save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. This sets at rest the previous conflict of opinion as to whether those provisions were mandatory—See (1906) 33 Cal., 789 10 C. W. N., 581, where the previous cases are fully discussed, 16 Bom., 626.]

And within the scope of that sub-clause now fall suits to remove any trustee (24 Cal., 418, 2 M. L. J., 251), as to who can sue, see 24 Cal., 418; 2 C. L. J., 460.

It is not necessary that there should be any breach of trust; it is enough if the direction of the court is considered necessary for the administration of that trust.—11 All., 18, in 6 I. C., 219 All., it was held that a suit of this sort cannot be referred to arbitration.

As regards the scope of sec. 30, C. P. C., 1882 C. P. C., 1908, O. 1., r. 8, see 23 Mad., 28, 20 Cal., 810.]

[11 Cal. 37] APPELLATE CIVIL

The 12th September, 1884

PRESENT

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR JUSTICE
BEVERLEY

Joy Prokash Lall and another . . . Plaintiffs

versus

Sheo Golam Singh and Others . . . Defendants.*

*Award—Judgment in accordance with award—Appeal—Defendants not
all joining in reference to arbitration.*

The question whether, under s. 522 of the Code of Civil Procedure, an appeal will lie against a decree given in accordance with an award, depends upon whether the award upon which the decree is based is a valid and legal award.

A plaintiff and some of the defendants to a suit applied to refer the suit to arbitration (certain other of the defendants not having joined in the application); an award was passed and a decree made in accordance with such award. The plaintiffs objected to the validity of the award on the ground that all the parties to the suit had not joined in referring the suit to arbitration; the objection was dismissed, and judgment given in accordance with the award. *Held*, that an appeal would lie from a decree dismissing the objection and confirming the award; but that under the special circumstances of the case, justice was so clearly in favour of the view that the award was good, that the Court, although not entirely approving of

* Appeals from Appellate Decrees Nos. 666 and 667 of 1883, against the decrees of J. F. Stevens, Esq., Offg. Judge of Sarun, dated the 9th of January 1883, affirming the decree of Baboo Kali Prasunno Mookerji, First Subordinate Judge of Sarun, dated 1st December 1882.

certain decisions of the High Court [(*Shulanath Biswas v. Kishen* [39] *Mohun Mookerjee* (5 W. R., 180); *Ram Soonder Mookerjee v. Ram Shurun Mookerjee* (6 W. R., 25); *Doorga Churn Thakoor v. Kally Doss Hasrah* (10 W. R., 469), *Bishoka Dasia v. Anunto Lall Pain* (4 C. L. R., 65)], which laid down that such an award is good, notwithstanding that some of the parties to the suit may not have joined in the reference to arbitration, did not think fit to differ from those decisions on that occasion.

THESE were two analogous suits numbered 112 and 190 of 1881 which were heard together, and which originated from proceedings held under the Land Registration Act.

The plaintiffs claimed to be recognised as holders of fractional shares in mauza Bissumbhurpur, but the revenue authorities disallowed their claim; the plaintiffs, therefore, brought the present suits for a declaration of their right to be registered as fractional sharers in the mauza.

The suits, as originally framed, were brought against defendants 1 to 8, who contested the plaintiffs' claim, and urged that there was a defect of parties to the suit. The plaintiffs thereupon applied to the Court that certain other persons might be added. In compliance with this petition an order was passed making those persons defendants, *viz.*, defendants 9 to 17.

The defendants 9 to 17 put in no defence in Suit No. 112, but in Suit No. 190 they put in a written statement stating that they had no interest in the subject-matter of dispute, and that they had therefore been made parties unnecessarily.

During the progress of these suits, the plaintiffs and defendants 1 to 8 made an application to the Court, in which defendants 9 to 17 did not join, for the purpose of having the suits referred to arbitration, and on the 18th February 1882 an order was passed referring the suits to the arbitration of three pleaders of the District Court.

The arbitrators took evidence and gave their award in favour of the defendants, finding that the plaintiffs were not entitled to be registered as fractional sharers in the mauza. This award was on the 4th October 1882 submitted to the Court, and the Court passed a decree in accordance with this award.

[39] On the 13th November 1882, the day on which the Court re-opened after the vacation, the plaintiffs filed the following objections to the award and asked that the award might be set aside, *viz.*: (1) that all the defendants had not joined in the reference to arbitration, and that therefore the award was bad, (2) that the defendants fraudulently concealed certain facts from the arbitrators, (3) that the arbitrators were guilty of misconduct. On the 6th December 1882 the Subordinate Judge found that the objections taken by the plaintiffs had not been made out, and held that the award should be enforced, and passed judgment in accordance with the awards under s. 522 of the Code of Civil Procedure, the period allowed by law for preferring objections against the award having expired.

The plaintiffs preferred an appeal to the District Judge, who, on the 9th January 1883, held that under the concluding portion of s. 522 of the Code no appeal would lie.

The plaintiffs appealed to the High Court.

Baboo Mohesh Chunder Chowdhry, Baboo Chunder Madhub Ghose, and Baboo Raghu Nundun Pershad for the Appellants contended that the defendants 9 to 17 not having agreed to refer the matter to arbitration, and not having been parties to the arbitration proceedings, the proceedings taken were

without jurisdiction and the award invalid, and the decree passed in accordance with the award was not therefore such a decree as is referred to in s. 522 of the Code.

Baboo Abinash Chunder Banerji for the Respondents cited *Shitanath Biswas v. Kishen Mohun Mookerjee* (5 W. R., 130), *Ram Soonder Mookerjee v. Ram Shurun Mookerjee* (6 W. R., 25), *Doorga Churn Thakoor v. Kally Doss Hazra* (10 W. R., 463), *Bishoka Dasia v. Anunto Lall Parn* (4 C. L. R. 65), as showing that the award was valid notwithstanding some of the parties had not joined in the reference to arbitration.

The **Judgment** of the Court was delivered by

Garth, C.J.—These suits were brought on the following allegations.

In mehal No. 2286 of the 'Saran Towjee, mauza Bissumbhurpur *alias* Aphur represents a 2-annas kolum or share, and of this [40] 6 pies belonged to Manessur Sahai and Mussammat Luchmi Koer. A private partition of the mauza having been made, the said share comprised among other lands 11 biggahs of *zeral* land in Aphur and 9 biggahs in Putti Esrawan.

Appeal No. 666 relates to the 9 biggahs in Putti Esrawan, and the plaintiffs allege that they purchased these 9 biggahs (with other lands) in certain execution proceedings, and applied to the Collector to have their names recorded as fractional co-sharers in the mehal, and this suit is brought in consequence of the Collector's refusal to so register them as fractional co-sharers.

Appeal No. 667 relates to 1 biggah out of the 11 biggahs in mauza Aphur, and the plaintiffs' allegation is, that they purchased this 1 biggah in certain other execution proceedings, but that the Collector has refused to register them as fractional co-sharers in the mehal in respect of this 1 biggah.

The defendants 1 to 8 are admittedly the purchasers of the 6-pie share of Manessur Sahai and Mussammat Luchmi Koer, after excluding the lands of Putti Esrawan.

The defendants 9 to 17 are the other co-sharers in the 2-annas kolum; they were added as defendants on the objection of defendants 1 to 8, in suit No. 112 on 8th February 1882, and in Suit No. 190 on 17th August 1881. In this latter case they filed a written statement on 16th September 1881 in which they supported the plaintiffs' allegations, and urged that they had been improperly made defendants.

On the application of the plaintiffs and defendants 1 to 8, both suits were referred to arbitration on the 15th February 1882. The defendants 9 to 17 admittedly did not join in this application.

The arbitrators found that the plaintiffs, as the proprietors of specific plots of land within the mehal, were not entitled to be registered as fractional sharers therein, and the first Court gave a decree in accordance with this award, dismissing the plaintiffs' suit.

The plaintiffs having preferred an appeal, the District Judge held that under the concluding portion of s. 522 of the Code of Civil Procedure, no appeal would lie, and he accordingly rejected the application.

[41] It is contended here, that the order of the District Judge was wrong. It is said that the defendants 9 to 17 not having agreed to refer the matter to arbitration, and not having been parties to the arbitration proceedings, those proceedings were irregular and without jurisdiction, and the award invalid, and that being so, the decree passed in accordance with the invalid award was not such a decree as is referred to in s. 522 of the Code of Civil Procedure.

The question in this case is, whether under s. 522 of the Code of Civil Procedure, an appeal lies against a decree given in accordance with an award. It has been held both by this Court and by the Allahabad Court in *Debendra Nath Shaw v. Aubboy Churn Bagchi* (I. L. R., 9 Cal., 905) and *Lachman Dass v. Brypal* (I. L. R., 6 All., 174), that the answer to this question must depend upon whether the award upon which the decree was based was a valid and legal award. We see no reason to differ from this view of the law. As therefore in this case the question was whether the award was valid, it is clear that the lower Appellate Court ought to have tried the appeals. But it would be obviously useless to remand the case to that Court; we think that as a matter of law the judgment of the first Court should stand.

Upon this point certain cases have been cited before us, in which it was held that the award was good, notwithstanding that some of the parties had not joined in the reference (5 W. R., 130; 6 W. R., 25, 10 W. R., 463, 4 C. L. R., 65).

We are not quite satisfied with those decisions, and we think that upon some future occasion it may be right to review them. But until a suitable occasion arises, we must be guided by their authority, and we are the more disposed to follow them in this instance, because the justice of the case is so clearly in favour of that view.

The plaintiffs are here attempting to set aside an award, and a judgment founded upon that award, on account of a technical mistake to which, if it is a mistake at all, they have themselves been parties. They themselves were the means of excluding the defendants 9 to 17 from the arbitration proceedings, and they never thought of taking the point, upon which they now rely, until the award was made against them.

[42] So far as we can see, the award is a perfectly fair one and the plaintiffs have, as a matter of justice, no reason to complain.

Both appeals are dismissed with costs.

Appeals dismissed.

NOTES.

[1. FINALITY OF AWARD—

Under the C. P. C., of 1882, before the Privy Council case of *Ghulam Jilani v. Mahomed*, 29 Cal., 167, the legality of the award might be made the subject of appeal —16 Cal., 482, 24 Cal., 908, 25 Cal., 141; 757, 27 Cal., 61, 17 Bom., 357; 20 Bom., 596, 15 Mad., 348, 18 All., 422. See now the alteration in the C. P. C., 1908, (1912) 9 A. L. J., 258.

I. LEGALITY WHEN SOME OF THE PARTIES TO A SUIT REFER—

All the parties should join in the reference, 9 C. W. N., 873, 6 A. L. J., 333; 31 All., 150; 8 A. L. J., 645, 28 Cal., 303, 26 Mad., 47, 11 C. W. N., 1152, 33 Cal., 899.

The C. P. C., 1908, has qualified the word 'parties' by adding 'interested'.—14 I. C. 562.]

[11 Cal. 43]

APPELLATE CIVIL

The 8th September, 1884.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
BEVERLEY.

In re Sunder Dass.Petitioner.

*Civil Procedure Code—Act XIV of 1882, s. 295—Decree-holders sharing
rateably in sale proceeds must be bonâ fide decree-holders*

The words “decree-holders” or “persons holding decrees for money against the same judgment-debtor” in s. 295 of the Code of Civil Procedure, signify *bonâ fide* decree-holders.

A Court is bound, in cases falling within this section, to satisfy itself whether the claimants are *bonâ fide* decree-holders within the meaning of the section, and where it is unable to satisfy itself as to the *bonâ fides* of the claim, the Courts should exclude such claimant from the distribution of assets.

ON the 9th February 1884 one Hur Pershad Dass obtained a decree in the Court of the Subordinate Judge of Arrah for Rs. 5,000 against Raghu Nath Pershad and six others upon certain hundies.

On the 15th March 1884 Hur Pershad Dass sold this decree to one Sunder Dass, and on the 18th March 1884 Sunder Dass applied to have his name entered on the record as decree-holder, and on the 3rd April 1884 an order was passed granting this application.

Sunder Dass made several applications for execution of this decree, and the sale of certain properties of the judgment-debtor was ultimately fixed for the 7th July 1884, the judgment-debtor having obtained a postponement of a previous order for sale dated the 2nd June.

On the 7th July 1884 the properties were sold in execution of another decree obtained by one Mullick Feda Ali against the same judgment-debtors, and in consequence thereof the sale in execution of Sunder Dass's decree was stayed.

Sunder Dass, under s. 295 of the Civil Procedure Code, claimed to share rateably in the sale proceeds, but on the 11th July [43] 1884 Feda Ali applied to the Court stating that the decree held by Sunder Dass was held by him *benamée* for the judgment-debtor, and that, therefore, Sunder Dass was not entitled to share rateably with the other decree-holders.

The Subordinate Judge, by an order dated the 11th July 1884, declined to enquire into the question of *benamée* in execution proceedings.

On the 12th July 1884 one Shedeullah Lall presented another petition to the same Subordinate Judge raising the same question, and the Subordinate Judge, on the 14th July, made an order directing an enquiry into the question as to whether Sunder Dass' decree was held *benamée* or not.

Sunder Dass thereupon applied to the High Court to have the order of the Subordinate Judge, dated 14th July 1884, set aside, on the ground (1) that the order of the 11th July 1884 was a final order, and that the Subordinate Judge should not have gone behind that order and passed one inconsistent therewith; and (2) that the Subordinate Judge had no jurisdiction to enter into the question of *benamée* in a case under s. 295 of the Code.

*Civil Rule No 993 of 1884, against the order passed by Baboo Kali K Bannerjee, Subordinate Judge of Arrah, dated the 16th of July 1884.

A rule *nisi* was thereupon granted to Sunder Dass, calling upon Shedsul-lah Lall to show cause why the order of the Subordinate Judge should not be set aside.

Upon the hearing of the rule,—

Moulvi Mahomed Yusuf appeared in support of the rule.

No one appeared on the other side.

The Order of the Court was delivered by

Garth, C.J.—Upon the best consideration that we have been able to give to this case, we think that the rule should be discharged. We granted the rule, having regard to the fact that s. 295 of the Code introduced a novel procedure in execution cases, and that the point submitted to us had arisen, so far as we were aware, for the first time.

We have not had the advantage of hearing both sides; but having heard the learned pleader who obtained the rule, we think that it should be discharged.

The person on whose behalf he applied, claimed as a decree-holder to share in the proceeds of a sale, which had been made [44] in execution of a decree obtained by another person. There were several decree-holders who claimed a share in those proceeds, and under these circumstances, the Court, under s. 295, is bound to divide the assets rateably amongst all the persons who hold decrees against the same judgment-debtor, and who have not obtained satisfaction of their decrees.

The objection taken before the Court below against the decree-holder who obtained this rule, was, that his decree against the judgment-debtor was not a *bona fide* decree, and that he held it in fact in trust for the judgment-debtor, and, if that were true, and the claimants were to share in the distribution of the assets, the other decree-holders might, under the last clause but one of s. 295, recover back the money from him.

That clause runs thus. "If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

Munshi Mahomed Yusuf has contended that this clause is in his favour. He says, that is the only way in which the question can be properly tried, whether his client is entitled to share in the assets or not, and that the Court below, in the execution case, had no right to go into the question. He contends that, so long as his client holds a decree against the judgment-debtor, which is unsatisfied (let that decree be ever so fraudulent) still the Court is bound to give effect to it, and to allow the decree-holder to share in the assets.

We cannot adopt that view. We think that the words "decree-holders" or "persons holding decrees for money against the same judgment-debtor" in s. 295 must mean *bona fide* decree-holders against the judgment-debtor; and if in point of fact the decree which the present applicant holds is a sham decree, we think that the Court has a right to enquire into the question, and to exclude him from the distribution of assets.

If this were not so, it is obvious that the section would give rise to a great deal of fraud, because any man, who is in difficulties, and likely to have executions issued against him by *bona fide* creditors, might always have a number of sham decrees in readiness against himself, to defeat the claim of any *bona fide* [45] creditor who might put in an execution. As soon as the *bona fide* creditor put in his execution, and sold the property, these sham decree-holders, who would really represent the judgment-debtor, might come in, and completely sweep away all the assets from the *bona fide* decree-holder.

But thereby says Munshi *Mahomed Yusuf*, if his client did improperly get hold of the assets, he might be made to disgorge them by a suit.

That is perfectly true ; but, on the other hand, his client might run away with the money, and it is not always easy to get back money out of the hands of a dishonest person. We think that a Court is bound to see, on occasions of this kind, when assets are to be distributed, whether the claimants are *bona fide* decree-holders within the meaning of the section : and even if the Court should decide in favour of the claimants, the last clause but one of s. 295 is intended to give the person or persons, who may be affected by that decision, the right to bring a regular suit to establish his or their rights.

We think, therefore, that the rule must be discharged

Rule discharged.

NOTES.

[In (1888) 13 Bom 154 (156) this case was followed ; but though doubted in 1 C.W.N. 638 (635) it was held in (1912) 17 C W N. 326, 328 that the Court could determine whether the claimant was a *bona fide* creditor or not]

[11 Cal. 45]

APPELLATE CIVIL

The 10th September, 1884.

PRESENT ·

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE PRINSEP.

Sotish Chunder Lahiry (one of the plaintiffs, decree-holders)... ..Petitioner
versus

Nil Comul Lahiry and others (judgment-debtors) Opposite Parties.*

*Sale in execution of estate of deceased—Suit against representatives of
deceased husband's estate.*

In 1862 a suit for mesne profits was brought against certain persons as being the heirs of one Romanath Lahiry deceased, among whom were his widow and two infant sons , during the pendency of this suit, the two infant sons died , and the widow was made a defendant as representing the estate of her deceased sons.

The suit was decreed in favour of the plaintiffs in 1875 ; and on the plaintiffs applying for execution, the widow objected that 5-16ths of the properties, against which execution was sought, was the property of her adopted son [46] whom she alleged to have adopted in 1874 ; the adopted son was not made a party to the suit ; this objection was overruled, but the same objection was taken by the adopted son through his natural father as his guardian and next friend, and the Court released the 5-16ths share from attachment, and allowed the objection.

Against this order some of the plaintiffs appealed, but pending the appeal another of the plaintiffs applied to the High Court under s. 622 of the Code of Civil Procedure to have the order set aside. The Court, whilst refusing to interfere with the order, inasmuch as there appeared to be no material irregularity therein, pointed out to the lower Court that the decree of 1875 having been obtained on account of a debt of Romanath Lahiry's, and being against

* Civil Rule No. 539 of 1884, against the order of J J S. Driberg, Esq., Deputy Commissioner of Dhubri, dated the 31st of December 1883.

the widow as representing her husband's (Romanath's) estate, the estate would be answerable for the debt, whether the widow or the adopted son represented the estate, supposing the decree to have been properly obtained. The principle in *Ishan Chunder Mitter v. Buksh Ali Soudagur* (Marsh., 614) followed.

On the 25th July 1854, one Kali Chundra Lahiry obtained possession of certain properties which had been allotted to him under certain butwara proceedings arising out of a suit brought by his late father against one Romanath Lahiry. Romanath Lahiry died in 1854, leaving two sons, Shib Nath Lahiry, the husband of one Bhubunesshuree Dabia, and Nil Comul Lahiry.

Subsequently to the death of Kali Chundra, which took place some time between 1854 and 1862 his widows, Goonomonee Dabia and Burroda Sundary Dabia, with Sotish Chundra Lahiry and Wipendra Chundra Lahiry on the 28th January 1862, instituted a suit for mesne profits, on account of the lands which had been allotted to Kali Chundra, against the heirs of Romanath Lahiry, who were then in existence, *viz.*, Nil Comul Lahiry, Bhubunesshuree Dabia, widow of Shib Nath Lahiry, and her two minor sons. This suit was dismissed by the Court of First Instance. On appeal, the High Court remanded the case to determine the amount of mesne profits recoverable by the plaintiffs, and the Privy Council subsequently upheld this latter decree. On the 6th September 1875 wasilat was decreed. During the pendency of this suit the two infant sons of Bhubunesshuree died, and the latter was made a defendant as representing the estate of her deceased sons, as well as the estate of her deceased husband, being described in the decree as "Bhubunesshuree Dabia, widow of Shib Nath Lahiry, son of Romanath Lahiry."

Against this decree of 1875 an appeal was preferred by the defendants other than Bhubunesshuree, and the High Court, on the 4th September 1880, modified the decree. This decree, as drawn up, made the appealing defendants liable for the amount of wasilat and costs, it was, however, amended by making all the defendants in the suit liable for wasilat and costs.

The plaintiffs applied to execute this decree, but Bhubunesshuree objected on the ground that she was not liable under it, and that 5-16ths of the properties, against which execution was sought, belonged to her adopted son, Jotendro Mohan Lahiry, whom she alleged she had adopted some time before the decree was passed, but during the pendency of the suit, *viz.*, in 1874. This objection was overruled. Thereupon Jotendro Mohan Lahiry, through his natural father, one Aukhoy Chunder Singh, applied under s. 278 of the Civil Procedure Code for the release of 5-16ths of the properties attached, on the ground that they belonged to him as the adopted infant son, stating that he was not a party to the suit in which the decree of 1875 had been passed. On the 3rd December 1883 the Deputy Commissioner of Goalpara allowed this objection, and released 5-16ths of the property from attachment. Against this order (the decree-holders) Burroda Sundary Dabia and her two minor sons preferred an appeal to the High Court, but previous to the hearing Sotish Chundra Lahiry, one of the plaintiffs in the suit, applied to the High Court under s. 622 of the Code to set aside the order of the 31st December 1883, and for the amendment of the decree by adding the name of Jotendro Mohan Lahiry as a party defendant to the suit.

Upon this application a rule was granted calling upon the judgment-debtor and Jotendro Mohan Lahiry, through his father Aukhoy Chundra Singh, to show cause why the order of the 31st December 1883 should not be set aside, and why, if necessary, the decree of the High Court, dated 4th September 1880,

should not be amended by adding therein the name of Jotendro Mohan Lahiry through a properly constituted guardian.

Mr. *Phillips*, Mr. *W K Dass* and Baboo *Upendra Chunder Mittra* appeared to show cause against the rule.

[48] Mr. *Phillips*.—The question is, whether this order of December 1883 is a proper order, and whether the Court will interfere with it under s. 622. The order is one of a competent Court exercising jurisdiction, and determining that the claim ought to be allowed. The order is not now up on appeal, and it is no question whether the Court has passed a correct order on the facts, it is not a question as to whether the Deputy Commissioner has decided on erroneous principles.

[GARTH, C.J.—Although we may not be able to interfere under s. 622 there is no reason why we should not explain to the Court below what is the law on the subject.]

Mr *Evans*, Baboo *Annoda Pershad Banerjee*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Mohini Mohun Rai* and Baboo *Isvara Chundra Chukrabarti* in support of the rule.

Mr. *Evans*.—The order is a misconception of jurisdiction, the suit was instituted in 1862 against the widow and her two minor sons as representatives of the estate of her husband. It may turn out that the adopted son is the person entitled, yet, as we obtained a decree against the estate of the husband, we were entitled to execute our decree notwithstanding the adoption. See *Ishan Chundra Mitter v Baksh Ali Soudagan* (Marsh, 614), *Court of Wards v Maharajah Coomar Ranaput Sing* (10 B L R., 294), *Jotendro Mohun Tagore v. Jogul Kishore* (I. L. R., 7 Cal., 357).

Is it not a material irregularity if Jotendra Mohan comes in and asks for the release of the estate? The answer is, it ought not to have been tried as a claim at all. It is an abuse of the claim sections to try and prevent us from executing our decree.

The **Order** of the Court was delivered by

Garth, C.J. (PRINSEP, J., *concurring*).—This was a rule obtained by Mr. *Evans* calling upon the claimant in the execution proceedings in this case to show cause why the order which had been made by the Deputy Commissioner, releasing certain property from attachment (which property is now supposed to belong to the claimant) should not be set aside, upon the ground that it was made with material irregularity

[49] The circumstances are these. The suit was brought, so far back as the year 1862, by the present plaintiff against the widow and the two minor sons of Shib Nath Lahiry for mesne profits, and that suit eventually came before the Privy Council, and the Privy Council made a decree in favour of the plaintiff and sent the case back, in order that the amount of the wasilat should be ascertained.

Subsequently, in the year 1874, the widow professed to adopt, and is said to have adopted, the person whom I call the claimant. The ultimate decree that was obtained was obtained in the year 1880. Certain property was then attached as liable to satisfy the decree, and an application was afterwards made by the claimant to have the property released from attachment, upon the ground that he was in possession of it, or rather, that the widow was in possession of it for him, and that he was in point of fact, in possession of it and not the widow; and the Deputy Commissioner made an order that the property should be released from attachment.

This is the order against which this rule was obtained ; it is said that the Judge acted with material irregularity in making that order.

We cannot see that he acted with any irregularity. He might have made a mistake in making such an order, but it was for him to determine whether the attachment should, or should not, be set aside, and under different circumstances the order which he made might have been a proper one. But he probably was not aware of the difficulty which often attends the solution of questions of this kind in point of law.

If the decree which was obtained was virtually a decree against the husband's property, it would bind that property, whether the person sued was the widow, or the adopted son.

It is not for us to determine here what was the legal effect of the decree, but so far as we can understand, the decree was in the first instance obtained against the widow as representing her husband's estate ; and it also appears to have been obtained for a debt of the husband. Therefore, whether the widow now properly represents the estate, or the adopted son properly represents the estate, the [50] estate would nevertheless be answerable for this debt, supposing the decree to have been properly obtained.

This case would seem to come within the principle of a case decided some years ago in this Court, and which was afterwards approved of by the Privy Council—the case of *Ishan Chunder Mitter v. Baksh Ali Soudagur* (Marsh., 614).

The circumstances of that case were these. A widow was there sued upon a bond, which had been given by her deceased husband, and at a time when she was not the heir of her husband, because the heir of the husband was her son, of whom she was only the guardian.

The suit, nevertheless, proceeded against the widow, and a decree was obtained against her, and under that decree the husband's property was sold.

The son then brought a suit to recover this property, upon the ground that at the time when the decree was obtained against the widow, and the property sold, she did not properly represent the estate ; but it was held, that as in point of fact she was the registered owner of the property, and as the suit was brought against her in respect of her husband's debt, and as by the terms of the decree the estate was rendered liable for the debt, the sale under the decree against her bound the property, although her son was no party to the suit. The principle of that decision has been adhered to in several other cases, and has been confirmed by the Privy Council. In the case of the *General Manager of Raj Durbhanga v. Maharajah Coomar Ramaput Singh* (14 Moo. I A., 605) the suit had been brought by A against B for arrears of rent, and (B having died pending the suit) a decree was obtained by A against B's widow, who had been made a defendant in his stead. Under that decree an execution was issued and "the interest of the widow" was sold under that decree. The widow in fact did not represent the estate of her husband, because there was a son who was the husband's heir. The sale was subsequently called in question by a creditor ; and it was held by the Privy Council that, although the son was never made a party to the proceedings, and although the widow did not properly represent the estate, still as the decree was obtained against the estate [51] under the decree passed the husband's property. In that case their Lordships say : "The whole proceeding, if fairly looked at, amounts to this—that the estate of Gourpershad (the father) was sold under that decree in execution for his debt, and that the interest of his widow, the registered proprietrix and ostensible owner of the estate, and also the interest of the son, if he had any interest, was bound by that decree. If that be so, the question arises, whether the respondent, the plaintiff in the suit below, has any ground

upon which he can come in and impeach the sale. It appears to their Lordships, that he can claim only what interest remained in Gourpershad, and that substantially the proceedings would be a bar to any claim on the part of Hurpershad." And further on their Lordships say: "Their Lordships also desire to add that they are unable to see any substantial distinction between this case and that of *Ishan Chunder Mitter v. Baksh Ali Soudagur* (Marsh, 614). They entirely agree in the principles expressed by Chief Justice PEACOCK in that case, and think that they govern the present case."

There is also another authority in I. L. R., 7 Cal., 357, in which the cases on this subject are reviewed, and in which this same doctrine was acted upon.

Therefore, if, as would appear to be the fact, the decree in this case was a decree against the husband's estate, and it was obtained against the widow as representing the husband's estate, it seems, according to the principle of these cases, that it would bind that estate whether the widow or the adopted son was the proper representative.

Under these circumstances, apparently, this property was attached, and the adopted son comes in and makes an application to the Court to have the property released from attachment. Probably, if the Judge had been aware of the authorities that I have quoted, instead of making the order which he did, he would have suggested, what I am about to suggest now, that the adopted son should be made a party to the proceedings (which would be, of course, perfectly fair), but that the attachment should continue, unless the adopted son were able to show some good cause why the sale should not take place.

If the decree were against the estate, it would seem, so far [32] as we can see, to matter very little whether the widow or the adopted son was the proper representative. But it is quite right that the adopted son should be made a party to the proceedings, in order that, if there was any good reason against the sale, he might be able to show it.

After the observations that we have made, the plaintiff will see that his proper course will be to make an application to the Court below, to have the adopted son made a party to the proceedings.

What we are asked to do now, is to set aside the order made by the Deputy Commissioner, releasing the property from attachment or to make the adopted son a party to the proceedings. We have no power to do either one or the other. We have no materials before us, which would justify us in setting aside the order; nor have we any power in this Court to order that the adopted son be made a party to the proceedings. That, of course, must be the subject of an application to the Court below.

If the adopted son is made a party to the proceedings, and another attachment is then issued, the order which has been made will be no bar to the execution.

We therefore think that the rule should be discharged, but, under the circumstances, we make no order as to costs.

Rule discharged.

NOTES.

[With reference to the remark that there may be joinder of parties in execution, Mr. Hukm Chand in his *Civil Procedure* (1900), Vol I, p 448, observed. "The joinder was not said to be under sec. 32, C. P. C., 1882, and not only no authority was cited in support of the course, but the opinion was *ultra vires*." See also (1887), 10 All., 97.

As regards the substantial representation in suits and execution proceedings, see (1888) 16 Cal., 40; 15 I. A. 195; (1888) 11 Mad., 408; (1885) 9 Bom. 429; (1897) 2 C. W. N., 251; (1895) 20 Bom., 336 (344), (1896) 21 Bom., 539, (1900) 25 Bom., 337.]

[11 Cal. 52]

CRIMINAL MOTION.

The 9th October, 1884.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

In the matter of Hari Mohun Thakur and another.....Petitioners
versus

Kissen Sundari and another.....Opposite Parties.

Burden of proof—Easement—Act X of 1882, s. 147.

The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land, the burden of proof would, therefore, lie upon the party alleging such rights

THIS was a proceeding under s. 147 of the Criminal Procedure Code. The parties were zamindars of Chunderpore and Amkhuria respectively, in the district of Bhagulpore. The dispute arose owing to the Amkhuria zamindars having used the water of a certain reservoir by cutting the spur of an old *bund*. It was [33] admitted that the *hathu* or spur in question lay wholly within the village of Amkhuria. The Court of First Instance (the Deputy Magistrate) held that as there was no reliable evidence to show that the Amkhuria party had, on any previous season during several years prior to the dispute, used the water of the reservoir by cutting through the spur, they should refrain from doing so now. The Amkhuria party applied to the High Court to have that order set aside. It was contended on behalf of the petitioners that, inasmuch as the ditch in dispute lay admittedly within their zamindari, the Deputy Magistrate ought to have called upon the opposite party to abstain from interfering with the cutting of the *bund*, and that the provisions of s. 147 were wholly inapplicable to the case.

Mr. Jackson and Baboo Gonesh Chunder Chunder for the Petitioners.

Mr. M. M. Ghose, Mr. O. C. Mullick and Baboo Charu Charun Mitter for the Opposite Party.

The **Judgment** of the Court (WILSON and MACPHERSON, JJ.) was delivered by

Wilson, J.—It appears to us that the order of the Deputy Magistrate in this case cannot be sustained. The controversy was between the proprietors of two neighbouring properties. In the proceedings before the Deputy Magistrate, the parties of the first part were the proprietors or persons connected with the proprietors of village Chunderpore. The parties on the other side were the proprietors or people connected with the proprietors of village Amkhuria. Now, it appears that there is a reservoir of some considerable size, which stands mainly within the limits of Chunderpore, but partly within the limits of Amkhuria, and partly within the precincts of another property belonging to persons different both from the first and second party. The reservoir is secured by a *bund* running along its north side with a spur at the western end, and a spur at the eastern end, both running southerly, the western spur and the adjacent portion of the reservoir being within the limits of Amkhuria. It appears that in the present year the

* Criminal Revision No 352 of 1884, against the order of Baboo Ram Narain Banerji, Deputy Magistrate of Bhagulpore, dated the 15th September 1884.

Amkhuria people set about cutting a passage or ditch through the western [54] spur, in order to draw the water of the reservoir to their village Amkhuria, and this was objected to by the Chunderpore people, and there being information that a breach of the peace was imminent, proceedings were taken under s. 147. Now, it is necessary, in order to appreciate these proceedings, to see exactly the position in which the parties stand. The Amkhuria people stand simply upon their ordinary proprietary right as owners of the lands of Amkhuria. They claim a right which *prima facie* all proprietors are entitled to exercise, viz., to cut a *bund* on their own land, and use the water standing on their own land. On the other hand, the Chunderpore people claim a right, which they may very well have, but which it lay upon them to establish, viz., to restrain the Amkhuria people from exercising ordinary proprietary rights over their own land. That is a right of the nature of an easement different from ordinary rights of owners of land. And in order to entitle them to ask for an order under s. 147, the Chunderpore people had to satisfy the Magistrate that the alleged right existed, that is to say, that the Chunderpore people had the right of restraining the Amkhuria people from doing as they would on their own land. The Deputy Magistrate, before whom the matter came, appears to us to have misunderstood the question which he had to deal with. He assumes that the question before him was not as to the easement alleged by the Chunderpore people, but the right of the Amkhuria people to cut their own *bund* and draw water standing on their own land. The finding which he arrives at is this. "The Court finds that the second party did not exercise any right in drawing water from the Banhara *bund* by cutting its western path for several years, and that they took no water from it by opening kunwas during the season next preceding such institution, and therefore the Court directs that they must not do so now, and that the western bottom be not cut till they obtain the decision of a competent Civil Court adjudging them to be entitled to do such thing." The Deputy Magistrate appears to us to have wholly misunderstood the question before him. He threw the burden on the wrong side, and his findings are insufficient to support the order that he has made. It is not necessary for us to say anything about the view taken by [55] the Deputy Magistrate of the proviso to s. 147. Whether that proviso really has any application to a case of this kind is a question of considerable difficulty, and one as to which we are not disposed to express any opinion at present. It is sufficient to say that in our judgment the order made by the Deputy Magistrate is not supported by any finding which he has arrived at, and that this order must therefore be set aside. Any costs that may have been paid under the orders of the Court will be refunded.

Order set aside.

NOTES.

[See also 8 C. W. N., 359, 29 Mad., 97, 15 M. L. J., 394.]

[11 Cal. 55]

APPELLATE CIVIL.

The 12th September, 1884.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Becharam Dutta.....(Judgment-debtor) Appellant

versus

Abdul Wahed and others.....(Decree-holders) Respondents.*

Execution of decree—Limitation—Application for execution by what limitation governed—Act XV of 1877—Act XIV of 1859, s. 20—Proceeding to enforce judgment.

Act XV of 1877 operates from the date on which it came into force as regards all applications made under it

Behary Lall v. Goberdhan Lall (I L R., 9 Cal., 446) dissented from.

An application for execution was made on the 2nd of March 1872. In the execution proceedings certain properties were attached and a sale proclamation was issued. A claim to a portion of the properties was then preferred by third parties, and allowed on the 17th of June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. A subsequent application for execution was made on the 14th of June 1875

Held, that the subsequent application was not barred by the provisions of s. 20, Act XIV of 1859

Bona fide proceedings in resistance of a claim to attach properties are proceedings to enforce a decree within the meaning of s. 20 of Act XIV of 1859.

In this case Abdul Wahed and others were the holders of a decree obtained, on the 10th January 1872, on a bond against one Becharam Dutta. The first application for execution of this decree was made on the 2nd March 1872, the second on the 14th June [56] 1875, the third on the 11th June 1878, the fourth on the 8th June 1881, and the fifth and last on the 10th March 1883. The judgment-debtor, on this last application, objected that execution was barred by limitation, inasmuch as the application of the 14th June 1875 was not made within three years from the date of the application made on the 2nd March 1872. The Munsif decided against him, and the judgment-debtor appealed to the District Judge.

The judgment of the District Judge was as follows :—

“ In his application of the 14th August 1883 to the Munsif, the appellant asserted that the decree had been pronounced *ex parte*, and that execution had not been sued out within three years of the date thereof. Both these allegations being admittedly false, he changed his ground at the hearing and urged that the decree could not be executed, inasmuch as the second application for execution was not presented within three years of the date of the first. Such was unquestionably the fact, but it cannot avail the appellant. The Judge who entertained the second application for execution had jurisdiction to determine whether it was or was not within time. He decided that it was. According to *Mungul Proshad Ditchai v. Gria Kant Lahuri* (I. L. R., 8 Cal.,

* Appeal from Appellate Order No. 40 of 1884, against the order of J. F. Bradbury, Esq., Judge of Buckergunge, dated 22nd of December 1883, affirming the order of Baboo Chandra Nath Ghose, Third Sudder Munsif of Barisal, dated the 17th of September 1883.

51), the application of 1875 should have been held to be governed by Act XIV of 1859, but inasmuch as till the publication of the Privy Council decision above cited, all the High Courts in India invariably held that the law of limitation in force at the time of the presentation of an application for execution governed such application, I do not suppose the provisions of s. 20, Act XIV of 1859, were considered when the application of the 14th June 1875 was admitted. Admitted however it was, and a notice, under Act VIII of 1859, s. 216, issued thereupon, but no further proceedings were taken. Upon the first application immoveable property had been attached and notified for sale. To a portion of the property attached a claim was preferred, and the claim was allowed on the 17th June 1872. The sale of all the property attached seems to have been unnecessarily stayed on account of the claim preferred to a fraction only thereof, and the first application finally proved infructuous. Upon these facts I think the Munsif would in June 1875 have been justified in considering that the requirements of s. 20, Act XIV of 1859, had been complied with, even however if such a finding cannot be supported, and should be deemed erroneous, it became final long ago. Not only the Court which entertained the application of the 14th June 1875, but those Munsifs who received the applications of the 11th June 1878 and the 8th June 1881 pronounced by implication that the application of the 14th June 1875 was in time, for unless it had been within time, the subsequent applications were clearly barred by [87] limitation. On the application of the 11th June 1878, two attachments issued, but without result, and the proceedings thereon terminated infructuously on the 12th December 1878. The next application was equally infructuous. A notice issued under s. 248 of the Civil Procedure Code and nothing more was done. In this instance, as in every other where proceedings in execution have been protracted, remissness on the decree-holder's part may be safely assumed. The respondents might unquestionably have prosecuted their decree with much more diligence than they exhibited, but in applying in 1883 the provisions of s. 20 of Act XIV of 1859, if they be applicable, it should I think be recollected that till the publication of *Mungul Proshad Dichit v. Grija Kant Lahiri* (I.L.R., 8 Cal., 51), parties, Courts and pleaders were alike under the impression that provided application succeeded application within three years, that sufficed to keep the decree alive. It would be unjust, therefore, to impute to the decree-holders bad faith, because they did not do more than what Act IX of 1871, the law which they and their advisers conceived to govern the execution of their decree, required. Section 20 of Act XIV of 1859, if it applies, does not I consider bar execution of their decree. It is true indeed that even on the hypothesis of the applicability of Act IX of 1871, the petition for execution of the 14th June 1875 was out of time, but *Mungul Proshad Dichit v. Grija Kant Lahiri* (I.L.R., 8 Cal., 51), I apprehend, prohibits our now questioning its admissibility. The admission thereof, by a Court possessing jurisdiction over it, having not been set aside, is final, and has been since confirmed by implication whenever a subsequent application for execution has been entertained and acted upon. The appellant has changed his ground more than once. I have clearly stated what his contention before the Munsif was. In appeal he has argued further that the application of 1878 likewise not having been prosecuted in good faith was insufficient to save limitation.

"For the reasons recorded above, I do not consider that any of the applications for execution were barred by Act XIV of 1859, and *Mungul Proshad Dichit v. Grija Kant Lahiri* (I.L.R., 8 Cal., 51) prevents our calling in question the admissibility of any but the last. On the last, the question might have arisen whether that of 1881 had been prosecuted with sufficient diligence to

save limitation; but this only on the assumption that Act XIV of 1859 governs the execution of the respondents' decree. The Munsif has acted on that hypothesis, and he may be right in holding that the repeal of Act IX of 1871 by Act XV of 1877 has made no difference. In *Behary Lall v. Goberdhum Lall* (I. L. R., 9 Cal., 446), MITTER and NORRIS, JJ., expressed the view adopted by the Munsif, but in a later case of *Radha Prosad Singh v. Sundur Lal* (I. L. R., 9 Cal., 644), MITTER and FIELD, JJ., refused to determine the question whether after the passing of [38] Act XV of 1877, Act XIV of 1859 could be deemed to still govern the execution of any decree whatsoever. Under these circumstances, I think the Munsif wisely decided in favour of the right to proceed, and I affirm his decision with costs."

From this decision the judgment-debtor appealed to the High Court.

Baboo Chunder Madhub Ghose and Baboo Jogesh Chunder Roy for the Appellant.

Baboo Kash Behari Ghose for the Respondent.

The Judgment of the Court (PRINSEP and MACPHERSON, JJ.) was as follows —

This is an appeal from an order directing the execution of a decree passed on the 10th of January 1872. The question is whether the execution is barred by the law of limitation.

The lower Court assumed that the whole proceedings, up to and inclusive of the last application for execution, are governed by Act XIV of 1859, but this seems to us to be an incorrect assumption. The Judicial Committee of the Privy Council has held in *Mungul Proshad Dicit v. Ganga Kant Lahiri* that the provisions of the Act IX of 1871 do not apply to any suit, or to any application in a suit, instituted before the 1st of April 1873, and that an application for the execution of a decree is an application in the suit in which the decree was obtained. The effect of this decision is, that so long as Act IX of 1871 was in force, Act XIV of 1859 governs all applications for the execution of a decree passed in any suit instituted before the 1st of April 1873. Act IX of 1871, which repealed Act XIV of 1859, was, however, wholly repealed by Act XV of 1877, which came into force on the 1st of October 1877. The latter Act contains no saving clause similar to that in s 1 of Act IX of 1871, and which made the Act of 1871 inapplicable to any suit instituted before the 1st of April 1873.

Consequently, in our opinion, Act XV of 1877 operates from the date on which it came into force as regards all applications made under it. In the case of *Behary Lall v. Goberdhum Lall*, [59] MITTER and NORRIS, JJ., no doubt held that the provisions of Act XV of 1877 did not apply to an application for the execution of a decree obtained before that Act came into force.

In a subsequent case reported in I L R. 9 Cal, MITTER, J., seems to have doubted the correctness of his decision in *Behary Lall v. Goberdhum Lall* and we learn that the same learned Judges have since reconsidered the matter and have come to a different conclusion. There is, therefore, no authority opposed to the view which we entertain.

In the present case applications to execute the decree were made on the following dates. —

2nd March	1872.
14th June	1875.
11th June	1878.
8th June	1881.
10th March	1883.

The last three being governed by the present Limitation Act (XV of 1877) are within time under clause 4, art. 179 of schedule II. It is contended, however, that as the application of the 14th June 1875 was, when made, barred by limitation, the decree is dead and cannot be revived by any subsequent proceedings. It is unnecessary to consider whether the circumstances in this case and in the case of *Mungul Proshad Dicht v. Gria Kant Lahiri* are similar as regards the action of the Court in connection with the subsequent applications, because we think that both Courts have rightly held that the application of the 14th June 1875 was not barred under the provisions of s. 20 of Act XIV of 1859. In the execution proceedings of 1872 property was attached and a sale proclamation was issued. a claim to a portion of the properties was then preferred by third parties, and allowed on the 17th June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. The application of the 14th June 1875 was, therefore, within time, if the period of three years is calculated from the date when the claim-case was disposed of. We think it can be so calculated.

[6] Both Courts have found that the plaintiff was, up to the 17th of June, earnestly resisting the claim which, till disposed of, was a bar to further proceedings.

Bona fide proceedings in resistance of a claim to attach properties are, we think, proceedings within the meaning of s. 20, Act XIV of 1859, taken to enforce the decree. We therefore dismiss the appeal with costs.

Appeal dismissed

NOTES

[As regards retrospectivity, see (1894) 18 Mad., 482 (483), (1889) 16 Cal., 267, 10 C.L.J. 463.]

[61] PRIVY COUNCIL.

The 20th, 21st and 24th June, 1884

PRESENT

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE

Ajit Singh (Plaintiff) Appellant

versus

Bijai Bahadur Singh and another. (Defendants) Respondents.
and

Bijai Bahadur Singh and another. ... (Plaintiffs) Appellants

versus

Ajit Singh... (Defendant) Respondent

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Equitable conditions—Cancellation of deeds of sale and hypothecation
for fraud.*

Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee, who had advanced money, and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction, *held*, that the

condition of cancellation should be, not the repayment of all money received by the manager, but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager, as he would have been justified in borrowing in the course of a prudent management of the estate.

APPEALS, with cross-appeals (consolidated and heard as one), from two decrees of the Judicial Commissioner of Oudh (17th January 1882), confirming with a modification, two decrees of the District Judge of Rai Bareli (31st May 1881).

These consolidated appeals, and cross-appeals, were preferred in two suits, of which the first was instituted by the appellant, Raja Ajit Singh ; and the second, in the nature of a cross-suit, was instituted by Raja Bijai Bahadur Singh, and his wife, Rani Janki Kunwar.

The judgment of the Court of First Instance, the District Court of Rai Bareli, granting in part the relief prayed, was, with a modification in the decree made in the second suit, confirmed on appeal, and cross-appeal, by the Judicial Commissioner, who afterwards admitted the present appeal as involving substantial questions of law.

The object of the suit brought by the appellant, Raja Ajit Singh, who was talukdar of Tarwal, and also carried on business [62] as a money-lender, was to have enforced against the respondent and cross appellant, Raja Bijai Bahadur Singh, talukdar of Bakloipur, a mortgage executed by the latter on the 19th June 1878. The object of Raja Bijai's cross suit was to have that mortgage deed set aside, as well as a subsequent deed of sale, of certain villages, executed by him, to the appellant on 26th May 1879, and to have accounts taken. The ground of this suit was that the execution of the above instruments had been obtained by undue influence, exercised on Bijai by this appellant, and Bijai's *karinda*, or manager, named Wahaj-ud-din, they having been in collusion.

The Courts below concurred in finding that Bijai, though not insane, or an idiot, was of feeble intellect and liable to be imposed on, also that the appellant, Ajit Singh, without occupying a fiduciary position in the technical sense, had been able to influence the former, and that he had colluded with Wahaj-ud-din, whom he had recommended to Bijai. As the result, this appellant was declared entitled to recover only the amount of the advances made with eight per cent interest thereon.

On this appeal—

Mr. *E. Macnaghten*, Q. C., and Mr. *It. V. Doyle*, for the appellant and cross respondent, contended that the judgments of the Courts below were not supported by sufficient evidence of undue influence, or of collusion between the appellant and Wahaj-ud-din, that the rate of interest claimed was not excessive, and that the equity had been carried too far against Ajit Singh.

Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon*, for the respondents and cross appellants, contended that Bijai was only liable for what had been received by him, or had been borrowed for his benefit. A case for further equitable relief had been established.

Mr. *R. V. Doyle*, in reply, cited *Smith v. Kay* [7 H. L. Ca. (1861), 750]; *Nevill v. Snelling* (L. R., 15 Ch. Div., 679).

Their Lordships' **Judgment** was, at the conclusion of the arguments, delivered by

Sir R. P. Collier.—These appeals are in two suits. The first [63] was instituted by Raja Ajit Singh against Raja Bijai Bahadur and Rani Janki Kunwar, his wife, who is an independent talukdar, to recover a sum of

Rs. 1,37,000, principal and interest. upon a hypothecation bond of the 19th June 1878, from Bijai, against him personally, and for enforcement of a lien against the hypothecated property. The second suit was instituted by Bijai and his wife against Raja Ajit Singh; and it prayed for the recovery of possession, together with mesne profits, of certain property comprised in a sale deed of the 26th May 1879, and for cancellation of the deed on the ground of fraud, undue influence, and want of consideration.

The issues framed in the two suits were these. In the first suit—(1) "Was the defendant No. 1 (Bijai Bahadur) in an unsound state of mind when he executed the deed of the 19th June 1878?" (2) "Was it executed under fraud and undue influence?" (3) "Did the plaintiff (Ajit Singh) occupy a fiduciary position with reference to defendant No. 1 (Bijai Bahadur)?" (4) "Was the deed executed without consideration having been received by defendant No. 1?" In the next suit the issues were these. (1) "Was the sale deed executed while Bijai was in a sound state of mind?" (2) "Was the deed executed under fraud or undue influence?" (3) The question of consideration.

The findings of the Judge in the Court of First Instance on those questions are as follows. On the question of the incapacity of Bijai "I am of opinion that Bijai's mental capacity is of the lowest order short of idiocy or insanity; that he has always been incapable of understanding complicated matters of business or exercising an independent judgment." As to fraud and undue influence: "Bearing in mind the weakness of Bijai Bahadur's mental faculties, the fact that Wahaj-ud-din and his adherents, in collusion with Ajit Singh, were encumbering his estate, the peculiar circumstances which have already been mentioned in this judgment, the unconscionable and exorbitant nature of the transactions themselves, I am of opinion that the hypothecation deed of 19th June 1878 (on which this suit is based) and the sale deed of the 26th May 1879 were executed under fraud and undue influence." With respect to the question of fiduciary position, he finds that Ajit was not, technically speaking, in a [64] fiduciary position *quoad* Bijai. With respect to the consideration, he finds that some consideration was advanced, and the effect of his judgment is to order the deeds to be cancelled, but to remain as security for the payment by Bijai of such consideration as he received. This portion of the judgment will be more particularly referred to by and by. This judgment of the Subordinate Judge was affirmed by the Judicial Commissioner of Oudh. Against these judgments there are cross-appeals.

The findings on the subject of fraud and undue influence are findings of fact, and their Lordships adhere to the rule, which they have more than once laid down, that they will not, except under peculiar circumstances, interfere with findings of fact by two Courts. But it has been contended on behalf of the appellant in the first suit that there was no evidence to support the findings of the Judge.

This makes it necessary, not indeed to review the evidence at length, but to state shortly some of the main outlines of it. It appears that Ajit and Bijai were two neighbouring talukdars, distantly related. Ajit was the elder. He was a man of acute intelligence, and carried on the business of a money-lender. Bijai was of weak intellect, had been paralysed soon after his birth, and was afflicted with epileptic fits, the tendency of which would be to deteriorate what understanding he had. Bijai, on his father's death, appears to have taken possession of the ancestral estate, and to have so mismanaged it that the Court of Wards thought it necessary to take the management of it upon itself. In 1870 Bijai applied to be restored as manager, and having

been examined by the Court of Wards, the estate was released to him. The view taken of his capacity by the Court at that time appears from a judgment to be found at page 25 of the record. "The Court concurs with the assessors that the defendant, Raja Bijai Bahadur Singh, is not of unsound mind and incapable of managing his affairs. He is feeble, and doubtless easily influenced by artful persons, and incapable of any great effort of body or mind, but he is not at all incapable in the sense meant by the Act." Then they go on to say. "Decree for the defendant," on the ground "that he is not a lunatic", whereupon [65] the management of this estate was, their Lordships cannot help thinking unfortunately for him reentrusted to him.

With respect to his capacity there is some evidence given by himself in this record, by which, if it is correct,—and it was for the Subordinate Judge who heard the witnesses to determine whether it represented or not the true state of his mind,—it would appear, although he signed various deeds that were put before him, he was not acquainted with the nature of their contents, and that evidence, as far as the accounts are concerned, is to some degree corroborated by that of Wahaj-ud-din, his agent, who says the accounts were written in Persian, a language which he did not understand. Their Lordships, therefore, think there was ample evidence on which the Judge was justified in his finding as to the capacity of Bijai. This being so, it is obvious that a neighbour and a relation, of acute intelligence, would, in all probability, exercise a great influence over him. Upon his being reinstated in the management of his estates, it became necessary for him to borrow for the purpose of paying arrears of the Government revenue; and in 1872 it appears that he sold some 50 villages to Ajit for the sum of Rs. 1,25,000, the greater portion of which was appropriated to the payment of the Government revenue. That transaction has not been impugned, and it will not be necessary further to refer to it. At that time, in 1872, the two talukdars seem to have been somewhat estranged. In 1875 they were reconciled. About the time of the reconciliation Ajit took occasion to advise Bijai to employ as his agent, or *karindā*, a man of the name of Wahaj-ud-din. Wahaj-ud-din was entrusted by Bijai with extraordinary powers. We have a document styled a *safinama*, of the 25th August 1875, wherein Bijai entrusts to his manager powers of appointing general agents, of dismissing and confirming *patwaris* and *chowkidars*, of executing documents, leases, and so on, power of borrowing money, power of executing simple bonds for borrowing money, or borrowing money by hypothecation or usufructuary mortgage of property, and a number of powers which the Judge of the Court of First Instance describes as "making him in effect the proprietor of the estate." This document was little less than an abdication on the part of [66] Bijai of his ownership of the estate in favour of the manager. It appears to their Lordships that a man in full possession of his faculties would not execute a document of this kind. This manager, Wahaj-ud-din, in pursuance of the powers here given him, hired a vast number of servants, displacing the old Hindu servants of Bijai by his own friends and protégés, as they are somewhere called, so that Bijai was surrounded by Wahaj-ud-din and Wahaj-ud-din's Mahomedan adherents. It seems by the evidence of several of the witnesses that Ajit and Wahaj-ud-din were in the habit of communicating together, and that Ajit exercised great influence over Bijai. The powers of borrowing given to Wahaj-ud-din were soon exercised. In December of that year, a bond is prepared by Wahaj-ud-din, and is executed by Bijai, whereby he borrows a sum of Rs. 6,000 of Ajit at the rate of 24 per cent. The principal of that sum, together with interest, accumulated; and in February 1876, two months after, another bond of Rs. 9,000 was given; and without going through the details of all these transactions, it appears that as

many as 12 bonds were taken by Ajit from Bijai in the course of about three and a half years, the interest and the principal rolling on until finally it reached the sum of Rs. 1,37,000, the subject-matter of this suit. In these cases the money was sometimes paid to Bijai, and sometimes paid to his manager. He goes through the form—one can hardly suppose it to be much more—of writing his name at the bottom of the deeds which were witnessed by the Mahomedan servants in the employ of Wahaj-ud-din.

It has been contended that there was no foundation for the finding in the following terms of the learned Judge that Ajit and Wahaj-ud-din acted in concert:—"It is impossible not to feel convinced that Wahaj-ud-din was gravely mismanaging the estate; that by duping his master he was dishonestly benefiting himself, that this state of things was fully known to Ajit Singh (as admitted by him in his deposition), that the latter was all along anxious, fairly or unfairly, to encumber the estate so completely as to bring about the result which he seems to have had in view, *viz*, the acquisition of proprietorship of Bijai Bahadur's entire taluka."

[67] It is true that there is no direct evidence in the record of a conspiracy between Ajit and Wahaj-ud-din, but they acted together against the interest of this unfortunate talukdar. His agent induced him to sign a number of bonds for sums of money which have been found not to be necessary for the purposes of the estate, and Ajit, whose duty as a relative, a friend, and a neighbour of Bijai, a man of weak intellect, was to have warned Bijai against the proceedings which were going on to his own ruin, so far from doing this, acts in concert with the unfaithful steward, and not only does he act in concert with him, but he profits principally by their joint transactions. Under these circumstances it appears to their Lordships that the learned Judge was amply supported by the evidence in his finding.

Such being the finding of the learned Judge, and the concurrent findings of two Courts, supported by adequate evidence, it follows that that judgment must be supported so far as the cancellation of the deeds is concerned, and that the appeal of Ajit must be dismissed.

But another question is raised by the cross-appeal. The finding of the learned Judge, with respect to the consideration for the deeds is in these terms (it seems that the evidence of advances was that money was paid from time to time, in the presence of the registrar of the Court, sometimes being handed to Bijai himself, sometimes to his manager) "But having considered the evidence, I am satisfied that the principal sums in cash, said to have been advanced at various times by Ajit Singh, were made over either to Bijai Bahadur, or on his behalf to his *karinda*, Wahaj-ud-din," and in accordance with that finding, he says "I am of opinion that substantial justice will be done between the parties if the plaintiff is decreed the principal sums advanced by him, together with interest at 8 per cent per annum on each of the sums calculated from the date of the suit, *viz*, 23rd January 1880, and no interest allowed subsequent to the date of the suit." He treats as sums proved to have been advanced all the principal payments, which were made. It has been argued, not that this finding is wrong in point of fact, but that the learned Judge has made a mistake in point of law, and their Lordships think that the judgment relating to these payments cannot be supported. The finding, as before observed, is that the [68] sums were paid either to Bijai Bahadur, or on his behalf to the *karinda*, Wahaj-ud-din. The learned Judge appears not to have applied his mind to the question as to how much actually got into the hands of Bijai himself, with reference to which sums it would seem difficult to say that he could have a right to cancel the deeds without repaying them.

But considering the relations that have been found to exist between Ajit and Wahaj-ud-din, their Lordships are of opinion that Ajit cannot raise a claim against Bijai merely by showing that he paid money to Wahaj-ud-din; he must show further that his advances were really applied to the benefit of Bijai, or were properly borrowed on his behalf.

Under these circumstances it appears to their Lordships that the decree of the Court below requires some amendment; and they propose to advise Her Majesty that that decree should be amended in this way.—They think it should be varied by directing that, instead of the account which the Munsarim is thereby ordered to take, it be referred to the Munsarim to take the following accounts: first, of such sums advanced by Ajit as shall be proved to have been paid to, and received by, Bijai personally; secondly, an account of such sums advanced by him as Wahaj-ud-din would have been justified in borrowing in the course of a prudent management of Bijai's estate; thirdly, an account of what is due upon such advances for simple interest at 8 per cent. from the date of the advance to the time of payment. Their Lordships cannot quite concur with the learned Judge in holding that the interest should be confined to the date of the suit. Their Lordships think that the decree in the other case, which is in many respects the same, but has peculiar circumstances affecting it (that is, the first suit by Bijai and his wife), should also be amended to the same extent.

Under these circumstances their Lordships will humbly advise Her Majesty that the decrees be varied in the manner stated. It appears to their Lordships that Bijai and his wife are entitled to the costs of both appeals.

Decrees varied.

Solicitors for the Appellant Raja Ajit Singh. Messrs. *Lawford, Waterhouse and Lawford*

Solicitors for the Respondents Raja Bijai Bahadur and Rani Janki Kunwar. Mr. *J. L. Wilson*.

NOTES.

[EQUITABLE CONDITIONS ON CANCELLATION OF DEEDS, etc.]

See (1903) 28 Bom. 181 where a minor got his mortgage-deed cancelled, (1908) 31 All. 21 (1908) 10 Bom. L. R. 1004 (lunatic), (1909) 32 All. 25, (1910) P. R. 76]

[69] APPELLATE CIVIL.

The 18th March, 1884.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Bhola Nath Roy.....Defendant

versus

Rakhal Dass Mukherji.....Plaintiff.

Hindu law, Bengal—Succession to estate of deceased brother—Half blood and whole blood—Sons of sisters.

Under the Bengal School of Hindu law sons of sisters of the half blood are entitled to succeed equally with sons of sisters of the whole blood to the property of a deceased brother.

THIS was a suit by the plaintiff, claiming, as one of the reversionary heirs of one Obhoy Churn Banerji, deceased, possession of a moiety of certain properties in the possession of the defendant. The relationship of the parties was not disputed. Obhoy Churn died in 1848, leaving a wife who died in 1850, whereupon his mother Debi Sundari succeeded to the property and died in 1874. The plaintiff and the defendant are grandsons of Kalinath (Obhoy Churn's father) by two daughters of two wives. The mother of the defendant was the sister of Obhoy Churn, and the mother of the plaintiff was his step-sister. The defendant contended that under the Hindu law he was entitled to succeed on the death of Debi Sundari to the entirety of the property left by Obhoy Churn, and that the plaintiff was not entitled to inherit.

The plaintiff obtained a decree in the Court of First Instance which was confirmed on appeal. The defendant appealed to the High Court

Baboo *Guru Das Banerji* (with him Baboo *Golap Chunder Shastri*) for the Appellant

(1) The half sister's son does not confer the same amount of spiritual benefit as the full sister's son, inasmuch as the latter offers oblations to the mother of the deceased which the former does not. (See *Dyabhaga*, chap. XI, s. VI, paragraphs 2 and 3. *Roghunandan—Sradh-Tattwa*).

[70] (2) Heirs of the full blood are preferred to those of the half blood. (See *Dyabhaga*, *ib.*)

(3) *Colebrooke's Translation of Srikrishna's Synopsis* of chapter XI of the *Dyabhaga* is not correct. It does not agree with the original text as given in any edition of the *Dyabhaga* current in Bengal. The text, as given in the edition of 1829, published under the authority of the General Committee of Public Instruction, runs thus: "In default of him, the father's daughter's son. He is the uterine sister's son; in default of him, the half sister's son as well." The text, as given in the edition of 1829, published by the late Pundit *Bhurut Chunder Seromoney* and the text, as given in the edition, published by the late Baboo *Prosonno Coomar Tagore* under the superintendence of the same learned Pundit, both support our contention.

(4) The only original authority that goes against the appellant's contention is the opinion of *Chudamoney*, cited by *Srikrishna* in his *Dyakrama-Sanghrah* with which *Srikrishna* can be said to agree by implication only.

* Appeal from Appellate Decree No. 1485 of 1882, against the decree of P. Dickens, Esq., Judge of Nuddea, dated 11th May 1882, affirming the decree of Baboo Bhagwan Chunder Chatterji, Munsif of that District, dated 25th November 1880.

Baboo *Rash Behari Ghose* for the Respondent.

The following judgments were delivered :—

Prinsep, J.—The point in issue in this appeal is, whether sons of sisters of the whole or half blood are entitled to succeed equally to the estate of a deceased brother. The lower Courts have held that they inherit equally.

As an authority for this proposition there is a translation of *Dyakrama-Sanghraya of Srikrishna Tarkalankara* by Mr. *Wynch*, chap. I, s. 10, cl. 1, in which as an authority the opinion of *Acharya Chudamoney* is given. That this was *Srikrishna's* opinion is confirmed by a reference made to it in a commentary by *Jagannatha Tarkapanchanana* (see book V, chap. 8, s. 1), or in the edition of 1874, published by Higginbotham & Co., vol. 2, p. 566. From this we learn that some fifty years after *Srikrishna Tarkalankara*, *Jagannatha Tarkapanchanana*, who was a great authority in all matters connected with Hindu law, and probably may have been a contemporary of *Srikrishna*, distinctly states *Srikrishna's* opinion to the same effect as has been presented in the translation by Mr. *Wynch*. In 1829, Mr *Macnaughten*, in his well-known book on the principles [71] of Hindu law, evidently having in his mind these authorities, expresses his opinion that, according to the most approved authorities, there should be no distinction between the sister's son of the whole and half blood. See page 28 of the edition published by Higginbotham & Co., in 1874.

In 1859 Baboo *Shama Charan Sircar*, who is generally accepted as an authority on Hindu law, in his *Vyavastha Darpana*, 2nd ed., page 265, refers to this opinion as being that of authors respected and followed, but at the same time he gives his own opinion to the contrary, and gives reasons for the same. The reasons for the contrary opinion are that superior spiritual benefits by oblations are conferred by the sons of the sister of the full blood. But we find, that in the opinion of *Srikrishna* quoted by *Jagannatha*, it is laid down that this is not so—that is, the sons of both sisters, whether they be sisters of the whole or full blood, offer the same oblations, and therefore rank equally in their rights of succession to inheritance. The opinion is thus expressed, "but no distinction is taken in the case of daughter's sons, because the maternal grand-mother does not share the funeral cake offered by her daughter's son."

It is, however, pressed on us that the translation of the commentary by Mr. *Colebrooke* is not altogether correct, and more recent editions, the first of which bears date 1829, are laid before us as reproducing the correct version. Now, as I have already stated, all the previous authorities are unanimous to the contrary. In the edition of 1829 there is no reference made to the previous mistake, and looking to the context, there seems reason to believe that the word *tadwava* introduced there would give a different meaning and is an interpolation.

The only other direct authority on this point is the *Vyavastha*, published by Mr. *Macnaughten* in his book, it is to be found at page 86 of the second volume, in which the Pundit, to whom the point we are now called upon to decide was pointedly referred in 1826, declares that there is no difference between sons of sisters of the whole and half blood.

Under such circumstances I am unable to come to any other [72] conclusion than that arrived at by the lower Courts. The appeal must, therefore, be dismissed with costs.

O'KINEALY, J.—I concur in the decision arrived at by my learned brother. In this case we have to determine what is the law of inheritance which prevails in Bengal, in regard to father's daughter's sons, and whether there is any distinction between the son of a sister of the whole blood and the son of a sister of the half blood.

The contention raised on behalf of the appellant is that according to *Srikrishna Tarkalankara* sister's sons of the whole blood took before sister's sons of the half blood. He bases his contention on three grounds. *first*, spiritual benefit, and *second*, that in the edition of 1829 of *Srikrishna's* recapitulation of the line of inheritance, there the word *tadwava* between these two classes, [?] which show that they did not take together, but that one was postponed to the other. *Thirdly*, that in two subsequent editions of 1850 and 1860, both of which were edited by the same gentleman, the word *tadwava* appears in a subsequent part of the recapitulation which refers to the succession of paternal grandfather's daughter's sons. Consequently there can be no doubt that the word *tadwava* in the edition of 1829 must be considered to be correct.

Putting aside for the moment any discussion as to the law which has actually prevailed in Bengal up to the present time, we find that *Colebrooke*, on a comparison of those copies of the recapitulation, declared that sister's sons of the whole blood and of the half blood take together. that in 1829, the word *tadwava* was interpolated by persons whom we do not know, or on what authority we do not know, and that in 1853 and 1860, the word *tadwava* was inserted in another place for reasons equally unknown. It seems to me that even in this state of circumstances, it would be difficult to conclude that *Colebrooke's* translation is incorrect. The difficulty becomes insuperable when we refer to the other authorities. In the *Dyakrama-Sanghrahā*, chap I, s. 10, para. 1, *Srikrishna* states as follows "According to *Acharrya Chudamoney*, the son of the proprietor's own sister, and the son of his half sister, have an equal right of inheritance." So [73] that if we hold that *Colebrooke's* translation is incorrect, we must start with the proposition that *Srikrishna* has in one book said one thing, and in another something directly contradictory. This, though possible, is very improbable. But I think that all doubt on that point is set at rest by referring to the commentary by the learned lawyer of about the time of *Sir William Jones*. I refer to the commentary of *Jagannatha Tarkapanchanana*. In book V, chapter 8, s. 1, it is stated as follows "In the succession of brother's sons, a distinction between the whole and half blood must be understood, not in the case of daughter's sons. But some lawyers consider it as the opinion of *Jimutavahana* that, in the succession of the sons of the father's daughters and so forth, a distinction is taken between uterine and half-sisters. Herein *Srikrishna Tarkalankara* does not acquiesce, because no law is found expressly declaring the participation of a maternal grandmother in the funeral cake offered to the maternal grandfather." We have, therefore, not only the opinion of *Srikrishna* himself, but of another very eminent lawyer, stating that this is *Srikrishna's* opinion. I think that this must put an end to any doubt that may be entertained as to the correctness of *Colebrooke's* translation. From the time of *Srikrishna* to 1809, *Colebrooke's* time, this was the recognized law. In 1829, *Sir William Macnaghten* said "There is a difference of opinion among different writers of the Bengal school as to the whole and half blood, some maintaining that an uterine sister's son excludes the son of a sister of the half blood: but according to the most approved authorities there should be no distinction. A sister's daughter is nowhere enumerated in the order of heirs." This opinion he supports by the opinion of a pundit of the Zillah Court in the Jungle Mehal, dated 1826.

Next in succession is the opinion of *Shama Charan Surcar*, a gentleman well known for his knowledge of Hindu law. At page 265 of the second edition of his book, written about the year 1860, he says, referring to the right of sister's son to inherit. "Although the opinion of the aforesaid authors is respected and followed, yet it must be admitted that the distinction made in the

commentaries above alluded to is neither unreasonable nor inconsistent, based as it is not only in preference to the whole [74] blood, but also on consideration of the sons of the sister, paternal aunt and grandfather's sister of the whole blood, conferring comparatively more benefit than the sons of those of half blood."

Therefore it appears to me that an unbroken series of authority from the time of *Srikrishna* to the year 1860, show that the law prevailing in Bengal makes no distinction between the sons of sisters. Nor does it appear, even discussing the question on the ground of spiritual benefit, that the appellant should succeed. In the reference, which I have already made to *Srikrishna's* opinion, it is stated that, as far as spiritual benefit is concerned, there is no difference, and there can be no difference, between that which is derived from the sons offering oblation to a maternal grandfather, because in those oblations the maternal grandmother obtains no part. Whether, therefore, we look at the law prevailing in Bengal, or at the doctrine of spiritual benefit, the result is the same, and the conclusion that we have arrived at is, that no distinction is made between the sister's sons of the whole and half blood. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[Upon this case, which appears to be a settled rule of inheritance, Mr *Golap Chandar Sarkar* in his *Hindu Law* (1910) IV Edn p , 345, observes. " See *Srikrishna's* Recapitulation *supra* p. 331-2, showing that relations of the whole-blood should be preferred,"—a proposition based upon express texts of the *Smṛiti* D B., xi, v. 10 and D. T , xi sec., 63 (*it is this statement however that was controverted in this decision*) Upon the authority of this decision, the preference on this ground is to be confined to the nine collaterals among the first class *Dayabhaga sapindas*, namely, a brother, an uncle, and a grand-uncle, and their descendants , it will not apply to any other relations]

[11 Cal. 74]

APPELLATE CIVIL.

The 13th September, 1884

PRESENT.

MR. JUSTICE PRINSEP AND MR. JUSTICE MACPHERSON.

Tripura Sundari and others(Objectors) Appellants

versus

Durga Churn Pal and others.... (Auction-purchasers) Respondents.*

Sale proclamation, irregularity in service of—Execution sale of groups of property under one decree—Irregularity and damage, then necessary relation—Code of Civil Procedure (Act XIV of 1882), ss. 289 and 311.

The words "on the spot where the property is attached" in s 289 of the Civil Procedure Code refer to each property attached, and not to a group of separate properties attached under

* Appeals from Original Orders Nos. 366 and 373 of 1883, against the orders of Baboo *Krishna Chunder Chatterji*, First Subordinate Judge of Backergunj, dated the 13th of August 1883.

one proceeding or order in one execution case, and therefore when distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation in each of such properties amounts to an irregularity in the publication of the sale.

Held, also, that where there is no evidence to connect the two elements of irregularity and injury under s. 311, it must appear, before a Court can set aside an execution sale, that the injury complained of is the reasonable and natural consequence of the irregularity, and attributable to it alone.

[75] THESE were two appeals to the High Court from an order of the Subordinate Judge of Barisal, which governed both cases, confirming the sale of several groups of property in execution of a mortgage decree. Upon the evidence the lower Court, among other things, held that there was no irregularity in publishing or conducting the sale, nor was there any inadequacy in the price. The ground common to both the appeals was that the sale proclamation not having been fixed up in a conspicuous part of each of the distinct and separate properties put up for sale, the service was irregular and illegal, and it was argued on the hearing that *Olpherts v. Mahabir Pershad Singh* (L. R., 10 I. A., 25) did not apply to the case.

Mr. Phillips, Baboo Annoda Pershad Banerjee, and Baboo Barkant Nath Doss for the Appellants.

Mr. Jackson, Baboo Sreenath Doss, Baboo Chunder Madhub Ghose, Baboo Ras Behari Ghose, and Baboo Bhuban Mohun Doss for the Respondents.

The **Judgment** of the Court (PRINSEP and MACPHERSON, JJ.) (as far as is requisite for the purposes of this report) was as follows —

The irregularity complained of in the publication of the sale proclamation is that the proclamation was not fixed up in any part of the properties sold. This objection as regards the Husnabad property is groundless. The evidence shows that the decree-holders and judgment-debtors have their cutcheries on the opposite sides of a court-yard, that of the former being on the south and north sides, and that of the latter on the west side. The notice was attached to the house on the north side, because the western house is said to have been at the time under repair and the judgment-debtors were using the north house. The latter fact is denied by witness No. 10 of the judgment-debtors, but the fact of suspension being proved, and the property being joint, there was, we think, a sufficient compliance with the law, whatever the truth may be as to the occupation of the particular rooms. The return of the peon who proclaimed the sale does not show that a copy of the proclamation was fixed up in any part of the Tarabolia and Abdullapur properties. On the contrary, he seems to have been furnished with only one copy of [76] the proclamation for publication in this way, though the sale was in all other respects properly published. This was, we think, an irregularity. It has been held, and, in our opinion, rightly, in *Kalytara Chowdhuran v. Ramcoomar Goopta* (1 L. R., 7 Cal. 466) that under s. 289 of the Civil Procedure Code, a copy of the sale proclamation must be fixed up in some conspicuous part of the property. When several separate properties are attached under one proceeding or order, in one execution case, the attachment is separate and distinct as regards each. The words "on the spot where the property is attached" in s. 289 must refer to each property attached, and not to the whole in a lump. When, therefore, distinct properties are proclaimed for sale in one execution, it is not sufficient to affix one copy of a general proclamation covering all of them on a part of one only of such properties; it must be affixed on each. The object of the section is to give due notice of the intended sale of each attached property, and this would be defeated if, when there are several distinct and unconnected properties, a general sale proclamation is affixed to one only.

We are unable, however, to hold that in the present case the irregularity is a sufficient ground for setting aside the sale, as we cannot trace to it the damage complained of. It is urged that the decision of the Privy Council in *Olpherts v. Mahabir Pershad Singh* (L. R., 10 I. A., 25) does not apply; but it is quite clear that, when there is no evidence to connect an injury with an irregularity, the one must at least flow reasonably and naturally from the other and be attributable to it alone. The appellants do not attempt to prove that there was a paucity of bidders owing to defective publication. On the contrary, their case is, that there were a number of persons who, but for the conduct of the decree-holders, would have bid more than the properties actually realized. They fail to prove this, and we cannot infer that there was from other causes an absence of bidders.

The appeals must therefore be dismissed with costs

Appeals dismissed.

NOTES

[As regards selling by lots, separate proclamation is not required for each piece — C. P. C. 1908 O. 21, r. 67 (3) giving effect to (1888) 12 Bom. 368, as regards irregularity in execution sales see also (1885) 11 Cal. 658, (1889) 11 All. 333, 12 C. W. N. 757.]

[77] CRIMINAL REFERENCE.

The 18th September, 1884

PRESENT

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

In the matter of Chandra Sekhar Rai Petitioner.*

Security bond—Code of Criminal Procedure, Act X of 1882, s. 514.

As there is no provision in the Criminal Procedure Code authorizing a Police officer to take a surety bond for the production of any person before the Police, such a bond is *ab initio* void, and a Magistrate has no power to alter it and impose fresh obligations thereunder.

THIS was a reference to the High Court by the Judge of Dacca, in respect of an order of a Magistrate purporting to have been passed under s. 514 of the Criminal Procedure Code. The facts are briefly these. On a certain date the Inspector of Police sent a report to the Magistrate of Dacca that one Chandra Sekhar Rai had given a bond to him for the production of twelve persons, and had failed to produce them when required, and had therefore rendered himself liable to the penalty mentioned in the bond. In pursuance of a notice Chandra Sekhar appeared before the Magistrate who, on the 12th August, passed the following order: "I find that the accused were ordered to be present; but whether before the Police or before the Magistrate is not stated. No security could be taken for the production of the persons before the Police, but only before the Magistrate. I therefore direct that Chandra Sekhar Rai produce the twelve men before me within ten days." This order was served upon Chandra Sekhar on the 12th August. Thereupon Chandra Sekhar presented a petition to the Magistrate denying execution of the bond, the Magistrate, however, on the 18th August, declared the bond forfeited, and directed the attachment and sale of the petitioner's moveable property.

* Criminal Reference No. 142 of 1884, made under s. 438 of the Code of Criminal Procedure, by W. H. Page, Esq., Officiating Sessions Judge of Dacca, dated 8th September 1884, against the order of H. F. Wyer, Esq., Magistrate of Dacca, dated 18th August 1884.

The High Court (WILSON and MACPHERSON, JJ.) passed the following Order—

[78] Macpherson, J.—The Magistrate's order directing the attachment and sale of the moveable property of the petitioner on forfeiture of the surety bond executed by him for Rs. 2,400 is illegal, and must be set aside. There is no provision in the Criminal Procedure Code authorizing a Police officer to take security for the production of any person before the Police. If the bond was in this respect bad, the Magistrate had no power to alter it and to impose on the petitioner a fresh obligation.

Assuming, however, that the conditions of the bond could be legally enforced, there has been a total disregard of the provisions of s. 514 of the Code. The bond was taken by a Police officer, and that section requires that on its being proved to the satisfaction of the Court that the bond has been forfeited, the Court shall record the grounds of such proof, and call upon the person bound by it to show cause why the penalty should not be paid. In the present case the petitioner denied the execution of the bond, and cited as his witnesses the Police officer, to whom it was said to have been given, and other Police officers. These were witnesses whose attendance he could not enforce without the assistance of the Magistrate, and it is difficult to see how the Magistrate could, on the mere report of a Police officer, whose conduct in the matter was directly challenged, be satisfied that the bond had been executed.

A Magistrate acting under s. 514 must proceed on legal evidence, and the penalty can only be enforced on proof that the bond was duly executed and forfeited. The denial of execution by the petitioner made it incumbent on the Magistrate to take evidence as to the fact of execution.

The Magistrate's proceedings are in other respects illegal. If the notice to produce the accused persons within ten days was only served upon the petitioner on the 12th August, there was no breach on the 18th, when the Magistrate summarily ordered that the amount should be realized by attachment and sale of his moveable property.

Order set aside

NOTES.

[An illegal bond cannot be enforced—4 C.W.N. 121, (1904) P.L.R., 42, (1907) P.W.R., 22 G.]

[79] CRIMINAL REFERENCE

The 31d November, 1884.

PRESENT

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON

Queen-Empress

versus

Atar Ali. Accused.

False charge—Compoundable offence—Discharge of accused charged under s. 211, Indian Penal Code, upon plea of original charge having been compounded—Act XLV of 1860 (Indian Penal Code), ss. 211, 342, 347—Act X of 1882 (Criminal Procedure Code), s. 345.

The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211 of the Penal Code.

* Criminal Reference No. 159 of 1884, by Baboo A. Borooah, Officiating Magistrate of Noakhali, dated the 6th October 1884, against the order made by H. W. Barber, Esq., Deputy Magistrate of Noakhali, dated the 10th September 1884.

A laid a charge against M for wrongful confinement. The Police reported the case as a false one and A not appearing to prove his complaint the District Magistrate ordered him to be prosecuted under s. 211 of the Penal Code, and made over the case to a Deputy Magistrate. Upon the hearing of such charge, A pleaded that he had compounded the original charge laid by him against M, and that, therefore, the charge against him under s. 211 could not lie. The Deputy Magistrate, without hearing any evidence, dismissed the case.

Held, that the course so taken was illegal, as such plea was no conclusive answer to a charge under s. 211*.

THE facts which gave rise to this reference were as follows.—

On the 29th June, one Atar Ali gave information to the Police of Charsid-dhi that his father was being wrongfully confined by Minut Ali, with a view to extort a kabooliat from him. The Police reported the case as false, and as the complainant failed to appear and prove his complaint, the District Magistrate ordered his prosecution under s. 211 of the Penal Code, on the 23rd August, and made over the case for trial to the Deputy Magistrate, who was a first class Magistrate. On the 26th August, the latter fixed the 9th September for hearing, and issued a summons against Atar Ali, under s. 211 of the Penal Code. On the 9th September the case was adjourned till the 10th September. On the 10th September Atar Ali filed a petition, submitting that the charge under s. 211 could not proceed, as he had compounded the original charge under s. 342 of the Penal Code. The Deputy [80] Magistrate accordingly dismissed the case without passing any orders about the accused. Upon being called upon for an explanation by the District Magistrate, he gave the following as his reasons for the course adopted: "In this case the complainant in the original charge was called on to come and prosecute. He did not do so, on the ground that he had compounded with the accused. Now, s. 345 of the Code of Criminal Procedure does not prevent a case under s. 342 being compounded out of Court. Hence, if a complainant on that charge does not appear to prosecute, a charge under s. 211 would not lie against him, especially on the motion of the Police."

The District Magistrate accordingly now referred the case to the High Court, with a covering letter which contained the following:—

"It appears to me the order of the Deputy Magistrate is quite illegal. A charge under s. 211 of the Penal Code cannot be compounded. An accused summoned under s. 211 of the Penal Code cannot be discharged without taking evidence for the prosecution. The complaint before the Police amounted to an offence under s. 347 of the Penal Code, and was described by them as such, and such an offence is not compoundable under s. 345 of the Criminal Procedure Code. There is no law that a false charge of wrongful confinement cannot be enquired into, if the complainant fails to prove his complaint.

"Questions again and again come before us—(1) whether the right of compounding allowed by s. 345 of the Criminal Procedure Code can be exercised at any time the complainant chooses, *e.g.*, after the charge is framed, or after the witnesses for the prosecution are examined, or only up to the initial stage of the prosecution, *viz.*, when the accused appears, or is brought before the Magistrate; and (2) whether a prosecution under s. 211, Indian Penal

*[Sec 211—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or

False charge of offences
made with intent to injure. knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both, and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.]

Code, can be frustrated by the alleged exercise of this right, i.e., whether the original complainant, when ordered to prove his complaint preliminary to a trial under s. 211, Indian Penal Code, can get off by simply alleging that he had compounded the case.

"As these two points are connected with this reference, I [81] solicit the honourable Judges will be pleased to clear our doubt by a decisive ruling."

No one appeared on the reference for either party

The **Opinion** of the High Court (WILSON and MACPHERSON, JJ.) was delivered by

Wilson, J.—We agree with the District Magistrate in thinking that the order of the Deputy Magistrate is illegal, on the ground that the compounding of the original charge was not a conclusive answer to the charge under s. 211. The order will be set aside, and the case will proceed before such Magistrate as the District Magistrate may direct.

The other point raised by the District Magistrate we think it unnecessary to deal with upon this reference.

[11 Cal. 81]

APPELLATE CRIMINAL.

The 12th November, 1884.

PRESENT

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY

Chunder Nath GhosePetitioner

versus

Nundololl Chatterji.Opposite party.

Penal Code, ss 497¹, 498—Marriage insufficiently proved—Discharge of accused—Re-trial ordered—Wife ordered to be examined on re-trial.

In an enquiry into a case of alleged adultery and enticing away a married woman for illicit purposes, the complainant refused to examine his wife as to the marriage; the Deputy Magistrate declined to frame a charge, and discharged the accused

The Sessions Judge directed a re-trial to be held by another Deputy Magistrate, and ordered that the evidence of the wife should be taken as to the marriage

Held, that the Sessions Judge in ordering a re-trial had not exercised a proper discretion, he having admitted that the prosecution had failed to prove the marriage, and it not being alleged that any evidence was tendered by the prosecution and not taken by the Deputy Magistrate.

*Criminal Revision No. 377 of 1884, against the order of H. Beveridge, Esq., Officiating Sessions Judge of 24-Pergunnahs, dated 20th of September 1884, setting aside the order of Nawab Abdul Latif, Khan Bahadur, Deputy Magistrate of Sealdah, dated 1st August 1884

†[Sec. 497 —Whoever has sexual intercourse with a person who, is and whom he knows or has reason to believe to be the wife of another man, without the

Adultery.

consent or connivance of that man, such sexual intercourse not amounting to the offence of rape is guilty of the offence of

adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both In such case the wife shall not be punishable as an abettor.]

THIS was a motion made to the High Court under Chapter XXXII of the Criminal Procedure Code.

It appeared that one Nundololl Chatterji accused Narain [82] Mytee with having committed adultery with his (the complainant's) wife, and with having enticed her away for illicit purposes.

The complainant cited several witnesses (amongst whom was his wife), but although she was in attendance at the Court, refused (when called upon to do so by the Deputy Magistrate) to examine her. Evidence was attempted to be given of the marriage, but was insufficient.

The Deputy Magistrate held that the evidence on behalf of the prosecution was insufficient to justify the framing of a charge, and he accordingly dismissed the case, and directed that the accused should be discharged.

Nundololl Chatterji thereupon applied to the Court of the Sessions Judge under s. 435 of the Code of Criminal Procedure, on the ground that the evidence was sufficient to justify a conviction.

The Sessions Judge sent for the record and passed the following order :—

“ I do not think that the Deputy Magistrate's judgment in this case is satisfactory. It is extremely short, and no reasons are given for disbelieving the evidence for the prosecution. It cannot be doubted that the woman left the house where she and her husband were residing, or that she did so at about the time mentioned by the witnesses. She may not be of good character, but still she could hardly effect her departure alone, and if the accused helped her to go away, they are guilty under s. 498.

It is objected that the marriage has not been properly proved. This is true, but apparently this was because the husband and the barber witness were not properly examined. The marriage took place some twenty years ago, and so it is not a matter very susceptible of strict proof. This is a point on which the woman herself might be examined. Her deposition should certainly have been taken. It seems to me that the accused have been improperly discharged, and I, therefore, direct that the case be further enquired into. As the evidence was once taken by Nawab Abdul Latif, and he has disbelieved it without assigning any reasons for his disbelief, I think it will be better that [83] the case be re-tried by some other Magistrate. The woman should be sent for and examined and proof should be taken of the marriage.”

The accused thereupon moved the High Court to have the order of the Sessions Judge set aside, on the following grounds .—

(1) That the complainant had attempted, but had failed, to prove his marriage with the woman said to have been enticed away, and that, therefore, the Sessions Judge was wrong in directing the alleged wife to be sent for, and examined as to the marriage, inasmuch as she was cited as a witness by the prosecution, and attended Court each day of the enquiry, but was not examined by the complainant, the latter having distinctly stated to the Deputy Magistrate that he declined to examine her.

(2) That the Sessions Judge was wrong in ordering a new trial, and in ordering the new trial to be held by an officer other than the Deputy Magistrate who had held the enquiry.

Baboo *Aushutosh Dhur* and Baboo *Sham Lall Mitter* for the Petitioner.

Baboo *Kali Charan Banerjee* for the Opposite Party.

The **Order** of the Court (PRINSEP and O'KINEALY, JJ.) was as follows :—

This is a case of adultery and enticing away a married woman with criminal intent under ss. 497 and 498* of the Penal Code. After hearing the entire evidence for the prosecution, the Magistrate discharged the accused, on the ground that the evidence was not sufficient to justify the framing of a charge. The Sessions Judge, however, on an application made to him, has, under s. 437 of the Code of Criminal Procedure, directed a further enquiry to be held. The Sessions Judge, at the same time, admits that the prosecution has failed to prove the fact of marriage on which this case depends. It is not alleged that any evidence was tendered by the prosecution, and not taken by the Magistrate. But the Sessions Judge seems to think that the wife, whom the complainant, the husband, refused to call as a witness, should have been examined by the Court, and on the supposition that if the case be retried a different complexion might be put on it, he has thought proper to order a retrial by another Magistrate.

[84] In dealing with this matter we think we should consider whether we should have granted such an application, if it had been made to us. We have no doubt that it would not have been regarded by us favourably, and that we should certainly not have reopened the case. We cannot, therefore, but find that in ordering a further enquiry, or rather a retrial, the Judge has not exercised a proper discretion. The order is therefore set aside.

Order set aside.

[11 Cal. 84]
CRIMINAL REFERENCE

The 5th December, 1884.

PRESENT

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS

Uma Churn Mundle and others.Complainants

versus

Joshein Sheikh and othersDefendants |

Criminal Procedure Code, Act X of 1882, ss 133, 138, 139—Jury illegally constituted—Juror refusing to act.

One out of five jurors appointed under s. 138 of Act X of 1882, declined to act on the jury. Two out of the remainder of the jury were in favour of a temporary order under s. 133 being maintained, whilst the other two were against its being so maintained. The Deputy Magistrate declined to pass any order under s. 139 of the Code of Criminal Procedure, as a majority of the jurors did not find the temporary order to be reasonable and proper, and he therefore struck off the case.

Held, that the course taken by the Deputy Magistrate was irregular, and *ordered* that a fresh jury be summoned, and the case enquired into anew.

* [Sec 498:—Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]
Enticing or taking away or detaining with a criminal intent a married woman.

† Criminal Reference No. 185 of 1884, made by W. H. Grimley, Esq., Magistrate of Howrah, dated 28th November 1884, against the order of Baboo Bunkim Chunder Chatterji, Deputy Magistrate of Howrah, dated the 14th of October 1884.

THIS case was referred to the High Court under s. 438 of Act X of 1882.

It appeared that one Joshein Sheikh had closed up a public thoroughfare by placing a fence across it, and on the complaint of one Uma Churn Mundle, the Deputy Magistrate of Howrah issued an order under s. 133 of the Code of Criminal Procedure, calling upon Joshein Sheikh to remove the obstruction, or to appear before him to show cause why the order should not be set aside.

The parties appeared, and eventually a jury consisting of five persons was appointed under s. 138 of the Code of Criminal [85] Procedure. One of these five jurors appointed did not act on the jury, and of the remainder, two were in favour of the Deputy Magistrate's order being maintained, and two were against it.

The Deputy Magistrate thereupon passed the following order: "Of the five jurors appointed, one has not acted at all. Two report in favour of the order, two against it. As a majority of the jurors do not find the order to be reasonable and proper, no further steps can, under s. 139, be taken. Case struck off." The District Magistrate, at the instance of the complainant, considered that this order was illegal, because (1) the jury were not legally constituted, inasmuch as it consisted of four persons only, and (2), because the proper course for the Deputy Magistrate to have taken was to have appointed another juror in the place of the one who did not act. The Deputy Magistrate, on being called upon for his explanation, did not consider it necessary to offer any explanation in support of the course he had taken, inasmuch as he was of opinion that the case could be revived without any reference to the High Court, and he further considered that ss 438, 439, of the Code of Criminal Procedure, did not apply to a case in which there was no sentence to be revised.

No one appeared for either party on the reference.

The order of the Court (**Mitter and Norris, JJ.**) was as follows.—

We think that the course taken by the Deputy Magistrate was irregular. He must summon a fresh jury and commence the enquiry afresh.

Order set aside.

[11 Cal. 85]

CRIMINAL REFERENCE.

The 8th December, 1884.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS

Queen-Empress

versus

Jacquet.

Verdict in accordance with charge—Verdict disagreed with by Judge—

Reference under s. 307, Act X of 1882.

The Court will not interfere with the finding of a jury, unless their verdict is shown to be manifestly erroneous.

A prisoner was charged under ss. 302 and 304 of the Penal Code, and the Judge at the trial added a further charge under s. 325. The Judge in [85] his charge to the jury directed them that in the event of their finding the charges under ss. 302 and 304 unsustainable, they might find the prisoner guilty under s. 325.

* Criminal Reference No 23 of 1884, made by S.H.C Taylor, Esq., Sessions Judge of Burdwan, dated 20th November 1884.

The jury unanimously acquitted the prisoner under the charge framed under s. 302, and a majority of them acquitted him under the charge framed under s. 304 ; but a majority of them found him guilty under the charge framed under s. 325.

The Judge disagreed with their finding as regarded the charge framed under s. 304, and referred the case to the High Court under s. 307 of the Criminal Procedure Code.

The High Court refused to interfere with the verdict, on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence and having expressed his opinion to the jury that they might find the prisoner guilty under s. 325.

ONE Thomas Jacquet, a guard in the service of the East Indian Railway Company, was committed to the Court of the Sessions Judge of Burdwan, charged under ss. 302, 304 of the Penal Code with having caused the death of his wife.

The Sessions Judge on his own motion added a further charge under s. 325 of the Penal Code, in order to meet the somewhat doubtful testimony of the medical officer given in the Court below as to the exact cause of the death of the prisoner's wife

The evidence given at the Sessions Court was to the effect that on the 2nd October Jacquet was taken home drunk and incapable at about 11 A.M. and that at that time Mrs Jacquet was lying on her bed, and it appeared that the prisoner at 1 P.M. sent his servant with his children out of the house, and was then left alone in the house with his wife. At 6 P.M. the prisoner was again seen, and was then said to have been able to stand, and talk, between the hours of 1 and 6 P.M. Mrs Jacquet was murdered, the medical evidence was, however, a little uncertain as to the exact cause of death itself, though it clearly showed that the wife had been brutally treated.

The Sessions Judge charged the jury as follows.—

" There is hardly a point in this case either for or against the prisoner that has not been fully discussed before you by counsel on both sides, and it has been clearly shown to you that the main question which calls for your most careful consideration is whether the prisoner intended to commit any [87] offence, and if so what was the offence he intended to and did commit. I need hardly say that there cannot be a shadow of a doubt that the prisoner did take the life of his wife, for it would be simply preposterous to hold that the injuries which Mrs Jacquet received were either self-inflicted, or the result of accident. Some person must have caused them, and as the prisoner was admittedly alone with his wife that day, none but he could have killed her. I may furthermore observe that no attempt whatever has been made to shift the act on to any one else's shoulders, while the whole argument of prisoner's counsel has been directed solely to endeavouring to bring the case under s. 325 of the Penal Code. Looking at the several charges you will see that intention or knowledge forms an essential element therein. If, after considering all the facts disclosed, you are of opinion that the prisoner really did intend to take his wife's life under any of the conditions enumerated under s. 300 of the Penal Code, you must find him guilty of a most atrocious murder. If, however, the circumstances disclosed lead you to think that his case falls short of murder, there is the charge under s. 304 of the Penal Code against the prisoner, and if for any good reason you hold that s. 304 of the Penal Code will not apply to his case, there is the third (and alternative) charge under s. 325, under which it would be very difficult not to bring his case, if the other charges fail. You have been rightly told that intoxication cannot be pleaded as an excuse for the commission of an offence. But where intention or knowledge are facts

which bear directly upon the guilt or innocence of a person charged with so serious an offence as the prisoner is, it has always been the practice of our Courts to consider such plea when determining such question of knowledge or intention. And here it seems to me that it is all the more necessary to take that plea into consideration, inasmuch as we are left considerably in the dark as to much that took place from the hour of 1 P.M. to the time Mrs. Jacquet's dead body was seen by the prisoner's neighbours. You have the fact that the prisoner was helplessly drunk on the morning of the day the deceased lost her life, and also that his wife was tipsy. You have been told that there was a bottle of brandy which, though nearly full in the morning, was found nearly empty in the evening. None but these two persons apparently had access to this bottle, and it may be assumed, I think, that either one or both drank of its contents some time during the day. On the other hand, you have been told that at a later hour in the day the prisoner had sufficiently recovered to know, at all events what he was about, and I think it would be hard to hold that after 1 P. M. of that day the prisoner was incapable from drink of knowing what he was about. Up to this stage in the case nothing of a complicated nature presents itself. From this point, however, we have difficulties to contend with, and here too your best consideration to all the surrounding circumstances must be given. There are two points especially to which I would draw your attention, as it appears to me that a correct appreciation thereof will go far to help you to a [88] right determination on the question of intention or knowledge. It has been urged in the first place, that in sending his servant away with his children the prisoner must have premeditated murder, and, secondly, that in changing his clothes and concealing them, he was merely carrying out a preconceived plot. As to the second assertion it is not quite correct, for the prisoner did not conceal his blood-stained clothes, but put them with his other soiled linen in the dirty clothes basket, and he did not change his clothes till he went to the station to despatch two telegrams to his relations announcing the death of his wife. This he did publicly when his neighbours were viewing the corpse, and after he had been in his blood-stained clothes to call Mr. Rome to see his wife. So far then from there being any concealment, the man acted in a most open and public manner. Indeed, if you look to his whole conduct, it savours rather of a man partially stunned by the consequences of his own desperate acts, than of one who had preconceived a deliberate murder and afterwards tried to conceal the fact. If you agree with me in this, will you be prepared to hold that the sending away his servant with his two children, at a time when he was evidently still under the influence of his morning's libations, must show that he had planned a murder? I confess I cannot think so. You must consider whether or not you think so. But apart from all this, there is another very important circumstance which you have to consider in connexion with this question of intention. You have heard that the prisoner, though sometimes the worse for liquor, was generally a well-conducted inoffensive man, devoted to his wife, and against whom the most that only one witness could say was that he had at times slapped his wife. There is absolutely not an iota of evidence to show, or lead to the inference, that anything whatever had occurred, between husband and wife, on the day the latter lost her life, that was calculated to make the prisoner even annoyed or displeased with his wife. Such being the case, are you prepared to say that the prisoner intended to take the life of his wife? If, while caring for his wife, and having no cause for complaint against her, the man unprovoked committed a deliberate murder, I do not see how one could avoid looking on the act as that of an insane person. But the prisoner is not insane, and we must form some other and reasonable opinion on the case. In so doing, however, we are left absolutely to conjecture.

For hours during the day in question husband and wife were alone, not an eye to see, not an ear to hear what passed between them. We know only the result—and if you agree with me in thinking it highly improbable that murder could have been contemplated by any sane person under the circumstances, we are forced to the conclusion that something must have taken place between the two which actuated the prisoner to the deed—and it seems to me that there is nothing more probable than that both (being probably still under the influence of their morning's drinking) had words, and that in the course of a quarrel the prisoner, unable to control himself, made what must have been [89] a savage attack on his wife. If there were evidence to show what was the provocation, if any was given, it could be without much difficulty seen whether it was of that grave and sudden nature as would under the law reduce the offence from murder to culpable homicide not amounting to murder. But there is no such evidence, and we have to do the best we can to fill up the gap. Where a doubt exists the prisoner is entitled to the benefit thereof, and here an intention to commit murder as defined under s. 300 of the Penal Code seems to me to be left unproved. If you are doubtful on the point you must give the prisoner the benefit of such doubt. As to the charge under s. 304, I am bound to tell you that the facts, if credited, certainly establish that charge, for the prisoner was not so drunk that he did not know what he was about, and the attack was so savage and the wounds inflicted so severe, that he must have known what the consequences were likely to be. As to the charge under s. 325, I need hardly tell you that it is a very minor one, and was added in order to meet the doubtful testimony of the medical officer as to the cause of death when he was deposing in the Court below. If for any good reasons you can say that the case does not come under either s. 302 or 304, and you hold that a minor offence was committed, there is ample evidence to show that grievous hurt was voluntarily caused. Your best attention is solicited to all the facts disclosed in this case."

The jury unanimously found the prisoner not guilty under the charge framed under s. 302, and in the proportion of three to two found him not guilty under the charge framed under s. 304, but in the proportion of three to two found him guilty under the charge framed under s. 325.

The Sessions Judge, however, disagreed with the verdict of the jury as to their finding on the charge under s. 304 of the Penal Code, and as in his opinion the sentence which he was capable of passing under s. 325 was wholly inadequate to the offence committed, he referred the case to the High Court for orders under s. 307 of the Code of Criminal Procedure.

On the case coming up before the High Court—

The officiating Deputy Legal Remembrancer (Mr. *Leith*) appeared for the Crown.

Baboo Khetter Mohun Gangooli for the Prisoner

The following **Order** was passed by the Court (MITTER and NORRIS, JJ.):—

Norris, J.—This case has been referred to us by the Sessions Judge of Burdwan under the provisions of s. 307 of the Code [90] of Criminal Procedure. The facts are briefly these: The prisoner was committed for trial under ss. 302 and 304 of the Penal Code. At the trial the Sessions Judge of his own motion added a charge under s. 325 of the Penal Code. Evidence was adduced in support of all three charges, and at the close of the case for the prosecution and the speeches for the prosecution and defence, the Judge proceeded to charge the jury. He began his charge by telling the jury that the counsel for the defence had endeavoured to bring the case within s. 325, in

other words, had endeavoured to save his client's life. The Judge then goes on to point out to the jury what evidence there is in favour of the charge under s. 302, and what evidence there is against it. Similarly, the Judge points out what evidence there is for and against the charge under s. 304. Then the Judge goes on to say: "As to the charge under s. 325, I need hardly tell you that it is a very minor one, and was added in order to meet the doubtful testimony of the medical officer as to the cause of death when he was deposing in the Court below. If for any good reasons you can say that the case does not come under either s. 302 or s. 304, and you hold that a minor offence was committed, there is ample evidence to show that grievous hurt was voluntarily caused." Now, if the Judge in the Court below was of opinion, as he appears to be according to his letter of reference, that this case resolved itself simply into the question whether the prisoner was guilty of murder or of culpable homicide not amounting to murder, instead of directing the jury, as he has done, that they might convict under s. 325, he should have struck out the charge under this section, even if the prisoner had been originally charged thereunder. He should have said "Gentlemen, there was a charge under s. 325, I have taken it upon myself to strike out that charge, as the crime of the prisoner cannot possibly be brought under that section." Instead of doing that, the learned Judge invites the jury, if they fail to find a verdict either under s. 302 or 304, to return a verdict under s. 325. This being the way that he has charged the jury, it is unreasonable for the Judge to complain of the verdict that the jury have returned and thrown upon us the responsibility of dealing with the case under s. 307 of the Code of Criminal Procedure. We decline to interfere with the verdict of the jury. [91] We convict the prisoner of the offence charged under s. 325, and sentence him to be rigorously imprisoned for seven years.

Mitter, J.—I concur. It is clear upon the authority of decided cases that this Court will not interfere unless the verdict of the jury be found to be manifestly erroneous. In his charge to the jury the Sessions Judge directed that, in the event they found the other charges unsustainable, they might find the accused person guilty under s. 325, if that offence, in their opinion, has been established upon the evidence. The Sessions Judge heard the evidence, and after recording it, he expressed his opinion, in his charge to the jury, that they might upon that evidence find the accused person guilty under s. 325. That being so, I am not prepared to say, upon the bare perusal of the recorded evidence, that the verdict of the jury is manifestly erroneous.

Verdict affirmed.

NOTES

[See also 10 Bom , 497 , 15 Bom , 452 , 20 Bom , 215]

[11 Cal. 91]
CRIMINAL MOTION.

The 6th November, 1884.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Rajnarain Koonwar.... Petitioner

versus

Lala Tamoli Raut.....Opposite Party.

Joinder of charges—Summons and warrant cases—Criminal Procedure Code, ss. 247 and 253.

In the investigation of a complaint, which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons and the other a warrant case, the procedure should be that prescribed for warrant cases

THIS case arose out of a dispute in regard to a certain field. It was alleged that, in the course of the dispute, one Lala Tamoli had been severely assaulted and his crops taken away. The charge laid was one of theft, as well as of voluntarily causing hurt. The Deputy Magistrate, seeing that the complainant [92] (Lala Tamoli) did not appear on the day fixed for the trial, passed an order under s. 247¹ of the Criminal Procedure Code, the effect of which was to acquit the accused. An appeal, it would seem, was preferred to the District Magistrate, who, after expressing his dissatisfaction with the mode in which the matter had been disposed of, ordered a new trial by another Deputy Magistrate. The accused, thereupon, applied under the revisional sections of the Code to the High Court, where, among other things, it was contended that the District Magistrate had no power to order a new trial in a case wherein an order of acquittal had already been passed.

Baboo *Gopinath Chatterjee* for the Petitioner.

Baboo *Amarendra Nath Chatterjee* for the Opposite Party.

The **Judgment** of the Court (WILSON and MACPHERSON, JJ.) was delivered by

Wilson, J.—In this case two charges were made against the accused persons arising out of exactly the same state of facts and under the same circumstances. The one was a charge of voluntarily causing hurt which would be a summons case, and the other a charge of theft, which would be a warrant case. But inasmuch as the two charges were based upon exactly the same evidence, and the same circumstances, and no order was made for a separate trial, it is plain that the mode of trial, under which the Deputy Magistrate ought to have proceeded, was that applicable to the greater of the two charges, that is, the case ought to have been tried as a warrant case. But what happened was this : The complainant being absent on a day to which the hearing of the case was adjourned, the Deputy Magistrate made an order purporting to be an order under s. 247. An order under this section is, of course, an

* Criminal Revision No 366 of 1884, against the order of J. C. Price, Esq., Officiating Magistrate of Durbhangah, dated the 17th October 1884, setting aside the order of Baboo Gowhur Ali, Deputy Magistrate of Durbhangah, dated the 30th June 1884

¹ [Sec. 247.—If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.]

order of acquittal. What he ought to have done was to have made the order under s. 253, not for acquittal, but for discharge. Now, one or other of two things must be the case. Either the Deputy Magistrate intended to take the proper procedure, and make order under s. 253, although he mentioned s. 247. If that be so, then, perhaps, the order ought to be treated as one under s. 253; but in this case the order of the District Magistrate would be clearly [93] right; or, on the other hand, the Deputy Magistrate did not intend to act under s. 253, but to proceed, as he says, under s. 247, and in that case he made an order which was clearly illegal. It may be that the District Magistrate had no authority to set aside that illegal order, but we have that authority; and the matter having been brought before us, we think it would be right to make the order which we have power to make, although, perhaps, the District Magistrate had not. That being so, it would be an idle form to interfere with the order made by the District Magistrate.

Retrial allowed.

NOTES

[But a warrant case cannot be tried as a summary case.—29 Mad., 372]

[11 Cal. 93]

APPELLATE CIVIL.

The 12th September, 1884.

PRESENT ·

MR. JUSTICE MACPHERSON AND MR. JUSTICE BEVERLEY.

Shama Charan Chatterji. Defendant

versus

Madhub Chandra Mookerji and another Plaintiffs.

Jurisdiction—Cause of action—Execution of decree—Decree for possession—

Regular suit—Formal possession—Civil Procedure Code, Act XIV of

1882, ss. 244, cl. (c), 263, 264.

In 1877 the plaintiffs sued the defendant for possession of certain properties and obtained a decree, in execution of this decree the plaintiff, on 12th of July 1879, obtained formal possession of the properties sued for. The defendant continued to remain in actual possession and occupation of a portion of the premises, and refused to give up possession of the same to the plaintiff, who served him with a two-months' notice to quit in June 1881. The plaintiff did not evict the defendant in execution of the decree obtained by him against the defendant but instituted a fresh suit for that purpose

Held, that such a suit would lie.

Seemle, that the delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises, which may be enforced in a regular suit.

THIS was a suit for the recovery of possession of certain properties. The plaintiff stated that the properties in question had, with [94] others, been mortgaged by the defendant to the plaintiffs on the 16th December 1870, that in 1876 the plaintiff served a notice of foreclosure under Regulation XVII of 1806, and when the foreclosure became absolute, they instituted a suit against the

* Appeal from Appellate Order No. 131 of 1884, against the order of J. G. Charles, Esq., Judge of 24-Pergunnahs, dated 29th January 1884, reversing the order of Baboo Boloram Mullik, Subordinate Judge of that district, dated 20th February 1883.

defendant for possession of the properties, and obtained a decree. In execution of this decree the plaintiffs obtained possession of all the mortgaged properties on the 12th of July 1879. The plaint then stated that "the defendant, without entering into any settlement, continued to hold possession of" that portion of the mortgaged properties which was the subject of the present suit, and which was all along in the defendant's actual possession and occupation, and refused to vacate the same when required by the plaintiff to do so in June 1881.

The defendants contended that the plaint disclosed no cause of action, and this contention was successful in the Court of First Instance. On appeal, the Judge, referring to the first ground of appeal taken before him, which was that "the plaintiff's suit is not barred either on the ground of *res judicata* or under s. 244, cl. (c), of the Civil Procedure Code," gave judgment as follows:—

This ground of appeal raises a question of some importance and one, moreover, which has given rise to many conflicting decisions. No doubt the rulings quoted by the Subordinate Judge, namely, *Kristo Gobind Kur v. Gunga Pershad Surmah* (25 W. R., 372) and *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258) support his view of the law, but, on the other hand, the following rulings relied on by the appellant's pleader, namely, *Umbucka Churn Goopta v. Madhub Ghosal* (I. L. R., 4 Cal., 870), *Lokessur Koer v. Purgun Roy* (I. L. R., 7 Cal., 418), and *Seru Mohun Bania v. Bhagoban Din Pandey* (I. L. R., 9 Cal., 602) are equally strong and more recent authorities in support of the appellant's new cause of action. In the case of *Kristo Gobind Kur v. Gunga Pershad Surmah* (25 W. R., 372), [which was followed in *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258)] Mr. Justice MACPHERSON held that symbolical possession unaccompanied by actual physical possession is a mere pretence, and not real possession within the meaning of the Code of Civil Procedure. This view of the law is no longer possible after the Full Bench decision of the Calcutta High Court in the case of *Juggobundhu Mukerjee v. Ram Chunder Bysack* (I. L. R., 5 Cal., 584), which lays down the broad proposition that symbolical possession as between [93] the parties to the suit must be deemed, both in point of law and fact, equivalent to actual physical possession. In accordance with this view of the law Sir RICHARD GARTH, C.J., held in the case of *Lokessur Koer v. Purgun Roy* (I. L. R., 7 Cal., 418), that if a decree-holder be put in possession under the decree by an officer of the Court, the form in which execution is given is quite immaterial. It seems to me in such cases the real point for determination is, whether the formal possession given by the Court officer does or does not operate in point of law as a complete transfer of actual possession. No doubt a decree-holder enjoys the privilege, under s. 263 of the Civil Procedure Code, of having a person bound by the decree removed if he refuse to vacate the property, but I cannot see how the decree-holder's failure to deal harshly with the former owner could affect his rights in any way until the judgment-debtor has acquired a superior title by adverse possession for upwards of twelve years under Art. 138^c, Sch. II, Act XV of 1877. It appears

[Art. 138 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale.	Twelve years.	The date of the sale.]

from the judgment of the Subordinate Judge to have been alleged in his Court on behalf of the plaintiffs, that the defendant was not disturbed, because he promised to remain on as the plaintiff's tenant. It is impossible to say whether this allegation is true or not, as no evidence whatever has been recorded, but there is nothing improbable in it when we consider that the history of the suit, as disclosed by the written statement, is a mere record of compromises. If it be true, as asserted in the receipt of the plaintiffs on the record, that they received formal possession through an officer of the Court, I hold that this symbolical possession being equivalent in law to actual possession, the defendant, even if he continued to remain on the premises, must be regarded either as a tenant or a trespasser, but no longer as a possessor in virtue of his own title. A suit to eject a tenant or a trespasser discloses an entirely different cause of action from a suit to obtain possession from a proprietor in occupation, and hence, in my opinion, the present suit will lie. With regard to the bar alleged to be imposed by s. 244, cl. (c), of the Civil Procedure Code, I need only add that, as I find that formal possession awarded to the plaintiffs in the execution proceedings would constitute complete legal possession, the previous decree must be considered to be finally executed, and therefore the present suit, being founded on a new cause of action, cannot be said to raise a question relating to the satisfaction of a previously satisfied decree. On the above grounds, I remand the case to the lower Court under s. 562 of the Civil Procedure Code, with directions to readmit the suit under its original number on the register, and to proceed to investigate the suit on its merits.

The defendant appealed to the High Court.

Bahoo Troylokhya Nath Mitter for the Appellant.

Bahoo Chunder Madhub Ghose, Baboo Jogendra Chunder [96] Ghose,
and *Bahoo Surendra Nath Rai* for the Respondents

The following **Judgments** were delivered —

Macpherson, J.—No evidence has been recorded in this case, and the only question we are called upon to decide is, whether the plaint discloses a cause of action on which the suit can be maintained. The Subordinate Judge held that it did not do so. The Additional Judge took a different view and remanded the case for trial on the merits. The appeal is against the order of remand.

The allegations in the plaint are to the effect that the plaintiff after foreclosure obtained a decree against the defendant for possession of properties mortgaged by him, including a house standing on two biggahs of land, and other lands, some of which were, it is now stated, in the occupation of tenants, that the plaintiff executed this decree, and on the 12th July 1879 obtained possession of all the properties with the aid of the Court; but that the defendant without entering into any settlement continued to hold possession of two biggahs of land and the buildings thereon, although he had been served with a notice to quit in June 1881. The suit is accordingly brought to recover possession of the two biggahs of land and of the buildings, and the cause of action is said to have arisen on the 6th August 1881, when the term of notice expired. The defendant in his answer took various pleas; he denied that the property claimed was covered by the mortgage deed; and he pleaded that, after a series of compromises subsequent to the decree, the mortgage debt had been fully liquidated. The only pleas with which we are now concerned are those relating to the absence of a cause of action, and to the jurisdiction of the Court to entertain the suit.

It is to be regretted that the first Court did not, before dismissing the suit, determine in what particular way the plaintiff obtained possession, and what he meant by saying that the defendant "without entering into any settlement continued to hold possession," as this might mean that some settlement was contemplated by the parties, but was not carried into effect.

Both sides have argued before us on the understanding that formal, though not actual, possession was given by the Court, that is to say, possession in the way referred to in s. 264. The defendant's denial that any possession was obtained in execution is explained to mean that there was no transfer of possession, and this is of course true from his point of view, as his actual possession was never disturbed, and he denies that the property was at all affected by the decree.

The question, therefore, is whether a person entitled under a decree to actual physical possession of property can, after obtaining merely formal possession, bring a suit to oust the defendant, or, whether he must complete his possession by proceedings in execution of his decree. In other words, does the delivery of such formal possession give him a cause of action for a fresh suit. There has been a good deal of controversy and some conflict of decisions as to the effect of a formal delivery of possession under s. 264. It has now, however, been decided by a Full Bench of this Court, in the case of *Juggobundhu Mukerjee v. Ram Chunder Bysack* (I L. R., 5 Cal., 584), that possession given under s. 224 of the old Code (corresponding to s. 264 of the present one) is, as against the defendant, equivalent to actual possession and gives a fresh starting point for limitation. This overruled the case of *Pearce Mohun Poddar v. Juggobundhu Sen* (24 W. R., 418), in which it was held that a formal delivery of possession under s. 224, unaccompanied by any subsequent actual possession, did not give rise to a fresh cause of action. The Full Bench case is not precisely in point, as the plaintiff in that case was only entitled to the kind of possession which could be obtained under s. 224, the land being in the occupation of tenants.

If, however, the delivery of possession in the manner described in s. 264 does, in the eye of the law, place the plaintiff in possession as against the defendant, I do not see how any less effect can be given to it simply because the defendant was not at the time ejected. If the defendant afterwards refuses to quit, he remains as a trespasser at his own risk and has only himself to blame if he is subjected to the harassment of a fresh suit.

But there is distinct authority for holding that the same principle will apply in the case of a person who, being entitled to actual possession under s. 263, takes only formal possession.

[98] In the case of *Umbucka Churn Goopta v. Madhub Ghosal* (I. L. R., 4 Cal., 870), the plaintiff obtained a decree for possession by the ejectment of the defendant, but in 1866 took only formal possession through the Court. In 1872 her assignee sued to eject the defendant, and BIRCH and MITTER, JJ., held that the formal possession given by the Court was sufficient to give a fresh cause of action, notwithstanding that actual possession was never obtained. Similarly, in *Lokessur Koer v. Purgun Roy* (I. L. R., 7 Cal., 418), the plaintiff had a decree for *khas* possession, but took only formal possession by proclamation and beat of drum, and then brought a suit against the defendant within the period of twelve years for possession. GARTH, C.J., and McDONELL, J., held that the formal possession given by the Court operated in point of law and fact as a complete transfer of actual possession from one party to the other. It is true that the question in issue in these cases, and in the Full Bench case, was

one of limitation; but, to decide this, the Court had to determine when the cause of action arose, and it held that the plaintiff could sue within twelve years from the time of delivery of formal possession.

If, therefore, the delivery of formal possession, although the defendants continued in actual possession, effected a complete transfer of the property and furnished, in the cases referred to, a good foundation for a fresh suit, the same result must, I think, follow in the present one. The execution proceedings end with the delivery of possession, and there being a fresh cause of action, there is no bar to the jurisdiction of the Court.

The appellant's pleader relies on the cases of *Mahomed Wali v. Noor Buksh* (25 W. R., 127), *Kristo Gobind Kur v. Gunga Pershad Surmah* (25 W. R., 372), and *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258). BIRCH and MITTER, JJ., refused, in the case already cited, to follow the decision in *Mahomed Wali v. Noor Buksh*. The correctness of the decision in *Kristo Gobind Kur v. Gunga Pershad Surmah* was doubted in the case of *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty*, and the principle on which it proceeded has not been followed in subsequent cases. I think the decision [99] of the Judge is correct, and that the appeal must be dismissed with costs.

Beverley, J.—I must confess that I have had considerable doubt in this case; but on the whole I am inclined to agree with my learned brother that, although there is some conflict of authority in the matter, we are bound to follow the later decisions of this Court.

The question before us is simply this,—whether a person who has obtained a decree for immovable property in the occupancy of the judgment-debtor, and who in execution of that decree has taken mere formal possession of such property, is entitled to bring a fresh suit to compel the same judgment-debtor to deliver up the actual physical possession of the property.

Sections 263 and 264 of the Code prescribe the mode in which decrees for immovable property shall be executed.

Section 263 refers to cases when the property is in the occupancy of a person bound by the decree, and it provides that "possession shall be delivered over to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree who refuses to vacate the property."

Section 264, on the other hand, refers to cases when the property is "in the occupancy of a *tenant* or other *person entitled to occupy* the same and *not bound by the decree* to relinquish such occupancy," in which cases a formal possession is to be given by publication of the Court's order in the manner laid down.

This distinction was fully recognized in the Full Bench decision in *Juggobundhu Mukerjee v. Ram Chunder Bysack* (I. L. R., 5 Cal., 584), and that decision only applies to cases falling under s. 264, that is, to cases in which the property decreed is not in the occupancy of the judgment-debtor.

When the property is in the occupation of the judgment-debtor, s. 263 gives the Court the power, if need be, to remove him; and the question is, whether, if the decree-holder does not choose to put in motion this power of the Court, but contents himself with a mere formal order declaring his [100] possession, but giving him no actual possession at all, he is at liberty to commence the whole proceedings *de novo*, and to bring a fresh suit and obtain a fresh decree.

It is contended that such a fresh suit is barred both by the provisions of s. 244 of the Code, and also by s. 13. Section 244 says that all questions arising between the parties to a suit in which a decree has been passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, *and not by separate suit*. It is contended that the Court having power under s. 263 to oust the judgment-debtor and put the decree-holder in actual possession of the property, a separate suit for such direct occupation is prohibited by this section.

And it is also contended that the matter is *res judicata* under s. 13 of the Code, on the ground that no fresh cause of action arises from the mere refusal of the judgment-debtor to deliver quiet possession, and the omission on the part of the decree-holder to enforce his decree in accordance with the provisions of s. 263.

In support of these contentions we are referred to the cases of *Mahomed Wali v. Noor Buksk* (25 W. R., 127), *Kristo Gobind Kur v. Gunga Pershad Surmah* (25 W. R., 372), *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258).

The case of *Mahomed Wali v. Noor Buksk* (25 W. R., 127) appears to be on all fours with the present. In that case it was held, to use the language of MITTER, J., in *Umbicka Churn Goopta v. Madhub Ghosal* (I. L. R., 4 Cal., 870), "that unless possession (which the report shows to mean substantial possession) is obtained in execution of a decree for possession of land, the decree-holder cannot maintain a second suit for possession against the same defendants, alleging a fresh disturbance of his possession."

The case of *Kristo Gobind Kur v. Kishen Persad Surmah* (25 W. R., 372) went further, and decided that even an auction-purchaser was confined to the remedies prescribed by the Code (ss. 318, 319), and that if he failed to obtain possession under those sections, he could not bring a fresh suit.

[101] This decision was followed in *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258), but its correctness was doubted; and it has since been held, *Seru Mohun Banua v. Bhagoban Din Pandey* (I. L. R., 9 Cal., 602), that an auction-purchaser is not confined to the remedies provided by ss. 318, 319, but that he may sue without proceeding under those sections at all, or if the possession be obtained under them prove to be infructuous. It may be said, therefore, that the case of *Kristo Gobind Kur v. Kishen Persad Surmah* (25 W. R., 372) has been overruled as regards an auction-purchaser. The case of an auction-purchaser, however, is not exactly the same as that of a decree-holder. An auction-purchaser would obviously not be barred from suing either by s. 244 or by s. 13 of the Code.

On the other hand, the cases of *Umbicka Churn Goopta v. Madhub Ghosal* (I. L. R., 4 Cal., 870), *Lokessur Koer v. Purgun Roy* (I. L. R., 7 Cal., 418), relate to a decree-holder, and are relied on as authority that a fresh suit will lie.

In the first case a tenure was sold for arrears of rent and purchased by the decree-holder in 1864, in 1865 the decree-holder sued to eject the tenants, and having obtained a decree she took formal possession in 1866. She then gave a lease of the tenure to the plaintiff, who in 1877 sued to oust the old tenants, and it was held that the formal possession obtained in 1866 was sufficient to bar limitation. It is true that the question raised in that case was one of limitation only, and that the precise point that arises in the present case was not directly decided. The plaintiff in that suit was not the decree-holder in the former suit, and the suit could not, therefore, have been barred under s. 13 or s. 244 of the Code. But I think it must be taken to have been

virtually decided, that the formal possession taken in 1866 gave not only a fresh starting point as regards limitation, but also a fresh cause of action in respect of which the plaintiff was enabled to sue.

In *Lokessur Koer v. Purgun Roy* (I. L. R., 7 Cal., 418), the facts were very similar to those in the present case, but in that case also the precise point now before us was not directly taken, the only [102] question raised and decided being, whether the delivery of formal possession was a sufficient answer to a plea of adverse possession for more than 12 years. The remarks made in that case, however, support the view that a fresh cause of action arises at the time the decree-holder is put into possession, and that the form in which possession is given is really immaterial. In the majority of cases no doubt the formal delivery of possession by the officer of the Court would be sufficient. It is only in case of actual resistance probably that the officer would feel justified in forcibly ejecting the tenant.

But if the judgment-debtor remain in occupancy after formal delivery of possession, he thereby becomes a trespasser no less than if he were to vacate at the time and return the day after. And having thus become a trespasser, a fresh cause of action arises to the decree-holder who may thereupon sue for ejectment. The judgment-debtor has no ground for complaint in being thus twice sued; he is bound to obey the decree, and if he continues in possession after execution, he does so at his own risk. For these reasons I concur in dismissing the appeal.

Appeal dismissed.

NOTES.

[Where there has been symbolical possession against the judgment-debtor, the proceedings may be said to terminate there and a regular suit for possession is not barred by virtue of sec 47, C. P. C., 1908 (- sec. 244, C.P.C., 1882) --(1906) 28 All , 722 3 A L.J , 504 (1906) A.W.N., 213 , (1903) 8 C.W.N., 49 (51), (1897) 24 Cal., 715 , (1886) 10 Mad , 53 (55)]

[11 Cal. 102]

APPELLATE CIVIL.

The 27th November, 1884.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Soorja Koer and another.....Plaintiffs
versus
 Nath Buksh Singh and another.....Defendants.
 and
 Chowrasi Koer.....Plaintiff
versus
 Nath Buksh Singh and another.....Defendants

Maintenance—Property sold in execution of decree for maintenance—Subsequent suit to recover maintenance, and to follow property in hands of auction-purchaser.

A Hindu widow's right to recover maintenance is subject to the right of a purchaser of a portion of the family estate for valid consideration.

A obtained a personal decree against B for maintenance, at the sale in execution of this decree a portion of the family property was sold and purchased by C. At this sale the widow gave notice that she claimed a right to recover maintenance from the family property.

In a subsequent suit by A against B and C to recover arrears of maintenance, A sought to follow the property in the hands of C. Held, that the fact of such notice being given at the time of the auction sale would not affect the rights of the auction-purchaser C, he having purchased at an auction sale held under a decree obtained in satisfaction of a valid family debt.

In these cases it appeared that Soorja Koer and Sansar Pati Koer, respectively, the widow and widowed daughter of one Golab Roy, deceased, had jointly, and that one Chowrasi, the daughter-in-law of Golab Roy, had separately each instituted a suit and severally obtained decrees against the son of Golab Roy, one Nath Buksh Singh, for maintenance, the decrees in no way declaring that the maintenance given should be a charge upon the estate of Golab Roy, deceased. In execution of the joint decree obtained by Soorja Koer and Sansar Pati Koer certain property, formerly belonging to Golab Roy, was put up for sale, and at the sale on the 15th March 1882, when a portion of the property was purchased by Isri Singh, the decree-holders in both suits gave notice that they claimed a right to maintenance out of the estate.

On the 4th April 1882, Soorja Koer and Sansar Pati Koer jointly, and Chowrasi Koer separately, each brought a suit for subsequent arrears of maintenance, praying for money decrees against Nath Buksh Singh and Isri Singh, it being alleged in both suits that the former purchased the property sold in execution under the decree above mentioned behami in the name of Isri Singh.

* Appeals from Appellate Decrees Nos. 1334 and 1158 of 1883, against the decrees of Baboo Abinash Chunder Mitter, Officiating Second Subordinate Judge of Tirhoot, dated 19th of February 1883, affirming the decrees of Baboo Brijo Mohun Pershad, Munsif of Durbhanganah, dated the 23rd of June 1882.

The Munsif, in one judgment governing both cases, held that Isri Singh was the actual purchaser of the property at the execution sale of the 15th March 1882, and he, therefore, dismissed the suit as against him, as he did not consider the property to be liable to the claim for maintenance, but gave the plaintiffs a decree against Nath Buksh Singh.

The plaintiffs appealed to the Subordinate Judge, contending that the purchaser at the auction sale having purchased with notice of the plaintiffs' claim to maintenance ought to be held liable.

The Subordinate Judge held that Isri Singh must be taken [104] to have had notice of the claims for maintenance at the time of his auction purchase, but that the property of Golab Roy, having been sold for a valid debt, could not be followed into the hands of a purchaser for the purpose of making it liable for the maintenance claimed, simply because notice was given at the time of sale. He, therefore, dismissed the appeals.

The plaintiffs appealed to the High Court.

Baboo *Rajendro Nath Bose* for the Appellants.

Baboo *Mohesh Chunder Chowdry* and *Munshi Mahomed Yusuf* for the Respondents.

Judgments of the Court (MITTER and NORRIS, JJ.) were as follows :—

In this case (No. 1158) the plaintiff-appellant is the daughter-in-law of one Golab Roy, and the defendant No. 1, Nath Buksh Singh, who is his *kartaputer*, is in possession of his estate. It appears that the plaintiff-appellant before us obtained a decree for maintenance against the defendant No. 1. Similarly, the widow of Golab Roy, namely, Soorja Koer, and her daughter obtained a decree for maintenance against the defendant No. 1. In execution of this latter decree, a portion of the family property was brought to sale, and purchased by the defendant No. 2, the respondent before us.

The present suit was brought, both against the defendant No. 1 and the defendant No. 2, to recover maintenance from the month of Augrahan 1286 to 20th Cheyt 1289. Plaintiff, in her plaint, sued to recover a personal decree against both these defendants. Her allegation was that the purchase of a portion of the family property by defendant No. 2 was a benami purchase, and that the defendant No. 1 was the real purchaser.

The suit has been dismissed as against the defendant No. 2. The lower Courts find that defendant No. 2 was the real purchaser of a portion of the family estate.

It is contended before us in this second appeal that the lower Courts are not right in dismissing the suit wholly against defendant No. 2; that under the Hindu law the maintenance of a widow is a charge upon the entire family estate, that before the particular portion of the estate, of which the defendant No. 2 became a purchaser, was sold, the plaintiff-appellant, [105] before us gave notice of her right to recover maintenance out of the estate of Golab Roy; and that, therefore, at any rate, the lower Courts should have declared that the amount decreed as maintenance was to be considered as a charge upon the portion of the family estate purchased by the defendant No. 2.

We are of opinion that this contention is not valid. A somewhat similar question to the one raised before us was decided in the case of *Lakshman Ram Chandra Joshi v. Satyabhama Bai* (I. L. R., 2 Bom., 494). In that case the nature of the lien which a Hindu widow has over the family estate in respect of her claim for maintenance is explained and defined. It was held there that if the sale takes place for the satisfaction of a family debt, or any other debt

which would make the sale valid according to the Mitakshara law, the purchaser would not be affected by any notice on the part of the widow, and the property purchased would not be charged with any lien on account of widow's maintenance. Applying that rule to this case, we are of opinion that the lower Courts have come to a right decision. Here the property was brought to sale in execution of a decree for maintenance obtained by the widow and daughter-in-law of Golab Roy, under such circumstances as would pass the entire property. It would be a valid sale under the Mitakshara law.

That being so, the daughter-in-law has no right to follow the property sold in the hands of the purchaser, although there was a notice of her right given before the sale.

We therefore dismiss this appeal with costs.

In this case (No. 1334) the appellants are Mussummat Soorja Koer and another, the decree-holders, in execution of whose decree a portion of the family estate was sold. Before the sale took place they also gave notice of their right to recover maintenance from the family estate. It is true that in this case the decree-holders, who were bringing the property to sale, gave the notice mentioned above, therefore in this respect there is a difference between this case and the Bombay decision cited above, but the principle of the decision would apply. Notice in this [106] case would not give to the widow any higher rights than what she possessed under the Hindu law, and the Bombay decision lays down what the Hindu law is upon the point. It lays down that the widow's right to recover maintenance is subject to the right of the purchaser of a portion of the family estate for valid consideration.

Therefore, it is clear that under the Hindu law, the plaintiffs, appellants, have no right to follow this property in the hands of the purchaser. That being so, the notice of their right to recover maintenance from the family estate cannot affect the rights of defendant No. 2. Under the Hindu law the widow's rights are limited in the way stated above. The defendant No. 2 purchased this property in execution of a decree for maintenance. Under the Hindu law such a purchaser acquires a superior right to that of the widow to recover maintenance from the estate.

In this case also, therefore, upon the principle laid down in the Bombay decision cited above, the judgments of the lower Courts appear to be correct.

We therefore dismiss this appeal also with costs.

Appeals dismissed.

NOTES.

[The creditor's rights override the right of maintenance conferred by Hindu Law, and when the property is sold for those debts, even prior notice of those claims does not affect the purchaser:—24 All. 160 ; 22 All 326 ; 2 Bom. 494 , (1907) P. R. 36 . (1908) P. L. R. 11]

**[11 Cal. 106]
APPELLATE CRIMINAL.**

The 16th December, 1884.

PRESENT ·

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Behari Mahton....Appellant

versus

Queen-Empress.....Respondent.

*Charge—Accused entitled to know exact value of charge made against him—
Criminal Procedure Code—Act X of 1882, s 221.*

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, and unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.

[107] IN this case the accused, Behari Mahton, was committed to the Sessions Court at Patna charged as follows.—

(1) “That he on or about the 14th day of January 1884, being a member of an unlawful assembly and using violence in pursuance of its common object, committed the offence of rioting and thereby committed an offence punishable under s. 147 of the Penal Code.”

(2) “That in pursuance of the common object of the unlawful assembly of which he was a member, certain other members of the assembly committed the offence of murder of Bhagut Goala, and that he was therefore under s. 149 of the Penal Code guilty of that offence.”

The Sessions Judge added to the last charge the words “and thereby committed an offence punishable under ss. 302, 149 of the Indian Penal Code and within the cognizance of the Court of Sessions”, he also further added two other charges, viz.—

(3) “That you, Behari Mahton, on or about the 14th January 1884, at Kurhara, in pursuance of the common object of the unlawful assembly of which you were a member, such common object being to resist the theft of crops by violence, certain other members of the said assembly (names unknown) committed the offence of culpable homicide of Bhagut Goala, an offence which you knew likely to be committed in pursuance of the common object, and you are therefore under s. 149 of the Indian Penal Code guilty of the aforesaid offence, and thereby committed an offence punishable under ss. 304 and 149 of the Indian Penal Code and within the cognizance of this Court.”

(4) “That you, Behari Mahton, on or about the 14th January 1884, at Kurhara, in pursuance of the common object of the unlawful assembly of which you were a member, such common object being to resist the theft of crops by violence, certain other members of the said assembly (names unknown) committed the offence of grievous hurt which you knew likely to be committed in pursuance of the common object, and you are therefore under s. 325 of the

* Criminal Appeal No. 680 of 1884, against the order and sentence of T. D. Beighton, Esq., Sessions Judge of Patna, dated the 10th of July 1884.

Indian Penal Code guilty of the aforesaid offence, and thereby committed an offence punishable under ss. 325 and 149 of the Indian Penal Code, within the cognizance of this Court."

[108] The Judge in charging the jury omitted to direct the jury to consider what, if any, was the common object of the assembly before the assault was committed, he further omitted to point out that if the assault was committed in the absence of the accused, they ought to be satisfied that it was committed in pursuance of a common object which would make the assembly unlawful within the meaning of s. 149 of the Penal Code.

The jury acquitted Behari of the offences under the first and third charges, but found him guilty under the last (having returned no verdict under the second charge).

The prisoner was sentenced to 18 months rigorous imprisonment.

The prisoner appealed to the High Court

No one appeared at the hearing.

The **Judgment** of the Court (MITTER and NORRIS, JJ.), after setting out the two first charges *in extenso*, ran as follows —

We are of opinion that the two first charges are not sufficiently explicit, and that they should have contained such particulars of the manner in which the alleged offence was committed as would have been sufficient to give the accused notice of the matter with which he was charged.

The foundation of both charges lay in the fact that the accused was alleged to have been a member of an unlawful assembly "An unlawful assembly" is defined by s. 141 of the Indian Penal Code, and the alleged common object of the assembly ought to have been set out in the charges. An accused person is entitled to know with certainty and accuracy the exact value of the charge brought against him Unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself, but by others with whom he was in company.

The Sessions Judge appears to have recognised the insufficiency of these charges, for he framed the new charges (Nos. 3 and 4) [here followed *in extenso* charges 3 and 4 as set out above.]

The Jury unanimously acquitted the accused on the first charge and on the first amended charge (1 and 3). As far as we can gather from the record, which is almost illegible, and which we [109] have almost been constrained to return to be fair copied, they have returned no verdict on the second charge; nor does the Sessions Judge appear to have directed their attention to that charge in his summing up. We are, however, satisfied that even if the second charge had been properly framed, there was no evidence upon which the accused could have been convicted of murder. The Jury, however, convicted the accused on the second amended charge (charge No. 4).

We have now to consider whether, looking at the form of the charge and considering the Judge's summing up, the conviction can be supported, for we can only set it aside upon some error in law.

We are of opinion that the charge as framed discloses no offence.

The common object of the unlawful assembly as laid in the charge was "to resist the theft of crops by violence." There is no punctuation in the charge as set out in the record, but we imagine that what was meant to be charged as the common object was "the resisting, by violence, the theft of crops."

Now, it is clear that under s. 96 of the Indian Penal Code the accused was justified in using violence for the protection of his own crops or those of any other persons, provided that, in the exercise of such right, he did not inflict more harm than it was necessary to inflict for the purpose of such protection.

The charge, to have disclosed an offence, should have alleged the common object to have been "to unlawfully resist by violence the theft of crops," or, still better, "to defend certain immoveable property, to wit, growing crops against the offence of theft, and, in such defence, to inflict more harm than was necessary for the purpose of such defence."

The case for the prosecution was that unnecessary violence had been used by members of the assembly other than the accused, for which he became responsible by virtue of s. 149 of the Indian Penal Code; this should have been distinctly alleged. We have carefully perused the Judge's summing up, and it appears to us to be deficient in this respect, in that he has not directed the Jury to consider what, if any, was the common object of the [110] assembly before the assault was committed; nor has he told them that if the assault was committed in the absence of the accused, they must be satisfied that it was committed in pursuance of a common object which would make the assembly "unlawful" within the meaning of s. 149 of the Indian Penal Code. We are, therefore, constrained to set aside the conviction. Under the circumstances we think no good result would follow from our directing a new trial, and we accordingly direct that the accused be discharged from custody.

Appeal allowed.

NOTES.

[Where the findings negative the common object which was not precisely set out in the charge, and the charge itself was defective by not specifying the property which was the common object, it was held that the accused were prejudiced — 33 Cal. 295. 2 C. L. J. 516. See also 4 C. W. N. 196; 7 C. W. N. 301; in 22 Cal. 391 the omission to state intention was held curable.]

[111] PRIVY COUNCIL.

The 4th and 12th July, 1884.

PRESENT :

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Madhopersad.....Plaintiff

versus

Gajudhar and others..... Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Foreclosure of mortgage—Regulation XVII of 1806, s. 8—Service of copy of petition and of parwana, in the manner provided, essential.

The provisions of s. 8 of Regulation XVII of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of

mortgagors from fraud. The prescribed procedure must be strictly followed. *Norender Narain Singh v. Dwarka Lall Mundur* (L. R., 5 I. A., 18; I. L. R., 3 Cal., 397) referred to and followed.

Held, that although the mortgagor at the hearing of the foreclosure suit in the Court of First Instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given, that service of the copy petition for foreclosure, and of the parwana signed by the Judge, was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal.

APPEAL from a decree (15th March 1881) of the Judicial Commissioner of Oudh, reversing a decree (8th September 1880) of the District Judge of Lucknow, and dismissing the appellant's suit for foreclosure of a mortgage.

The principal question raised on this appeal related to the sufficiency of proceedings purporting to have been in conformity with Regulation XVII of 1806, s. 8. Another question was whether or not the mortgagors had received the mortgage money, on which the Courts in India differed.

The object of the suit was to obtain possession, in proprietary right, of mouzah Bhadin in the Unao district of Oudh, which had been mortgaged by way of conditional sale by the respondents, or their predecessors in estate, to the father of the appellant. The mortgage, dated 3rd May 1863, was registered under Act XIX [112] of 1843, the mortgage money Rs. 4,851 being payable, with interest at one per cent. per month, within five years. It contained a clause to this effect: "Should the principal amount with interest be not paid within the time above specified, and the whole or a portion thereof remain unpaid, this mortgage deed will be held an absolute deed of sale, free from all dispute, and the mortgagee will be entitled to possession of the village, according to the terms of a deed of sale."

The execution of this mortgage being admitted, the defence was that the consideration had not, in fact, been paid, the instrument having been made upon a promise by the mortgagee that the expenses of the mortgagors attending an appeal, in which they were interested, should be defrayed by the mortgagee. The appeal, however, turning out to be unnecessary, never was made.

Issues having been fixed, and the defendants called on to disprove the *prima facie* case against them, the Court of First Instance, the District Judge of Lucknow, gave judgment in favour of the plaintiff, finding on the evidence that there was affirmative proof of the consideration money having been in fact paid, and foreclosure of the mortgage was accordingly decreed. This decision was reversed by the Judicial Commissioner. He held that, under the circumstances, the plaintiff might be fairly put to the proof of the consideration; and that the evidence, oral and documentary, had been insufficient to establish it. He was, however, of opinion that if he had concurred with the Judge of the first Court as to the receipt, in fact, of the mortgage money by the mortgagors, it would still have been necessary to dismiss the suit in its present form, on the ground that notice of foreclosure had not been duly served, according to s. 8, Regulation XVII of 1806, and that the proceedings were therefore invalid. His judgment on this point was the following: "Although the parwana of 26th April 1876 purports to issue by order of Deputy Commissioner, it certainly does not bear his official signature; there was no copy of the written application for foreclosure served with it at the same

* Under this Act registration of deeds affecting interests in land was not compulsory; but such deeds, when registered, were to be satisfied in preference to those not registered.

[113] time; nor does it notify that, if the mortgagor shall not redeem the property mortgaged, in the manner provided for in the foregoing section of the Act, within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive.

What it does do is simply to order them to appear by the 18th May to take away notice deeds in the matter of Madhopersad's notice of foreclosure of mouzah Bhadin for Rs. 12,365-6-0, on conditional deed of sale.

It is urged that their subsequent petition objecting to foreclosure proves that they were aware of the claim to foreclose the amount claimed, and the amount was to be paid by them within one year; but this is not so. What it proves is that they were aware that petitioner had claimed all this, but that is a very different matter to an authoritative notice by the Judge that such was the law. It is further urged that this objection was not taken in the Court of First Instance, and so must be held to be waived, but I cannot concur. The provisions of s. 8 of Regulation XVII of 1806 are imperative and not merely directory. In *The Bank of Hindoostan v. Shoroshubala Debee* (I. L. R. 2 Cal., 311) a formal notice was served, and the mortgagors must have been well aware of the legal results of such notice, for they had once gone through the whole foreclosure proceedings of the same mortgage; although the proceedings were subsequently cancelled, yet there being no proof of service at the same time of a copy of the written application for foreclosure, this was held to be fatal to the plaintiff's claim to foreclose. And in my opinion the tendency of all cases is to show that, whether parties raise it or not, it is imperative on the Judge to try and decide the issue, whether notice of foreclosure had been duly served or not. Foreclosure being an act which puts an end to the right of the mortgagor, it must be carried out strictly in accordance with the Regulation. The right to foreclosure rests upon such notice as the law requires to be given, and though it may be hard on the claimant that he should suffer from the laches of the Court, yet it is eminently his duty to see that everything is done in conformity with law, [114] and it would be much harder if the mortgagors were to lose their estate for non-conformance with a notice which in no important respect was conformable with the law.

On these grounds I decree this appeal and cancel the decree of the District Judge, dated 8th September 1880, and dismiss this suit. As to costs, there being found no fraud on the part of plaintiff, who probably found this bond among old family papers without knowing its real value, I do not think it necessary to decree costs against him. Each party will bear their own costs in both Courts."

On this appeal---

Mr. R. V. Doyne, for the appellant, argued that the judgment of the first Court was correct upon the evidence; and that the Judicial Commissioner had reversed the finding upon insufficient grounds. He also contended that the notices given with a view to foreclosure had been in effect a substantial compliance with the requirements of s. 8 of Regulation XVII of 1806, followed as they had been by the other proceedings in the District Court in which the respondents had virtually admitted the receipt of due notice; so that it was not open to them to contest this point at a later stage.

He referred to Macpherson on Mortgages, 6th edition, 210, and *The Bank of Hindoostan v. Shoroshubala Debee* (I. L. R., 2 Cal., 313, 315).

The respondents did not appear.

On a subsequent day, July 12th, their Lordships' Judgment was delivered by

Sir R. P. Collier.—This is an appeal from a judgment of the Judicial Commissioner of Oudh, reversing a judgment of the District Judge of Lucknow.

The plaintiff, a banker, sued to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it. The mortgage was dated 3rd May 1863, 17 years before the commencement of the suit; of the mortgagors, 17 in number, 11 survived, the remaining defendants being representatives of those who had died. The mortgagee was Rajah Behari Lal, the father of the plaintiff. The deed of mortgage purports to be a security for the repayment within five years of Rs. 4,851, with 12 per cent. interest, the receipt of [116] which sum is acknowledged, and it declares that if the principal and interest are not repaid within five years the instrument shall operate as an absolute deed of sale.

The principal sum is stated to be made up of debts due by the mortgagors, or otherwise secured by former mortgages, which they were to be provided with money to pay, of a balance due to the bank, and an advance of Rs. 1,356 "for necessary expenses."

The plaintiff alleged default in the payment of the mortgage money, that the proper proceedings for foreclosure had been taken, and claimed possession of the land.

The defendants denied that any consideration was given for the bond, and alleged that it was given only to secure advances which might be made to pay the costs to which the plaintiff might be put by the prosecution of an appeal by two persons who had brought a suit against them, and failed in the lower Court, that no appeal was preferred, and that nothing was advanced.

The issues stated were —

- (1) Did the defendants receive no consideration?
- (2) Were the defendants induced to execute the deed by fraud and misrepresentation?

On the part of the plaintiff the mortgage was duly proved, which undoubtedly threw upon the defendants the burden of proving absence of consideration.

The plaintiff further called witnesses to the actual payment of the consideration money when the mortgage was executed. He put in the former mortgages. He showed an entry in his books whereby it appeared that the sums due on the former mortgages were either advanced to the defendants or paid for them, that they owed the balance to the Bank stated in the mortgage deed, and received the amount stated to have been paid to them. Against this evidence the defendants called two witnesses who swore that they were present on the examination of the deeds, and that no money passed, but none of the mortgagors, of whom 11 were living, were called to prove want of consideration, the pendency of the litigation, to meet the possible cost of which they alleged the mortgage to have been given, [116] or indeed any part of their case, which involved a charge of gross fraud against the bankers. The District Judge believed the evidence of the plaintiff, and gave judgment in his favour.

This judgment was reversed by the Judicial Commissioner on two grounds: 1st, that the mortgage was without consideration; 2nd, that the proper proceedings had not been taken to effect foreclosure.

The finding of the Judicial Commissioner on the first point seems to have been mainly based on three considerations:—

- (1) That the entries in the books of the plaintiff contradict his story. Their Lordships have already intimated that in their view these entries confirm it.

(2) That the money was said to be advanced before the deed was registered. It is to be observed here that the transaction occurred in 1863, a year before the Registration Act of 1864 came into force, which, for the first time, provided that payment of the consideration of deeds might be made in the presence of the Registrar at the time of registration and recorded by him—a practice which has since become common. As the banker was not a party to the deed, his presence before the Registrar was not necessary, while that of the defendants was. If there is some force in the observation that it is strange that he should, after parting with his money, have entrusted the deed to the defendants to have it registered and receive it back from the Registrar, on the other hand it is to be observed that the deed must at some time have been returned to the banker, as he produced it at the trial.

(3) The absence of any demand of interest from the time of the mortgage money being due to the date of the suit, nearly 12 years, an observation certainly of some weight.

On the whole, however, their Lordships are of opinion that the evidence preponderates on the side of some consideration having been received by the defendants, though how much was actually advanced to them in cash may admit of doubt.

The second ground on which the Judicial Commissioner reversed the judgment of the District Judge presents a question of more difficulty. It was contended on the part of the appellant that, inasmuch as the defendants had in the Court [117] below rested their case solely on the absence of consideration for the mortgage, and had admitted in their written statement that they received some notice of foreclosure, and no issue as to the validity of the foreclosure had been raised in the Court of the District Judge, the defendants were precluded from questioning the regularity of the foreclosure proceedings before the Judicial Commissioner, although they took the point in their grounds of appeal; and that the Commissioner had no power to inquire into those proceedings.

The proceedings necessary to effect foreclosure are thus prescribed in s. 8 of Reg. XVII of 1806.—

“Whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakeels of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a parwana, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive.”

These provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often (as in the present case) poor and ignorant men, from fraud and oppression on the part of money-lenders. Accordingly, both in the Courts of India and by this Board, it has been held that the prescribed procedure must be strictly observed. In the case of *Norender Narain Singh v. Dwarka Lal Mundur* (L. R., 5 I. A., 18; I. L. R., 3 Cal., 397) it was held that the finding

of the Zillah Judge, in the foreclosure proceedings, that notice had been duly given to the mortgagors, was not even *prima facie* evidence of the Regulation having been complied with, and [118] that the service of the petition for foreclosure and the parwana of the Judge in the form directed by the Regulation must be strictly proved. To construe the pleadings in the District Court as a binding admission that the respondents had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in India a stricter construction than is usual.

The Judicial Commissioner had the subject brought before him by the grounds of appeal, he had power to take additional evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it. In their Lordships' judgment he had, at the least, a discretion to inquire into the subject if he thought fit, and they are not prepared to say that he exercised that discretion so wrongly that his judgment ought to be reversed.

Although the vakeel for the mortgagors appeared before the Judicial Commissioner, argued the question of foreclosure, and adduced evidence upon it, it does not appear that any application was made for the settlement of an issue on this question, nor was it suggested, nor is it now suggested, that further evidence of the regularity of the foreclosure proceedings was obtainable.

The question remains whether, in the foreclosure proceedings, the provisions of the Regulation of 1806, with respect to the notification to be made to the mortgagor, were or were not duly observed.

Several documents were put in, of which the following is a specimen :—

“ Translation of Notice to Ishri, dated 30th March 1876

“ (Signed) H. B. H.

“ Madhopersad, son of Rajah Behari Lal, Bahadur, Sahukar (banker) and Talukdar of Maurawan, etc Plaintiff,

versus

“ 1, Gajadhar, 2, Jagan, 3, Matadin, son of Thakur, 4, Ishri, son of Dhaukal : 5, Janki, son of Jewrakhan, 6, Lalta, 7, Badloo, and 8, Bhagwandin, sons of Madari, 9, Sheo Charan, 10, Gauri, 11, Janki, and 12, Mathura, sons of Pem, 13, Kusahar, son of Baji, 14, Kulidin, 15, Rajwa, and 16, Sheo Singh, sons of Badri, 17, Sankata, minor son of Ram Sahai, under the guardianship of his mother, and 18, Bala, son of [119] Bhawanidin, Brahmins, residents, and co-sharers of mouzah Bhadin, pargana and tahsil Purwa, in the district of Unao, mortgagors

Defendants.

‘ Claim—Foreclosure of mortgage of the entire village Bhadin in the pargana and tahsil Purwa, in the Unao district, under the terms of the deed of mortgage by conditional sale, dated 3rd May 1863 A D for an amount noted below —

“ Notice

“ To Ishri, son of Dhaukal, caste Brahmin, resident and sharer of mouzah Bhadin.

“ Whereas plaintiff has filed in the Court an application for foreclosure of mortgage in respect of village Bhadin described in the deed of mortgage by conditional sale, dated 3rd May 1863, owing to non-performance of the conditions entered therein, notice of one year's currency is hereby given to you, as laid down in s. 8, Regulation XVII of 1806, that if you will not pay up the mortgage money with interest within twelve months and redeem the mortgaged property, the mortgagee shall, at the expiration of the period stipulated for, become

in virtue of the condition as regards non-receipt of the mortgage money and interest the absolute proprietor of the said village, and no objection whatever will thereafter be attended to.

					Rs.	A.	P.
" Principal mortgage money	...	...	...	...	4,851	0	0
Interest	...	...	...	...	6,982	4	0
Future interest for one year	..	...	...	...	582	2	0
Costs	...	..	..	...	8	4	0
Total	...	...	...	...	12,373	10	0

" Dated the 30th March 1876.

" In Hindi.

" (Signed) ISHRI, Lumberdar, with pen of Gauri, Patwari. Witnessed by Gauri, Patwari."

H. B. H. are said to be the initials of the District Judge.

The signature at the bottom is said to represent the receipt of the document by Ishri, one of the defendants, but when and where he received it is not very certain.

The following is a sample of another set of notices, dated the 26th of April 1876:—

" By order of the Deputy Commissioner of Unao.

" Notice of Foreclosure of Mortgage

" No. 59. Miscellaneous, Civil.

[120] " Madhopersad, son of Rajah Behari Lal, Bahadur, Banker, and Talukdar of Maurawan, etc. *Plaintiff,*

versus

" Gajadhar, etc. (18 persons), residents of mouzah Bhadin, pargana and tahsil Purwa... .. *Defendants.*

" Claim —Foreclosure of mortgage by conditional sale of the entire village Bhadin in lieu of Rs. 12,365-6 in all

" Notice to Sheo Charan, defendant

" Whereas the plaintiff named above has put in a petition in this Court requesting that a notice of foreclosure of mortgage be issued to you, you are therefore directed to attend this Court, on 18th May of the current year, and take away the aforesaid notices, filed by the plaintiff after understanding their full purport, consider this urgent.

" Dated this 26th day of April 1876, A D.

" (L.S.)

(Signed)

"

It would appear by this that the defendants are summoned to attend the Court on the 18th May, in order to receive a notice of foreclosure, and that consequently they had not received notice before.

Accordingly on the 18th of May they attend the Court.

The proceedings before the Court are headed:—

" Claim to foreclosure of mortgage of village Bhadin in lieu of Rs. 12,365-6. Application for the issue of notice of foreclosure for the term of one year."

The defendants objected to receiving the notice, on the ground of want of consideration for the mortgage.

A minute of the Court of the Deputy Commissioner, dated 19th December 1876, is in these terms:—

" Parties are present, i.e., the defendants, who were sent for, have appeared in person, while the plaintiff's pleader is present for him; notice has been delivered."

It has been contended that on that day at least the notices were delivered to the defendants, and that on that occasion they signed their names as having received them.

But what did they receive? The document of 30th March; none other is suggested, unless it be the document of the 26th of April, which is less favourable to the plaintiff.

This document of the 30th of March, however, is not a compliance with the Regulation. It is not a parwana under the seal and official signature of the Judge; it does not notify from [121] what date the year during which redemption shall be made begins to run, and it neither was nor purports to be a copy of the petition for foreclosure, the furnishing which to the mortgagor is declared by this Board in the case before cited to be essential. Their Lordships are therefore of opinion that the Judicial Commissioner was right in holding that the requirements of the Regulation had not been complied with, and they will humbly advise Her Majesty that his judgment be affirmed.

Solicitor for the Appellant: Mr. T. L. Wilson.

Appeal dismissed.

NOTES

[Where other formalities have been observed, the mere fact of the Judge's initials being on the *parwana* instead of his signature does not vitiate it —(1906) 29 All., 145 3 A L J., 857. (1906) A. W. N., 309 (310); (1907) P. R., 105, *contra* (1893) 16 All., 59; (1888) P. R., 16. Strict compliance with the requirements of the Regulation should be established.—(1912) P. L. R., 121. (1912) P. W. R., 69: 13 I. C., 621 (seals), (1907) P. R., 46. (1903) P. R., 71. (1903) P. L. R., 162, (1902) P. R., 48. (1902) P. L. R., 63, (1886) 8 All., 388. 6 A. W. N., 140, (1888) 11 All., 164 9 A. W. N., 48, (1906) 9 O. C. 147 (149)]

[11 Cal. 121]

PRIVY COUNCIL.

The 4th, 8th and 23rd July, 1884.

PRESENT

LORD WATSON, SIR B PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Kalidas Mullick Plaintiff

versus

Kanhaya Lal Pundit, and on his decease,
Behary Lal Pundit and others..... Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Construction of gift, as to quantity of estate given—Limitation Act XV of 1877, Sch. II, Arts. 134 and 144—Gift when operative without delivery of possession—Hindu law.

The rule as to the construction of the language in which a gift is made, independently of the "Transfer of Property Act," Act IV of 1882, (which may, or may not, have been expressed so as to lay down, in favour of absolute gifts, a rule more positive), is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention.

A gift being thus expressed,—“I put a stop to my interest in those taluqs, and withdraw my enjoyment thereof, and I make them over to you” *Held*, that this must be read with what preceded it, *viz.*, “in order that you may perform those religious ceremonies,

celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control ; " and that the words of gift must be taken to be limited by the purpose of the gift ; the whole taken together showing that the donor's intention was that the donee should take the property for life only.

Held, also, that, consistently with the authorities in the Hindu law, a gift, where the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession ; and that where a donee, or vendee, is under the terms of the gift, or sale, entitled to possession, there is no reason why such gift, or sale, though not accompanied by possession, whether of move-[122] able or immovable property, (where the gift or sale, is not of such a nature as would make the giving effect to it to be contrary to public policy), should not operate to give the donee, or vendee, a right to obtain possession.

APPEAL by special leave (obtained 16th December 1882) from a decree of the High Court, setting aside the judgment of the Subordinate Judge of Cuttack, as to limitation, but, on other grounds, affirming his decree (30th June 1880), whereby the suit was dismissed.

One of the questions raised by this appeal depended on the construction of an *ikrarnama* of gift, another on the application of the law of limitation, and the third was whether a gift, where no possession of the property was transferred to the donee, was valid or invalid.

The property given was a ten-annas share in taluq Santiapur zilla Cuttack, which formerly belonged to Ramkumar Brohmo, who having instituted a *deb seba*, or worship, and celebration of festivals, at Kona in the district of the 24-Purganas, died some time before 1838, leaving an only son, Srinath Brohmo, and one widow, Ruttonmoni Dasi

Srinath Brohmo died, without issue, in 1838, leaving an only widow, Romasunderi Dasi, his personal representative. Among his male relations, who expected to be heirs on the death of his widow, and of his mother Ruttonmoni, was Tarinicharn Brohmo, the father of the minor respondents.

On the 13th of June 1841, Romasunderi executed in favour of her mother-in-law, Ruttonmoni, an *ikrarnama* of gift transferring her interest in Santiapur to Ruttonmoni, for the performance of the *deb seba*, and ceremonies. In 1865, in satisfaction of a decree obtained against Ruttonmoni by another person, this interest was sold for Rs 17,800 to Kanhaya Lal Pundit, at an execution sale, and he obtained possession.

Ruttonmoni died in 1867, and after her death Romasunderi and Tarinicharn executed the *ikrarnama*, dated 1st February 1876, which occasioned the present contention, giving the same property to Krishnamohini Dasi, wife of Kalidas Mullick, the plaintiff-appellant. This *ikrarnama* recited the former *ikrarnama* to Ruttonmoni executed in 1841, and stated that on her death the property had reverted to Romasunderi and Tarini-[123]charn. Krishnamohini died on the 4th November 1878, leaving the appellant, Kalidas Mullick, her heir and representative, who brought this suit against Kanhaya Lal, claiming possession of the ten-annas share of taluq Santiapur, under the *ikrarnama* of gift of 1st February 1876, and mesne profits for the three years prior to suit. Kanhaya Lal, for the defence, alleged title as purchaser of the rights granted by Romasunderi to Ruttonmoni in 1841. He also set up limitation under Act XV of 1877. A further defence was that Romasunderi, who was a party-defendant, never having been in possession, the deed of gift executed by her was invalid. She, by her written statement, supported the plaint.

The suit was dismissed by the Subordinate Judge of Cuttack. He was of opinion that, under the *ikrarnama* of 1841, Ruttonmoni took only a life estate, and that on her death the property reverted to Romasunderi, whose

gift to the plaintiff was valid for her own life. But he considered that the suit was barred under Art. 144, Sch. II of Act XV of 1877, "for the possession of the objecting defendant was adverse to the trustee Ruttonmoni, and, through her, also to Romasunderi, the person by whom that trust was created, and, being so, was a bar to both, having commenced more than twelve years before the suit was brought."

The plaintiff appealed to the High Court, and the defendant filed a memorandum of objections to the appeal, to the effect that Ruttonmoni took an estate which was either absolute, or at least valid against Romasunderi, and those claiming through her; this estate, also, having passed at the execution sale.

The High Court (CUNNINGHAM and TOTTENHAM, JJ) held that the *ikrarnama* of 1841 conveyed an estate for the life of Romasunderi, the donor. They said "The expressed object and motive for the *ikrar* was to provide for the performance of certain religious rites and festivals by Ruttonmoni, and for her support, both matters necessarily restricted to her lifetime. The grantor and grantee were both of them persons whose legal estate in the family property was for life only, nothing is said about the duration of the interest conveyed. It may be that each party took for granted the fact that the interests with which they were dealing were life-interests only. It is conceded that Romasunderi must be deemed to have conveyed at most only her own life-[124]interest, it follows, not unnaturally, that she may have intended only to deal with her mother-in-law's life-interest, though she did not in express terms limit the grant to this, but left it to be inferred from the personal object of the grant, and the personal trust by which it was accompanied."

The Judges, having referred to the judgment of the Judicial Committee in *Sreemutty Rabutty Dossee v. Subchunder Mullick* (6 Moo. I.A., 1), as showing "the degree in which the circumstances of a Hindu widow should be taken into account, in construing instruments in which she is concerned," and having stated that they considered applicable the rules laid down in the Indian Succession Act, 1865, and the Transfer of Property Act, 1882, the latter Act, although not in force, enacting, in their opinion, what was "unquestionably the present law on the subject" concluded thus "Upon the whole, we are of opinion that though some expressions in the deed favour the view that the intention of the deed was to create a trust estate, which expired at Ruttonmoni's death, that intention is not sufficiently indicated to justify us in setting aside the distinct and unconditional terms of the grant, and we think, therefore, that that grant must be deemed to have been, at any rate, of all the estate in the taluq, of which Romasunderi could dispose, and that accordingly, as she is still alive, Ruttonmoni's interest has not expired, and that the present action must fail. Kanhaya Lal Pundit having died pending the appeal to the High Court, the respondent, Behari Lal Pundit, was substituted for him.

On this appeal—

Mr. T. H. Cowie, Q.C., and Mr. J T Woodroffe, for the appellant, argued that, according to the true construction of the *ikrarnama* of the 13th June 1841, the whole life-interest of Romasunderi was not transferred to Ruttonmoni; but the former retained the reversion of her estate for life, as a widow

* The Transfer of Property Act, 1882, (Act IV of 1882), s. 8, provides that unless a different intention is expressed, or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the incidents thereof.

Regard being had to the express object of the instrument of [125] 13th June 1841, and the personal trust placed in Ruttonmoni, it followed that the gift extended no further, and that Romasunderi, on the death of the latter, in her lifetime, became entitled to the possession. The High Court had been in error in holding that Ruttonmoni took anything but an interest for her own life. The result was that Romasunderi had been in 1876 in a position to make the gift. Neither Art. 134 *, nor 144, nor any provision in Act XV of 1877, the Indian Limitation Act, could be applied. No purchase of Ruttonmoni's interest could affect Romasunderi's, and the present suit, moreover, was brought when less than twelve years had elapsed from the date of Ruttonmoni's death.

Upon the question whether the gift of 1876, not having been followed by the delivery of possession, was valid, the affirmative was submitted. In gifts, under the Hindu law, equally with sales and mortgages, the necessity for the delivery of possession was only to prevent difficulties arising on the denial of the transaction by the donor, vendor, or mortgagor, and also to prevent competing claims. Here, however, no such question had arisen. The donor was a party supporting the donee's claim against a third party. The texts in the Hindu law, when taken as a whole, did not maintain, as an abstract proposition, that a gift without delivery of possession was void.

Reference was made to *Lalubhai Surchand v. Bhai Anurit* (I. L. R., 2 Bom., 299), *Bikan Singh v. Mussamat Parbutty Koor* (22 W. R., 99); *Bishonath Dey Roy v. Chunder Mohun Dutt Biswas* (23 W. R., 165), *Lokenath Ghose v. Jugobundhoo Roy* (I. L. R., 1 Cal., 297), *Gungahurry Nundee v. Raghubram Nunice* (14 B. L. R., 307, 313).

Mr. R. V. Doyne and Mr. J. D. Mayne, for the respondent, contended that the interest of Ruttonmoni, under which the respondent was in possession, was a valid and subsisting interest as against Romasunderi and the appellant claiming under her. The law of limitation barred the suit. But, if it was inapplicable, the defence remained good that the plaintiff's title was [126] defective and invalid, because the *ikrarnama* of 1876 was not accompanied, or followed, by possession.

Without admitting that Romasunderi had been entitled to enter on the death of Ruttonmoni, she, at all events, was not in a position to make, and had not made, a valid transfer by way of gift, which, according to Hindu law, was not effective without delivery of possession.

Reference was made to the *Mitakshara*, chap. III, s. 6, paragraphs 2 and 3 translated, 1 Wm. Mac., 217; Mayne, *Hindu Law and Usage*, paragraph 329, also to *Kishto Soondery Dabea v. Rancee Kishtomotee* (Marsh., 367); *Dugai Dabee v. Mothura Nath Chattopadhyaya* (I. L. R., 9 Cal., 854); *Harywan Anandram v. Naran Haribhai* (4. Bom. H. C., A. C. J., 31), *Girdhar Parjaram v. Daji Dulabhram* (7 Bom. H. C. A., C. J., 4); *Kachu Bayaji v. Kachoba Vithoba* (10 Bom. H. C., A. C. J., 491), *Rajah Sahib Perhlad Sein v. Baboo Budhoo Sing* [12 Moo. I. A., 301, (306)]; *Rancee Bhobosoondree Dassee v. Issur Chunder Dutt*

* [Art. 134 :—

Description of suit.	Period of limitation	Time from which period begins to run.
To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration.	Twelve years.	The date of the purchase.]

(11 B. L. R., 36); *Bai Suraj v. Dalpatram Dayashankar* [I. L. R., 6 Bom., 380 (385)].

Mr. T. H. Cowie, Q. C., replied.

On a subsequent day (23rd July) their Lordships' Judgment was delivered by

Sir R. Couch.—On the 13th of June 1841 Romasunderi Dasi, widow of Srinath Brohmo, executed an *ikramnama*, which was in the following terms :—

"To the most respectable Srimoti Ruttonmoni Dasi, widow of the late Ramkumar Brohmo, mother of the late Srinath Brohmo, inhabitant of Kona, pargana Havelisuhur."

"This *ikramnama*, executed in 1248 (1841-42) by Romasunderi Dasi, widow of the deceased Srinath Brohmo, inhabitant of Kona, pargana Havelisuhur, at present residing in Chitpur, in the district of 24-Purgannahs, sheweth.—

"That the taluqs comprised in the mouzahs mentioned in the annexed schedule, which were purchased in my husband's name, and which are recorded in my name in the collectorate sheristas of the districts of Cuttack and Puri, are under your control, with all rights appertaining thereto; and you have been performing the *deb seba*, and have been entertaining religious mendicants, and have been celebrating the *dole* and *durgutshub* festivals (which were originally instituted by my deceased husband and father-in-law), by residing in the house at Kona. In order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control, I put a stop to my interest (in those taluqs) and withdraw my enjoyment thereof, and I make them over to you, with this promise, that you may remove my name from the Collector's sherista in respect of the taluqs named in the schedule, and you may have your name substituted for it; that you should have undisputed possession in the mofussil, that you should take the lowajima papers and the arrears of rent from the amlas and officers appointed by me, that you should appoint men who are under your control to the offices of amlas, and through them you should collect rents from the tenants in the mofussil; that you should perform the above-mentioned *sebas*, and should provide for your support. I have no right or claim to the taluqs. If I advance any claim at any future time, such claim should be rejected. I have nothing to do with the profits and loss of the taluqs. You cannot claim anything from me. I have no claim against you. Wherefore, in health of body, in the enjoyment of my senses, and in calmness of judgment, I execute this *ikrar*. I shall never act in contravention of the terms of this *ikrar*.

"The 2nd Assar of the above-mentioned year (13th June 1841).

Schedule of the Taluqs.			Mouzahs.
" Taluq Santiapur, etc.	...	...	19
Purchased Bhiti mehal	...	...	1
Mehal Lakhranj resumed	...	...	1
Taluq Berhampur	...	...	1
			—
			22
" Taluq Jhareswurpur	...	...	1
Taluq mouzah Bangalpur, zilla Puri	...	...	1
Mouzah Durgadaspur	...	...	1
			—
			25
			—

Srinath Brohmo was the son of Ramkumar Brohmo and Ruttonmoni Dasi, and the taluqs mentioned in the schedules had been dedicated by

Ramkumar and Srinath to the service of two idols. Srinath died in 1838, having survived his father, the date of whose death did not appear. On the 24th of December 1864 one Banchhanidhi Moharana, having obtained a decree against Ruttonmoni on the 25th of February 1862, and having applied for a sale of a ten-annas share of the zamindary of the [128] taluq Santiapur, which was the share of Ruttonmoni Dasi by virtue of the *ikrarnama*, the same was publicly sold, and the respondent Kanhaya Lal Pundit became the purchaser for Rs 17,800 of the rights and interests of Ruttonmoni therein, as appears by the sale certificate dated the 27th of January 1865. Ruttonmoni died on the 16th of February 1867. On the 1st of February 1876 Romasunderi and Tarinicharn Brohmo, who was then the presumptive heir on the death of Romasunderi, executed a deed of gift to Krishnamohini Dasi, the wife of the appellant, which is in the following terms:—

“This deed of gift, executed by Romasunderi Dasi, widow of the late Srimoti Brohmo, inhabitant of Kona, pargana Havelisuhur, in the district of 24-Pergunnahs, at present residing in Dandmal Sahi in Puri, and by Tarinicharn Brohmo, son of late Bhoyrub Chunder Brohmo, inhabitant of Kastodanga, pargana Rajnuggar, sub-district Ranaghat, in the district of Nuddea, sheweth:—

“That on the death of my husband, I, Romasunderi Dasi, got possession by right of inheritance of his ancestral zamindaries, and the zamindaries which were recorded in his own name, and of the houses, etc. In order to pay off the debts incurred by my husband and father-in-law, I sold taluq Juggurnath Prosad, etc., of pargana Burjang, and taluq Rambhila of pargana Randia Orgura, and taluq Mowajib appertaining to pargana Senawut, pertaining to Balasur district, to Monmohini Dasi and Khettermoni Dasi and Doyamoni Dasi, and other taluqs to other persons. By this means I paid off the debts. As I am residing in this holy city, I made over to my mother-in-law, the late Ruttonmoni Dasi, under the *ikrarnama*, dated 2nd Assar 1248 (14th June 1841), taluq Santiapur and the purchased mehal Dihi, and resumed mehal lakhraj pertaining to it, and taluq Berhampur, and taluq Jhareswurpur, and taluq Durgadaspur, etc., situate in the district of Cuttack, in order to provide thereby for the *seba* of my husband's ancestral idols, viz., Lukhi Narain and Sridhur, and for the maintenance and religious ceremonies of my mother-in-law, the late Ruttonmoni. Accordingly my mother-in-law performed the *seba* of the idols and other duties till her death, which occurred in Falgun 1273 (February and March 1867). On her death those properties reverted to us. But as those zamindaries, etc., were in disorder during my mother-in-law's lifetime, after her death Rungomoni Dasi, the wife of the late Hurihur Brohmo, paid from her own funds for the *seba* of the above-mentioned idols. But she too is now unable to discharge those duties. And I am residing in this holy city of Puri. And I, Tarinicharn Brohmo, am also unable to keep up the *seba* of the idols; hence the *seba* of the idols has been interrupted. You are a near relation of ours. You are willing to undertake the *seba* of the idols. We too are [129] pleased with you. We give the idols to you. We give, of our own accord, taluq Santiapur and taluq Berhampur, zamindaries, and the brick-built dwelling house, and garden and lands and jamas, etc., in Kona, as described in the annexed schedule, to you, and execute this deed of gift. From this moment you should keep the idols under your control, take possession of the zamindaries, etc., collect the rents, recover the zamindaries and other properties, with mesne profits, from persons from whom they may be due since the death of the late Ruttonmoni Dasi, who was the mother-in-law of Romasunderi Dasi, and the grandmother (by relation) of Tarinicharn Brohmo, pay the revenue in the Collectorate, and the rents to the zamindars and spend

Rs. 1,200 a year, or Rs. 100 a month, for the *seba* of the idols. From this day we appoint you as the *seba* of those idols. You, your sons, grandsons, and your heirs may keep up the *seba* of the idols and enjoy and possess the properties named hereinafter. But you and your sons, grandsons, and other heirs will not have the right to alienate those properties by sale or gift. If at any time we or our heirs claim these properties such claim should be rejected.

The idols given by this instrument were handed over to the grantee. But as regards the land, Kanhaya Lal Pundit was at this time in possession, claiming to be so by virtue of his purchase on the 24th of December 1864, and when Krishnamohini Dasi attempted to take possession she was prevented by his servants. She died on the 4th of November 1878, having made her will, whereby she appointed her husband, the appellant, and one Behari Lal Mitter her executors, and directed that the appellant should, during his life, perform the worship of the two idols and manage the entire estate. On the 23rd of November 1878 the appellant alone proved the will, and on the 18th of December 1878 he brought a suit to recover possession of the ten-annas share of the taluq Santiapur against Kanhaya Lal Pundit as the principal defendant, but also making Romasunderi and the minor sons of Tarinicharn who had died, defendants. Romasunderi, by her written statement, admitted the plaintiff's claim, and said that she and Tarinicharn, who was her reversionary heir, as also of her husband, made an absolute gift of the zamindary in claim and the ancestral *deb seba* to Krishnamohini Dasi. She was also examined as a witness and cross-examined, when she identified the deed of gift and asserted the fact of conveyance to Krishnamohini. Kanhaya Lal in his written statement set up various [130] grounds of defence, including the law of limitation, and also that "Romasunderi was never in possession of the disputed property, hence the deed of gift executed by her is of no use, and is invalid."

The Subordinate Judge of Cuttack held that the possession of Kanhaya Lal was adverse to Ruttonmoni, and through her also to Romasunderi, and that Art. 144 of Act XV of 1877 was applicable, and as the possession commenced more than twelve years before the suit was brought it was beyond time. On this ground he dismissed the suit, but in case the Appellate Court might take a different view of the question of limitation he gave his opinion that Ruttonmoni, under the deed, only acquired a life interest, and that on her death the property would revert to the creator of the trust.

The High Court at Calcutta on appeal held that the "grant must be deemed to have been at any rate of all the estate in the taluqs of which Romasunderi could dispose," and that as she was still alive Ruttonmoni's interest "had not expired." On this ground they affirmed the decree. The objection in the written statement that Romasunderi was never in possession of the disputed property, and that the deed of gift was consequently invalid, was not noticed by either Court.

The questions in the present appeal are clearly stated in the reasons at the end of the respondents' case.

"(1) Because the deed of gift, which is the basis of the plaintiff's title, is utterly invalid, inasmuch as the donor was out of possession, and no possession was ever given to the donee.

"(2) Because the interest of Ruttonmoni, under which this respondent (Behari Lal, the representative of Kanhaya Lal, who has died pending this appeal) was in possession, was and is a valid and subsisting interest as against Romasunderi and the appellant, who claims under her.

"(3) Because the suit was barred by the law of limitation."

Their Lordships will first consider the second question. That depends upon the construction of the *ikrarnama*.

The rule laid down in the Indian Succession Act must not be applied to it, because it is not a will, nor the rule laid down in the Transfer of Property Act, because that was not in force until [131] a later date. It is not necessary to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that indefinite words of gift were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not, consciously or otherwise, so expressed themselves as to lay down a more positive rule in favour of absolute gifts. In this case the intention must be collected from the whole of the instrument. The words, "I put a stop to my interest (in those taluqs), and withdraw my enjoyment thereof, and I make them over to you," must be read in connection with the words which precede them,—“in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support by having the property under your authority and control.” It appears to their Lordships that the indefinite words of gift must be limited by the purpose of the gift, and that it was Romasunderi's intention that Ruttonmoni should take the property only for her life.

It will be convenient to consider next the question of limitation. The learned counsel for the respondent relied upon Arts. 134 and 144 of Act XV of 1877. The former applies to suits to recover possession of immoveable property conveyed or bequeathed in trust, or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. Their Lordships intimated in the course of the argument that the purchase at the sale in execution of the rights and interests of Ruttonmoni could not as between the purchaser and Romasunderi be considered to fall under this Article. Article 144 gives twelve years from the time when the possession of the defendant becomes adverse to the plaintiff. During Ruttonmoni's life possession was not adverse to Romasunderi (the plaintiff's title began long after), and the suit was brought on the 18th of December 1878, within twelve years of her death.

It remains to consider the third question. In the respondents' reasons it is broadly stated that the deed of gift was utterly invalid, inasmuch as the donor was out of possession, and no possession was ever given to the donee. But it must be observed [132] that in this case the dispute as to the validity of the gift is not between the donee and the donor or a person claiming under her. The donor is a defendant, and affirms the validity. The person who disputes it claims adversely to both. Several authorities were quoted in support of the respondents' contention, and it is necessary to see how far they are applicable to such a suit as the present. *Harjivan Anandram v. Naran Haribhai* (4 Bom. H. C., A. C. J., 31) was cited to show that a gift of land was not complete by Hindu law without possession or receipt of rent by the donee. It came before the High Court on a special appeal. The suit was to recover two bighas of land from the defendant who held it as tenant. The Assistant Judge on appeal from the Munsiff found that the land in dispute had been given to the plaintiff by one Babu, but that the gift had never been completed by a transfer or delivery of the property, and the donor Babu then denied the gift altogether, and he held that the gift, never having been completed, the promise to give was null and void. It would seem from the statement of the defence that the tenant had continued to pay rent to the donor. The High Court affirmed the decree. It is not necessary to set out here the authorities which were quoted. It is sufficient to say that, with the exception of the passage from the *Mitakshara*, they all show that the reason for delivery being

necessary is that the gift may not be resumed. This appears very clearly from the text of *Yajnyawalkya*, Dig., Book 2, v. 32, where it is said, "Let the acceptance be public, especially" of immoveable property, and delivering what may be given and has been promised, let not a wise man resume the donation." The last sentence of the passage in the *Mitakshara* is omitted in the report, but if the whole is read in connection with the preceding clause of the section it seems to have reference to the comparative strength of a title with possession and a title without it. The case differs most materially from the present, where the donor has done all she can to complete the gift and is a party to the suit and admits the gift to be complete. Another of the cases cited is *Girdhar Parjaram v. Daji Dulabhram* (7 Bom. H. C., A. C. J., 4). There the plaintiff brought a suit to compel [133] the defendants to pull down a partition wall which they had built between their property and the plaintiff's, and to restore certain ground which they had encroached upon. The plaintiff alleged that he had purchased the ground by a deed of sale. It was found that the plaintiff bought the house and land in question after the supposed encroachments were made, and they were sold to him according to measurements in a former bond which was not before the Court. The High Court quoted the judgment of this Board in 12 Moore I. A., 306 (which will be presently noticed) as applicable to the case, but they decided it on the ground that the plaintiff had given no evidence to show what was the extent of the land which the deed of sale purported to transfer to him, and there was nothing to prove that the old boundaries included the site in dispute. The head-note to the report takes no notice of this, and represents the case as decided upon the ground that, by Hindu law, it is requisite that the vendor should at the time of sale be in possession of the property sold. It was clearly not decided upon that ground, and the inaccuracy of the head-note has led to the case being treated as an authority for what was not decided in it. These cases have been noticed somewhat fully on account of the judgment of the Bombay High Court in *Kachhu Banaji v. Kachoba Vithoba* (10 Bom. H. C., A. C. J., 491), which was quoted for the respondent. There, in a suit to recover possession of a house and land, it was held that by Hindu law a change of possession is necessary to complete the sale of it, and that it could not be supplied where the vendor had no possession to deliver. The judgment contains the following passage "It is perfectly clear from the proceedings that, at the date of this transaction (the sale), the house was not in possession of the defendant Magan. The vendor therefore sold what he could not sell according to Hindu law, as laid down in *Harjivan Anandram v. Naran Haribhai* (4 Bom. H. C., A. C. J., 31). The texts there cited make a transfer of possession equally necessary to the completion of a sale as of a gift, and the delivery of possession of things having a material existence is regarded by the Hindu law as essential to their legal transfer. Such appears to be the principle of the decision in [134] *Girdhar Parjaram v. Daji Dulabhram*, (7 Bom. H. C., A. C. J., 4). There appears in this to be a misapprehension as to both cases. In the former, the question was whether a gift was complete without delivery. No law was laid down as to a sale, and only one of the texts cited mentioned a sale. That is the passage from the *Mitakshara*. * As to the latter case, it has been shown what the true ground of decision was.

Their Lordships will now consider the two judgments of this Committee upon which the respondents' counsel relied. In *Rajah Sahib Perhlul Sein v. Baboo Budha Sing* (12 Moo. I. A., 306) it is said "They (the Judges of the Sudder Court) seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a

construction would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it the execution of the bill of sale may be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do." The suit was brought by the purchaser against the vendor, and their Lordships held upon the facts that the purchaser had not done this, and that the contract had become incapable of being performed according to the true meaning and intent of the contracting parties.

In the other case, *Ranee Bhoboscondree Dasee v. Issur Chunder Dutt* (11 B. L. R., 36), the suit was based upon a deed executed [135] by Jogessur Ghose in favour of the plaintiff. In the judgment, their Lordships, after quoting what was said in the former case, say "Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Jogessur Ghose and the plaintiff were to be parties."

Neither of these decisions is applicable to the present case. The ground of them is that the plaintiff was not entitled under the terms of the contract of sale to possession. In this case the appellant is under the terms of the gift, and according to the construction which their Lordships have put upon the *ikrarnama*, entitled to possession, and their Lordships see no reason why a gift or contract of sale of property, whether moveable or immovable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession. This appears to be consistent with Hindu law. On the principle contended for by the respondent, so long as he prevents the true owner from taking possession, however violently or wrongfully, that owner cannot make any title to a grantee. Mr. Mayne earnestly contended that what is said in the books about the completion of a gift by possession is founded on a public policy relating to land and analogous to the feudal rule requiring investiture or livery of seisin. But the texts relate to moveables as well as to land, and, with one not very clear exception, they relate to intended gifts which it is contemplated that the donor may take back until they are perfected. They appear to rest on a principle which has nothing to do with the feudal rules and the European analogy to which is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case, the donor has, in fact, done all she could, and, as she still desires to support her gift, there is no question of compelling her to do more. The respondent has failed on all the grounds, and the appellant is entitled to possession of the property in suit with [136] mesne profits. Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of both the lower Courts, and to decree that the plaintiff is entitled to possession of the property in suit, together with all the costs incurred, and to be incurred, in the

lower Courts, and to remit the case to the High Court to pass such a decree for mesne profits as it may consider the plaintiff to be entitled to.

The Respondent, Behari Lal Pundit, will pay the costs of this appeal.

Solicitor for the Appellant: Mr. T. L. Wilson.

Solicitors for the Respondent Behari Lal Pundit. Messrs. Barrow & Rogers.

Appeal allowed.

NOTES.

[HINDU LAW OF ALIENATIONS--POSSESSION—

If the donor had done all he could, the mere non-delivery of possession does not render the gift invalid :—(1902) 27 Bom , 31 where previous authorities are discussed , (1904) 29 Bom., 42. 6 Bom., L. R., 687 , (1885) 9 Bom., 324 where (1882) 6 Bom , 380 was deemed to have been overruled by 11 Cal., 121

See also (1896) 11 C. P. L. R , 11 (12) , (1891) 5 C. P. L. R , 63 (64) , (1901) P. R , 45 ; (1906) P. R., 45 , (1901) P. L. R. 21 , (1903) P. R. 75 , (1899) 2 Bom. L. R. 69 , (1892) 20 Cal , 464 , but see as regards this 27 Bom., 31 , (1899) 27 Cal., 242 ,

Accordingly when there was a title by estoppel created by a mortgage of non-existent property, the mere fact of want of possession did not prevent the mortgage attaching to the property when it passed to the mortgagor under a sale-deed —(1907) 7 C. L. J , 387 Following this case, a gift of immoveable property by a Hindu donor was upheld when after his death his heir had given possession —(1892) 17 Bom., 486. A mortgage by a Hindu unaccompanied by possession when unregistered was upheld in (1893) 18 Bom , 332.

In (1901) 26 Bom., 449 the settlor did absolutely nothing towards effecting the transfer of property and the trust was not upheld.

As regards applicability of the Transfer of Property Act 1882, see (1890) 12 All , 523

This case was by analogy applied to the Mahomedan law of gifts under which seisin is required. In 11 Cal., 121 "it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case, it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the *hibanama* itself authorises the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at the time." See also (1911) 35 Mad., 120, (1899) 23 Bom , 682 , *contra* (1888) 13 Bom., 156.

In (1902) 30 Cal., 265 (275) this case was distinguished. There, "the subject-matter of the contract was property not only not in the possession of the transferor, but was property to which the transferor might never establish a title, namely, a title to redeem. The document provides that a suit was to be brought to redeem the property and upon possession being recovered the rents agreed upon should become payable, " "the document was not operative in effecting a present transfer of the property leased but was only a contract to be performed in future."

II. LIMITATION—

Applicability of Art 134 of the Limitation Act 1877, See (1894) 19 Bom. 140 ; (1899) 9 M. L. J. 93 ; (applicability to involuntary sales) , 9 All , 97]

[11 Cal., 136]

PRIVY COUNCIL.

The 2nd July, 1884.

PRESENT :

LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, AND SIR A. HOBHOUSE.

Ganga Pershad Sahu. Defendant

versus

Gopal Singh..... Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Equitable grounds of setting aside sale in execution.

Where a sale in execution took place under an order obtained, notwithstanding a consent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for a postponement, the petition so consented to, having been, by mistake, afterwards presented to, and filed by the judgment-debtor in the wrong court, *held* that the judgment-debtor was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby.

APPEAL from a decree (13th December 1881) of the High Court, substantially affirming, with a modification in its terms, a decree (12th April 1880) of the Subordinate Judge of Tirhoot.

The question on this appeal arose out of the postponement, by consent, of a sale in execution of a decree.

The appellant held a decree, dated 5th July 1876, against the respondent, for Rs. 9,163, with interest and costs, and in execution the property now in suit, consisting of eight mouzahs of land of the value of Rs. 51,000, was attached, and advertised for sale, on December 15th, 1877. Upon that day the appellant and respondent agreed to postpone the sale for two months.

[137] In pursuance of this agreement a petition was signed by the respondent and his pleader, praying that the 15th February 1878 might be fixed as the day of sale. This was also signed by the pleader for the appellant, as consenting to the prayer of the petition, with the condition "provided that the attachment should continue."

This petition was presented to the wrong Court; that is, to the First Subordinate Judge, instead of to the District Judge, who had made the decree, and was charged with the execution thereof. The First Subordinate Judge made the order applied for.

The District Judge, knowing nothing of any order of postponement, proceeded with the sale in the absence of the respondent, who had left in the belief that the sale had been postponed. The appellant was present, allowed the sale to proceed, and himself became the purchaser of all the mouzahs for Rs. 7,000; and was put into possession.

On the 10th December 1878 the respondent sued in the Court of the Subordinate Judge to have the sale set aside, and to obtain possession of the property. The Court of First Instance made a decree in favour of the plaintiff,

on the ground that the defendant had taken "unconscionable advantage" with reference to the execution sale. The Subordinate Judge found that the defendant was aware of the plaintiff's mistake, and that the property had been sold for much less than it would have fetched in an ordinary way. It was decreed that the plaintiff should obtain possession of the property upon paying to the defendant the sum under the decree, without interest, within a period of two months, and that the defendant should retain the profits realized by him in lieu of interest.

On appeal, the High Court (MITTER and MACLEAN, JJ.) in effect, affirmed this decree, observing that the facts were, in many respects, similar to those in *Rajmohun Gossain v. Gourmohun Gossain* (8 Moo. I. A 91), and that the principle applied there was, in their opinion, applicable here.

They, however, varied the decree of the Court below, and, having regard to the fact that the plaintiff owed money, under a decree, to the plaintiff's father as well as to the plaintiff, directed as [138] follows: "That on the plaintiff's depositing "in Court, or paying to the defendant and his father within two months from this date, the money still due to them under their decrees, with interest at the rate provided in those decrees up to the date when the process for delivery of possession of the disputed property was executed, the defendant do reconvey the property in suit to the plaintiff. Each party to bear his own costs both in this as well as in the lower Court. We allow no interest upon the decrees aforesaid from the date of delivery of possession, because we are of opinion that the defendant, having enjoyed the profits of the property in dispute, is not entitled to charge interest upon the decrees as well. The plaintiff will not be entitled to claim any *wasilat* in any future suit from the defendant for the period during which he may have been in possession."

On this appeal—

Mr. T. H. Cowie, Q. C., and Mr. C. W. Arathoon, for the Appellant, argued that the Courts below were wrong in deciding that the respondent was entitled to relief in equity.

Mr. H. Cowell, for the Respondent, submitted that with regard to the facts, as found by the two Courts below, the appellant could not, in equity, be allowed to retain the advantage of his purchase.

Their Lordships' Judgment was delivered by

Sir B. Peacock.—It appears to their Lordships in this case that the Judges of the Court below were right in ordering the sale to be set aside. The only question is as to the terms upon which it ought to be set aside, and in this respect their Lordships think that substantially the High Court was right. The time fixed by the High Court was two months from the 13th December 1881. In consequence of this appeal having been preferred that time has now expired, and the date must be altered. It appears also to be uncertain what is the amount due to the defendant and his father under the decrees which are mentioned by the High Court.

Their Lordships think the decree should be varied so as to meet those circumstances. They will humbly advise Her Majesty to order that the case be remitted to the High Court to cause the amount due to the defendant and his father under the [139] decrees referred to in the decree of the High Court, with interest at the rate, and up to the time, mentioned in the decree of the High Court to be ascertained; and that upon the plaintiff's depositing in the lower Court or paying to the defendant and his father, within two months from the time of that ascertainment the amount so ascertained to be due, the defendant do

reconvey the property in suit to the plaintiff, the said plaintiff not being entitled to claim from the defendant any *wasilat* for the period during which he may have been in possession of the property. In all other respects the decree of the High Court ought to be affirmed.

The Appellant must pay the costs of this appeal

Solicitor for the Appellant : Mr. T. L. Wilson.

Solicitors for the Respondent : Messrs. Barrow & Rogers.

Decree varied.

NOTES.

[In (1909) 13 C. W. N. 710 there is a full discussion of the question when a sale in execution should be set aside. In that case it was held on a review of the authorities, that when a sale has taken place on the basis of a satisfied decree, the satisfaction of which has been certified to the Court, the sale is void and ineffective to pass any title even to a *bona fide* purchaser for value without notice.]

In (1890) 17 Cal., 769 the majority of the Full Bench held that a separate suit would not lie to set aside a sale. At page 775 of the report, with reference to this case it was observed, "In fact, the sale (in 11 Cal., 186) was not invalidated but was affirmed by the order, for reconveyance was ordered on terms to be fulfilled by the plaintiff. On reference to the paper-book, it appears that those terms were contained in an agreement between the parties made after the sale, and that one of these terms was the payment by the plaintiff to the defendant and his father of money due under a former decree, which had no connection whatever with the sale, or with the suit in which the sale had taken place."

[11 Cal. 139]

APPELLATE CIVIL.

The 25th November, 1884.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Hafiz Abdul Kurrim.....Defendant

versus

Sri Kissen Rai.....Plaintiff.

Civil Procedure Code—Act XIV of 1882, s. 568—Additional evidence.

Where the lower Appellate Court allows additional evidence to be taken, though it is not satisfied that the evidence is necessary under clause (a) or clause (b) of s. 568 of the Code of Civil Procedure, the High Court will interfere, but where this does not appear to be the case, and there is simply an omission on the part of the Appellate Court to record its reasons for allowing additional evidence to be taken, the High Court will not interfere.

In this case the plaintiff, Sri Kissen Rai, alleged that the defendant, Sunker Pandey, together with one Bhuruk Nath Pandey and one Nund Kishore

* Appeal from Appellate Decree No. 505 of 1884, against the decree of J. Tweedie, Esq., Judge of Shahabad, dated the 13th of February 1884 affirming the decree of Baboo Lal Gopal Ben, Second Munsiff of Arrah, dated the 21st of February 1881.

Pandey, owned a transferable *guzashter* tenure, of which the defendant Syed Budrudduja was the zamindar. On the 6th of May 1874, Sunker Pandey mortgaged his share of the tenure, an eight-annas share, to the plaintiff; Bhuruk Nath Pandey [140] and Nund Kishore Pandey also mortgaged their eight-annas share to the plaintiff by a separate deed. These mortgages were *zuripeshgi*, and under them the plaintiff took possession of the tenure and continued paying rent therefor up to May 1880. The plaintiff went on to state that on the 3rd of October the defendant Budrudduja obtained a decree for arrears of rent for the years 1285 and 1286 against Sunker Pandey, directing that *Khas* possession of the land be made over to the latter unless the decretal money were paid within fifteen days. The money was not paid, and Budrudduja entered into possession, thereby dispossessing the plaintiff, who, in consequence, brought the present suit. The plaintiff charged that the decree of the 3rd of October 1879 had been fraudulently and collusively obtained by the defendant Budrudduja.

The Court of First Instance gave the plaintiff a decree, which was reversed on appeal by the District Judge. The latter found that the decree of the 3rd of October 1879 was neither fraudulent nor collusive, and, believing himself bound by the terms of the decree, declined to go into the question whether it was a proper decree to pass assuming the tenure to be a transferable one. On appeal to the High Court the case was remanded to the lower Appellate Court "to try the question whether the tenure is transferable or not." On remand the Judge found the evidence on the record wholly insufficient to establish transferability, but allowed additional evidence to be given on the point, so that the order of remand might be "carried out in the way most favourable to the appellant before the High Court." Ultimately the Judge found that the tenure was transferable, and gave the plaintiff a decree. The defendant Hafiz Abdul Kurrim, the successor of Budrudduja, appealed to the High Court.

Babu Chunder Madhub Ghose and Babu Saligram Singh for the Appellants contended that the additional evidence was not properly before the District Judge, because it was not taken in accordance with the provisions of s. 568 of the Code of Civil Procedure.

Babu Mohesh Chunder Chowdhry for the Respondent

The Judgment of the Court was delivered by

[141] Mitter, J.—The question which the District Judge in this case was called upon to decide by the remand order of this Court was, whether the tenure, to which the lands in dispute in this case appertain, is transferable or not.

The District Judge says. "I have gone over the evidence as it now stands and find that it is wholly insufficient to establish transferability, but I allow additional evidence to be given on the point, so that the order of remand may be carried out in the way most favourable to the appellant before the High Court." Then he caused additional evidence to be taken under the provisions of s. 568 of the Code of Civil Procedure by the Second Munsiff of Arrah.

When this evidence was returned, the District Judge, after taking it into consideration along with the evidence already on the record, has come to the conclusion that the tenure is transferable. He has accordingly, in accordance with the directions in the remand order, decreed the plaintiff's suit dismissing the appeal before him.

If the evidence thus taken was properly before the District Judge, there is no ground for interference, but it has been contended before us that that evidence was not properly before the District Judge, because it was not taken

in accordance with the provisions of s. 568 of the Code of Civil Procedure. Section 568 says: "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court.

"Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission." The corresponding section of the Code of 1859 was s. 355. The provisions of that section and s. 568 are substantially the same. In the decision of the Judicial Committee in *Gunga Gobind Mundul v. Collector of the 24-Pergunnahs* [11 Moo. I. A., 345 (368)] it was laid down that the recording of reasons by the Appellate Court for receiving additional evidence is not a condition precedent to the reception of that evidence.

[142] In *Beharee Lall Nundee v. Troyluckho Moyee Burmonee* (12 W. R., 223) Mr. Justice MARKBY makes the following observations with reference to the decision of the Judicial Committee just referred to. "The Privy Council have held, as seems to me they must hold, that this section does not make the act of the Judge in recording the reasons for receiving the evidence a condition precedent to the reception of the evidence (Sutherland's Privy Council Judgment, page 68); but this Court has nevertheless held in some cases—*Juggobundhoo Deb v. Goluck Chunder Holdar* (10 W. R., 228), *Joog Maya Debia v. Ram Chunder Chatterjee* (10 W. R., 378)—in special appeal, that the evidence has been improperly received, and has on that account set aside the decision. I imagine that these cases rest upon the ground that it was considered that there the Judge below had never considered the matters at all with reference to the provisions of s. 355, and had never decided upon that section that the evidence ought to have been received. One of them is so explained by Mr. Justice HOBHOUSE in Special Appeal No. 666 of 1869. I do not at all question the authority of these decisions, but I am not prepared to go to the length of saying that in this case the Judge has not considered the matter in accordance with the law. He says he considers that it is proper to ascertain the point of fraud, or no fraud, with reference to the documents then produced for the first time. If it were necessary to record the reason for the reception of the new evidence legally admissible, the Judge has not done so. But as it is conclusively stated that this is not necessary, then, I think, we have nothing before us which will justify us in saying that the Judge has acted erroneously. This seems to me to be in accordance with the view taken, by BAYLEY and HOBHOUSE, JJ., in the Special Appeal No. 668 of 1869 in which decision I concur."

The result of these decisions seems to me to be this, that where the Appellate Court, though it is not satisfied that the evidence is necessary either under clause (a) or clause (b) of s. 568, still allows additional evidence to be taken, the second Appellate Court [143] will interfere; but where this does not appear to be the case, and there is simply an omission on the part of the Appellate Court to record its reasons for allowing additional evidence to be taken the second Appellate Court will not interfere.

Now, in this case, we cannot say upon the judgment that the District Judge was of opinion that there was no substantial cause for taking additional evidence within the meaning of clause (b) of s. 568. No doubt, he says that he "allows additional evidence to be given on the point, so that the order of remand may be carried out in the way most favourable to the appellant before the High Court." This observation no doubt is entirely based upon a misapprehension of the purport of the remand judgment. The remand judgment simply directed him to decide a particular issue which it was essentially necessary to

decide in order to dispose of the case before him satisfactorily. It did not at all authorize, or direct, or in any way countenance, the taking of additional evidence. Upon that point he was left entirely to act according to the law. But although in this respect he has fallen into error, still we cannot say that before taking additional evidence he was not satisfied there was a substantial case of the nature mentioned in clause (b) of section 568. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See also (1885) 12 Cal , 37.]

[11 Cal 143]

APPELLATE CIVIL

The 4th December, 1884.

PRESENT ·

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS

Jhoti Sahu. Decree-holder

versus

Bhubun Gir..... Judgment-debtor.

*Execution—Decree under s 210 of Act XIV of 1882—Limitation—Civil
Procedure Code, Act XIV of 1882, s 210*

On the 23rd February 1878, an application was made for execution of a decree, dated the 3rd December 1877, in which the decree-holder stated that the judgment-debtor had agreed to pay the balance then due on the 13th August 1878. The application was then struck off on the 26th June 1878. On the 30th June 1881 the decree-holder again applied for execution, and on the 11th July 1881 the judgment-debtor, with the consent of the decree-holder, applied for time to pay the balance due till the 8th September 1881, [144] and that application was also struck off. On the 1st March 1883 the decree-holder again applied for execution.

Held, that the application was not barred by limitation upon the ground that the application by the judgment-debtor, made on the 11th July 1881, alleging that he had come to an arrangement with the decree-holder for the payment of the amount due by instalments, having resulted in its being registered and the proceedings struck off, amounted to a direction that the decretal amount be paid by instalments as stipulated in the petitions, and that

* Appeal from Appellate Order No. 213 of 1884, against the order of A. C. Bret, Esq., Judge of Tirhoot, dated 30th of April 1884, reversing the order of Babu Abinash Chunder Mitter, Second Subordinate Judge of that District, dated 8th August 1883.

this being so, there was a decree passed on that date under the provisions of the second paragraph of s. 210* of the Code of Civil Procedure, of which the decree-holder was entitled to have execution.

THIS was an appeal by a decree-holder against an order rejecting an application for execution.

The decree was dated the 3rd December 1877, and the decree-holder first applied for execution on the 23rd February 1878, stating that some portion of the debt had been paid, and that the judgment-debtor had agreed to pay the balance on the 13th August 1878. That application was struck off the file on the 26th June 1878.

On the 30th June 1881 the decree-holder again applied for execution, but on the 11th July 1881 the judgment-debtor, with the consent of the decree-holder, put in an application admitting the agreement set out by the decree-holder in his petition of the 23rd February 1878, and asking for time till the 8th September 1881 in which to pay off the balance due under the decree. The case was then struck off. The present application for execution was made on the 1st March 1883

The first Court held that the application was in time, on the ground that the judgment-debtor was estopped from pleading limitation by reason of his having filed the petition on the 11th July 1881 admitting the debt.

On appeal the District Judge reversed that order, upon the ground that the right to execution was barred in February 1881, and that it could not therefore be revived by any subsequent act or acknowledgment by the judgment-debtor.

The decree-holder appealed to the High Court.

Babu Busant Coomar Bose for the Appellant.

No one appeared for the Respondent.

[146] The Judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—We think that in this case the decision of the lower Appellate Court should be set aside, although we agree with the Judge in the reasons given by him in disposing of the arguments advanced before him in support of the contention that the decree was not barred by limitation.

We set aside the decision upon the ground that there was a decree passed, on the 11th July 1881, under the provisions of the second paragraph of s. 210 of the Code of Civil Procedure.

This point apparently was not taken before the District Judge, and from the facts of the case, as they appear on the proceedings, the point seems to arise.

On the 30th June 1881, the decree-holder, appellant before us, made a second application for execution. Thereupon, on the 11th July 1881, the judgment-debtor appeared and made an application, alleging that he had come to an arrangement with the decree-holder for the payment of the money, due

Decree may direct payment by instalments.

And after the passing of

Order, after decree, for payment by instalments.

as it thinks fit.

Save as provided in this section and section 206, no decree shall be altered at the request of parties.]

*[Sec 210:—In all decrees for the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments, with or without interest.

any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise,

under the decree, by instalments, and that the decree-holder had given him two months' time to pay off the money. The application was registered, and then the proceedings were struck off. We think this amounts to a direction that the decretal amount be paid by instalments as stipulated in the petition, to which the other side had consented. That being so, the present application, which was filed on the 1st March 1883, was clearly within time.

We therefore set aside the decision of the lower Appellate Court, and restore that of the Court of First Instance, but make no order as to costs.

Appeal allowed.

NOTES.

[In sec. 48 sub-clause 1 (b), (C P C., 1908), which corresponds to sec. 230 of the C. P. C., 1882, the words, 'or at recurring periods' were inserted to give effect to rulings like 14 Mad., 396; 16 Cal., 16, 11 Cal., 143, 4 All., 155; 12 Bom., 65.

As regards the limitation applicable, see (1886) 14 Cal., 348 (351).

Upon the construction of the petition for postponement, see (1888) 16 Cal., 16 (18), (1900) P. L. R., 23.]

[146] APPELLATE CIVIL.

The 18th December, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.

Gossain Money Puree.....(Decree-holder) Petitioner

versus

Guru Pershad Singh and others....Opposite parties.

Injunction in one suit pending appeal in another suit—Interim injunction

—Civil Procedure Code, Act XIV of 1882, s. 646.

A brought a suit and obtained a decree against B on a mortgage bond in the Court of a Subordinate Judge, which decree was confirmed by the High Court on appeal. A then applied for execution. In the execution proceedings the sons of B intervened claiming a portion of the properties attached, this claim was dismissed, and the sons of B brought a regular suit before the same Subordinate Judge to have their rights to the property declared, and obtained an *interim* injunction restraining A from executing his decree pending the decision of their suit. This suit was dismissed, and the sons of B appealed to the High Court. A again applied for execution of his mortgage decree, whereupon the sons of B applied for a further injunction restraining A from executing his decree pending their appeal to the High Court, this application was granted. *Held*, that the Subordinate Judge had no right to restrain the decree-holder from executing his decree, merely on the possibility of the Appellate Court reversing his decision.

THIS was a rule obtained under s. 622 of the Code of Civil Procedure.

It appeared that one Gossain Money Puree, on the 30th August 1880, obtained a decree on a mortgage bond against one Chukka Sing, the father of a Mitakshara family, in the Court of the Additional Subordinate Judge of Gya, which decree was affirmed by the High Court on the 8th May 1882. The decree-holder applied for execution of this decree, but the judgment-debtor

* Civil Rule No. 999 of 1884, against an order made by Baboo Kali Prosunno Mookerjee, Additional Subordinate Judge of Gya, dated the 14th of May 1884.

applied for a month's postponement, which was granted. On the 14th September 1882, the judgment-debtor applied for further time, but this was refused him. On the 16th December 1882, the sons of the judgment-debtor intervened in the execution proceedings under s. 278, and objected to the attachment of the mortgaged properties on the ground that they were entitled to certain parts of the property directed to be sold; this application was, however, disallowed. The sons of Chukka Sing thereupon, on [147] the 18th December 1882, brought a regular suit in the Court of the Additional Subordinate Judge of Gya against Chukka Sing and Gossain Money Puree to establish their right to the attached properties, and on the same date they applied that execution of the decree of the 8th May 1882 might be stayed, this application was dismissed. A similar application was then made to the High Court, which was on the 23rd January 1883 also rejected, the Court stating in its order "that should it appear fair and proper to the Court trying the regular suit, a temporary injunction might be granted by that Court under s. 492 of the Code of Civil Procedure."

In accordance with this order, the Additional Subordinate Judge, on the 9th February 1883, granted an *interim* injunction postponing the sale of the mortgaged properties in execution of the High Court decree until the final disposal of the regular suit.

On the 20th December 1883, the suit brought by the sons of Chukka Sing was dismissed. Against this decree they appealed to the High Court, and that appeal at the time of the application to the High Court hereinafter mentioned was then pending.

On the 30th January 1884, Gossain Money Puree applied for the sale of the properties attached under his decree of the 8th May 1882, and the usual sale proclamation was issued. But on the 9th May 1884, the sons of Chukka Sing applied in the Additional Subordinate Judge's Court for a further injunction staying the sale pending the appeal in the suit of the sons of Chukka Sing.

The Additional Subordinate Judge, on the 14th May 1884, directed that the sale should be stayed until the final decision of the appeal; the order was not made on notice to Gossain Money Puree, nor was security taken from the sons of Chukka Sing.

Gossain Money Puree thereupon applied to the High Court under s. 622 of the Civil Procedure Code and obtained a rule calling upon the sons of Chukka Sing to show cause why the order of the Additional Subordinate Judge of Gya, dated the 14th May 1884, should not be set aside, on, amongst others, the following ground:—That the Additional Subordinate Judge had no jurisdiction to issue an injunction for the purpose of staying the execution proceedings pending the appeal to the High Court, inasmuch as [148] he had decided the claim case against the sons of Chukka Sing, and had nothing to do with appeal to the High Court.

Baboo Karuna Sindhu Mukerjee showed cause against the rule.

Baboo Kaloda Kinkar Rai in support of the rule.

The Order of the Court was delivered by

Garth. C. J., (MACPHERSON, J., *concurring*).—We think that this rule should be made absolute.

It was applied for under these circumstances:—One Gossain Money Puree had obtained a decree against one Chukka Sing in the Gya Court, dated the 30th August 1880, by which the sale of certain property, which had been

mortgaged to him by Chukka Sing, was ordered to be made. That decree had been confirmed by the High Court.

Chukka was the father of a Mitakshara family, and after this decree had been obtained his sons brought another suit to have it declared that they were entitled to certain shares in the property which had been ordered to be sold, and which Chukka Sing had no right to mortgage.

Meanwhile the mortgagee, the plaintiff in the first suit, proceeded to execute his decree, but the plaintiffs in the second suit (the sons) applied for, and obtained, an *interim* injunction from the Subordinate Judge against the plaintiff in the first suit, restraining him from selling the property until the second suit should have been heard and decided.

On the 20th of December 1883 that suit came on to be heard, and was decided against the plaintiffs (the sons of Chukka Sing), whereupon, on the 30th of January 1884, the plaintiff in the first suit (the mortgagee) applied for execution against the mortgaged property, and the usual sale proclamation was issued.

The plaintiffs in the second suit, however, who had appealed from the decree which had been made against them, applied for and obtained from the Subordinate Judge, on the 14th of May 1884, a further injunction, restraining the plaintiff in the first suit from executing his decree until the appeal in the second suit should have been heard.

This rule was then obtained upon the ground (amongst others) that the Subordinate Judge had no right, under the circumstances, [149] to grant the injunction, inasmuch as he had decided against the claim of the plaintiffs in the second suit, and had nothing to do with the appeal to this Court.

It has now been contended on behalf of the plaintiffs, that by analogy to s. 546 of the Code of Civil Procedure, the Subordinate Judge, if he considered it right and equitable, had jurisdiction to stay execution in the other suit, until the appeal to this Court had been heard.

We think, however, that s. 546 has nothing to do with the question before us. That section only relates to *staying proceedings in execution by the Court which passed the decree in which the proceedings are pending*. That Court has a right, under certain circumstances and subject to certain conditions, to stay the execution of its own decrees while those decrees are under appeal.

But here the lower Court has taken upon itself in this suit to stay the execution of a decree which has been pronounced by the High Court in another suit.

The Subordinate Judge had in point of law no power to deal with the proceedings in that other suit at all. He had a right, whilst the questions in this suit were awaiting trial, to restrain the defendants by an *interim* injunction from enforcing his decree in the former suit. That he might do *by an order upon the defendants personally*. But as soon as those questions were decided against the plaintiffs, the Subordinate Judge had no right, we think, to restrain the defendant further, upon the mere possibility of the Appellate Court reversing his decree; and it is clear that he had no right to do so under the section of the Code upon which he appears to have acted.

If any Court has a right to grant an injunction now, we presume it would be the Court of Appeal. But it is no part of our present duty to decide whether any Court has such a power, or, still less, that, having the power, it ought to exercise it.

All that we now say is, that the Court below, having made a decree against the plaintiffs, had no right, in aid of the plaintiffs, to restrain the defendant from proceeding in the other suit.

The rule must be made absolute with costs.

Rule absolute.

NOTES.

[On the dismissal of a suit, the suit ceases to be a pending one and the Court which dismissed it ceases to have jurisdiction either to continue and maintain the injunction previously granted, or to issue a fresh injunction in respect of the matter in suit :—21 Cal., 561 ; 11 W. R., 384 , 10 All., 506.

The appellate Court would be the proper authority to be resorted to in the matter, as it has the same powers as the original Court :—11 Cal., 146 at 149 ; 10 All., 80 ; 1 All., 549, 551 ; 10 All., 80 was followed in (1910) 33 All., 79 F.B which overruled 26 All., 311.

The appellate Court has power to order stay of sale of immoveable property in execution of money decree :—(1907) 34 Cal., 1037=11 C. W. N., 1030=6 C. L. J., 298 F. B. *Contra* (1904) 8 C. W. N. 381 , (1893) 15 All., 196 (197) ; See also (1886) 12 Cal., 515 (518).

An original Court may however review its own decree and order (C. P. C. 1908, 47) or stay the execution of its own decree (*ibid*, O 41, r. 5).

The High Court may revise an order in respect of injunctions :—(1888) 12 Mad. 186 ; 11 Cal. 146.]

[180] APPELLATE CIVIL.

The 12th December, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Mohabir Singh and othersDecree-holders

versus

Ram Baghowan Chowbey.... ..Judgment-debtor*

Civil Procedure Code, Act XIV of 1882, ss. 2, 244 (cls. a, b and c)—

Appealable Order—Execution of Decree.

The ancestors of *B* mortgaged their share in a certain mehal to *A*. Subsequently *B* became entitled to this share in the mehal, and *A* obtained a decree on his mortgage, in execution of which the right, title and interest of *B* was sold and purchased by *C*. Subsequently to this latter decree and sale, *B* obtained a decree against *D* for possession of certain lands which were proved to belong to this mehal. *E* then obtained a decree against *B*, in execution of which the right, title and interest of *B* in this same mehal was sold and purchased by *F*; *C* and *F* transferred their rights under their respective purchases to *E*.

E thereupon, as purchaser of the right, title and interest of *B* from *F*, applied to execute the decree obtained by *B* against *D*. This application was rejected by the Subordinate Judge, but on appeal to the District Judge was allowed.

B thereupon applied to the High Court to have this order set aside.

Held, that the order should be set aside, inasmuch as no appeal lay from the order of the Subordinate Judge, the order not being a decree within the meaning of ss. 2 and 244, (cls. a, b and c) of the Civil Procedure Code.

* Civil Rule No. 1185 of 1884, against the order of J. Tweedie, Esq., Judge of Shahabad, dated the 19th of May 1884, reversing the order of Baboo Koelash Chunder Mookerji, Subordinate Judge of that district, dated the 8th December 1883.

SOME time previous to 1867 the ancestors of Mohabir, Bhootun, and Natha Singh mortgaged a certain mehal named Lotun to one Sookul Chand. On the 27th June 1867, Sookul Chand obtained a decree against the Singhs, in execution of which the right, title and interest of the Singhs in this mehal, which amounted to a six-anna ten-pie share, was sold and purchased on the 7th May 1877 by one Chundy Pershad. In 1877 the Singhs, with certain other persons, their co-sharers, instituted a suit against one Ram Baghowan Chowbey to recover 51 bighas of land which they alleged belonged to mehal Lotun, and, on the 16th June 1877, they obtained a decree for possession of 24 bighas thereof. Subsequently to the latter date, one Srimondel Doss obtained a decree against the Singhs, in execution [151] of which the right, title and interest of the Singhs in the same mehal was again put up for sale, and was on the 5th July 1880, purchased by one Gopi Lall.

Chundy Pershad and Gopi Lall, the auction-purchasers above, mentioned, transferred the interests which they had acquired under the auction sales to Srimondel Doss.

Whereupon Srimondel Doss, as purchaser of the right, title and interest of the Singhs from Gopi Lall, applied to execute the decree obtained by the Singhs against Ram Baghowan Chowbey and dated 16th June 1877, seeking to obtain possession of the 24 bighas covered by the said decree

The Singhs and Ram Baghowan Chowbey both put in objections to the application, on the ground that Srimondel Doss, not having purchased the decree, was not entitled to have his name recorded as decree-holder, and was not therefore entitled to ask for execution.

The Subordinate Judge, before whom the application was heard, rejected the application of Srimondel Doss, on the ground that he was neither the original decree-holder nor the purchaser of the decree of the 16th June 1877.

On appeal the District Judge declared Srimondel Doss to be entitled to the right, title and interest of the Singhs in the 24 bighas covered by their decree of the 16th June 1877, on the ground that the auction sale of the 5th August 1880 conveyed to the purchaser, Gopi Lall, all the right, title and interest of the Singhs in their share in mehal Lotun, and that Srimondel Doss had subsequently become the transferee of that interest.

The Singhs thereupon applied to the High Court and obtained a rule against Srimondel Doss and Ram Baghowan Chowbey, calling upon them to show cause why the order of the District Judge should not be reversed on the following grounds :—

(1) That the question adjudicated upon by the Subordinate Judge, not being one between the parties to the original suit or their representatives, the Subordinate Judge had rightly held that Srimondel Doss was not in a position to execute the decree, and from the Subordinate Judge's order no appeal would lie.

[152] (2) That inasmuch as the decree of the 16th June 1877 was never sold to Srimondel Doss, he had no right to come forward and ask for execution thereof.

(3) That the question between the parties was one which could not be determined in execution proceedings, and that Srimondel Doss should seek any relief he might think himself entitled to by a regular suit.

Baboo Anund Gopal Palit in support of the rule.

Baboo Mohesh Chunder Chowdhry and Baboo Srish Chunder Chowdhry, to show cause.

The Judgment of the Court was delivered by

Garth, C.J., (MACPHERSON, J., *concurring*).—We think that this rule should be made absolute.

The question which the Judge has decided in the Court below was not the proper subject of an appeal, unless it was "*a decree*" within the meaning of s. 2 of the Code of Civil Procedure. And it would not be "*a decree*" within the meaning of that section unless it came under sub-section (a) or (b) or (c) of s. 244.

The appellant in the Court below, Srimondel Doss, contends here that it does come within sub-section (c), because it is "a question arising between the parties to the suit in which the decree was passed, or their representatives." He argues that the party who applies to execute the decree is "a representative of the plaintiff in the suit."

We think, however, that the question is not one which can properly be said to have arisen between the parties to the suit. It is not a question between the plaintiff and the defendant, or between the representatives of either the plaintiff and the defendant; but it has arisen between the plaintiff in this suit and a person who, under a sale which took place in another suit, has professed to buy the plaintiff's interest in this suit.

He is a person, therefore, who claims the plaintiff's interest in this suit adversely to the plaintiff himself, and who is trying to avail himself of the decree, which the plaintiff has obtained in this suit.

The question, therefore, is not one between the plaintiff and the defendant, nor in any sense one between the parties to the suit, [153] it is a question between the plaintiff and a stranger to the suit

That being so, we think that no appeal lay to the District Judge. The rule will therefore be made absolute; the decree of the District Judge will be reversed, and that of the Subordinate Judge restored with costs.

Rule absolute.

NOTES.

[This was followed in (1889) 12 Mad., 511.]

[11 Cal. 153]

APPELLATE CIVIL.

The 22nd December, 1884.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Rughunath Panjah and others.....Plaintiffs
versus
Issur Chunder Chowdhry and others.....Defendants.

Res-judicata—*Act XIV of 1882, s. 13—Meaning of the words " Court of jurisdiction competent to try such subsequent suit."*

The words of s. 13 of the Civil Procedure Code, " in a Court of jurisdiction competent to try such subsequent suit, " refer to the jurisdiction of the Court at the time when the first suit was brought.

Where therefore a suit was brought and decided in 1867 in the Court of a Deputy Collector, that Court being at the time of suit the only Court competent to try suits of the nature of the one brought, and subsequently a second suit, regarding the same subject and between some of the same parties and the representatives of others, was brought in 1881 in the Court of a Munsif, which latter suit, if it had been brought in 1867, would have been cognizable by a Deputy Collector alone, *Held*, that the decision of the Deputy Collector was a bar to the second suit under s. 13 of the Civil Procedure Code.

The principle in *Gopinath Chobey v. Bhaghwat Pershad* (I. L. R. , 10 Cal., 697) approved.

THIS was a suit to have it declared that the plaintiffs were entitled to recover rent from the defendants at the rate of Rs. 92 per annum for 53 bighas of land held under a *potta* dated 21st Bysack 1266, and for khas possession of 2 bighas 6 cottahs in excess of the lands mentioned in the *potta*.

It appeared that one Gunga Gobind Sinha was the durputni taluqdar of 53 bighas of land in mouzah Higuldiha, and that he [154] obtained a decree for enhancement of rent against his ryots, Sonatun Maiti and others, in which decree Rs. 114 was the yearly rent fixed for the said 53 bighas of land.

Subsequently to this decree the tenure was purchased, in the name of defendant No. 1, by the defendants 2 to 7 at a sale in execution of a decree against Maiti and others, the defendants 2 to 7 then succeeded in obtaining from Gunga Gobind Sinha an abatement of rent of Rs. 22-8 and executed a *kabuliat* in the name of defendant No. 1, dated 21st Bysack 1266, for the said 53 bighas at Rs. 92 per annum.

In 1867 one Joygopal Panjah (defendant No. 9) sued for possession of 24 bighas of land, covered by this *potta*, stating that they were his rent-free *debut-ter* lands, and in this suit the defendants 1 to 7 and Gunga Gobind Sinha were made defendants; the suit was decided in favour of Joygopal Panjah. Subsequently to this latter suit the durputni passed into the hands of Rughunath Panjah (the present plaintiff), and he sued the defendants 1 to 7 in the Deputy Collector's Court for arrears of rent in respect of the lands held by them under the *potta* of 21st Bysack 1266. This suit was numbered 267 of 1867. The defendants in that case claimed an abatement of rent in consequence of the 24 bighas decreed to Joygopal Panjah. The abatement was allowed, and the

* Appeal from Appellate Decree No. 1791 of 1883, against the decree of Babu Radha Kristo Sen, Subordinate Judge of Bancoorah, dated the 3rd of April 1883, modifying the decree of Babu Ananda Nath Mozoomdar, Munsif of Kotulpore, dated 19th of September 1881.

jumma fixed at Rs. 41-11. Rughunath Panjah then brought a suit, being Suit No. 549 of 1871, for enhancement of rent of the said lands, which suit was eventually on appeal dismissed by the High Court on the 21st March 1873, on the ground that the said *potta* was a *mokurari potta* in favour of the defendants, and that the rent therefore was not liable to enhancement. Some time subsequently to the decision in Suit No. 267 of 1867, Rughunath admitted two other persons (the present plaintiffs Nos. 2 and 3) as co-sharers with him in the durputni taluq, and on the 23rd March 1881 Rughunath and his two co-sharers brought this present suit against defendants 1 to 7, asking (1) that the land held by the defendants under the *potta* of 21st Bysack 1266 might be declared liable to the payment of rent at the rate of Rs. 92 per annum as stipulated in the said *potta*, and (2) for a decree for arrears of rent for the years 1284 to 1286 at the same rate, [155] and (3) for khas possession of 2 bighas 6 cottahs of land held by the defendants in excess of the land mentioned in the said *potta*.

The defendants 8 and 9 intervened, claiming that some of their *debutter* lands had been claimed by the plaintiffs in the suit, and they were accordingly made defendants in the suit. Defendants 1 to 7 pleaded amongst other matters *res-judicata* as regarded the first and third prayers of the plaint. The Munsif held that the Suit No. 267 of 1867 was a bar to the plaintiffs' suit, inasmuch as the decree in that suit passed by the Deputy Collector, and confirmed on appeal, had definitely settled the amount of rent payable by the defendants to be Rs. 41-8, and that although in that suit the present plaintiffs Nos. 2 and 3 were not parties, yet they must be regarded as being representatives in interest of Rughunath to the extent of the shares to which they were admitted as co-sharers, and further held that the Suit No. 549 of 1871 precluded the plaintiffs from claiming any higher rate of rent than that allowed in Suit No. 267 of 1867, he also held that the 2 bighas 6 cottahs of land were included in the *potta*, and gave the plaintiffs a decree for arrears of rent at the rate of Rs. 41-8.

The plaintiffs appealed to the Subordinate Judge, who held that the question as to whether the plaintiffs were entitled to rent at Rs. 92 per annum was *res-judicata*, and he therefore dismissed the appeal, making, however, a small modification of the Munsif's decree, which is immaterial for the purposes of this report.

The plaintiffs appealed to the High Court.

Babu *Mohini Mohun Roy* and Babu *Nilmudhub Sen* for the Appellants, contended that s. 13 of the Civil Procedure Code did not apply, inasmuch as the Deputy Collector's Court in 1867 was a Court of different jurisdiction from that of the Munsif who tried this present case, and the first suit therefore could be no bar to the present suit.

Babu *Guru Das Bagneri* and Babu *Koruna Sindhu Mukerji* for the Respondents.

Judgment of the Court was delivered by

Garth, C.J., (MACPHERSON, J., *concurring*).—The only question [156] which we have to decide in this case is whether the former judgment is a *res judicata*.

The plaintiffs sue for the rent of a tenure at the rate of Rs. 92 a year; and the answer of the defendants is, that many years ago, in the year 1867, a suit was brought by the plaintiffs for the rent of this same tenure at the rate which they now claim; and the answer which the defendants then made was, that the lease originally professed to grant more land than the lessors had any

right to convey, and consequently the defendants claimed a deduction on the ground that some 24 bighas, which were covered by the *potta*, had been taken out of their hands by some one who had a better title to it than the plaintiffs; and the result of that suit, which was tried before the Deputy Collector, was, that an abatement of rent was made in favour of the defendants, and the jumma was assessed at Rs. 41-11.

The defendants, set up this judgment obtained before the Deputy Collector as a bar to this suit, and the Subordinate Judge has held that the defence is a good one.

The defendant contends that the Subordinate Judge was wrong. He argues, that according to the true meaning of s. 13 of the Code of Civil Procedure, where the Court in which the second suit is brought is a Court of different jurisdiction from that in which the first suit was brought, then s. 13 does not apply, and therefore as the Deputy Collector's Court in the year 1867 was a Court of different jurisdiction from that of the Munsif who tried this case, the decision in the first suit is no bar.

We think that this is not the true meaning of s. 13. The question which we have now to determine appears to have arisen in a somewhat different form in the case of *Gopmath Chobey v. Bhaghwat Pershad* and another, decided by MITTER and NORRIS, JJ., and reported in I. L. R., 10 Calcutta, 697.

The question there arose in this way. A suit was first brought to recover certain property, of which the value at that time was less than Rs. 1,000, and therefore the proper Court to try it was that of the Munsif.

A second suit was afterwards brought, between the same parties in the Court of the Subordinate Judge, to recover the same [157] property, which had then risen in value and become worth more than Rs. 1,000; and it was contended that as the Munsif could not have tried the second suit in consequence of the value of the property being more than Rs. 1,000, s. 13 did not apply. But Mr. Justice MITTER in delivering the judgment of the Court said this: "We are of opinion, that this construction of s. 13 is not correct. It is well known that in this country the value of landed property is increasing every day. A suit regarding a particular property may be, so far as the pecuniary value of it is concerned, properly cognizable by a Munsif to-day, and ten years hence a suit for that property, having regard to its pecuniary value then, might not be cognizable by the Munsif. But it would be unreasonable to hold, in a suit which might be brought ten years hence, that a decision between the same parties to-day passed by a Munsif having full jurisdiction would not be *res-judicata* ten years hence. The reasonable construction of the words *in a Court of jurisdiction competent to try such subsequent suit*, seems to us to be that it must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit, if then brought, the decision of such Court would be conclusive under s. 13, although on a subsequent date by a rise in the value of such property, or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property."

Accordingly the learned Judges in that case held, that the decision in the former suit was a *res-judicata* in the case then under discussion.

We entirely agree in the principle thus laid down, and we think it applies here. There is no doubt that the Court in which this suit is brought, and that in which the former suit was brought, are Courts of different jurisdictions; but at the same time the Court in which the former suit was brought was the

only Court at that time competent to try suits of that kind, and if this very suit had been brought at that time, the Deputy Collector's Court would have been the only Court competent to try it.

[158] We think, therefore, the Subordinate Judge was right in holding that the decision in the former suit is a bar to this suit.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[This case was approved of in 15 Mad 494, 24 Bom., 456; 2 O. C. 261; See also 25 Cal. 571 (where test of *appealability* was discussed), 9 C. W. N., 656; and 10 Cal., 697 *supra*.]

[11 Cal. 158]

ORIGINAL CIVIL.

The 11th September, 1884.

PRESENT.

MR. JUSTICE PIGOT.

Coggan

versus

Pogose.

*Equitable mortgage—Deposit of title deeds—Priority—Registration Act—
Act III of 1877, s. 48.*

A deposit* of title deeds of certain property, under a verbal arrangement to secure payment of a debt, is not an "oral agreement or declaration relating to such property" within the meaning of s. 48 of the Registration Act.

THIS was a claim made in the administration suit of *Coggan v. Pogose*, against the estate of the defendant, by the representatives of the late J. P. Wise of Dacca. In 1873 Pogose was indebted to Wise in a sum of Rs. 75,000, being the amount of certain bills of exchange accepted by Wise for the accommodation of Pogose. By a verbal agreement made in 1873 between Wise and

Pogose, the latter agreed to deposit, and did deposit, with the former a *Heba-bil-Ewaz* executed in his favour by one Nizamunissa Khatoon, and dated the 17th of July 1864, thereby, as claimed by Wise, "mortgaging to the said Josiah Patrick Wise the said Nicholas Peter Pogose's title and interest in the properties comprised in such *Heba-bil-Ewaz*," to secure payment of the said sum of Rs. 75,000.

By a stamped and registered instrument, dated the 4th day of July 1876, Pogose charged a portion of the same properties in favour of the Agra Bank to secure the payment of a sum of Rs. 25,000. On the 30th of June 1876, a similar charge had been made by him in favour of the Bank of Bengal to secure the payment of certain sums which amounted to upwards of Rs. 70,000. All the properties comprised in the *Heba-bil-Ewaz* had been made over to, and were in the possession of, the Official Trustee of Bengal. The question was, whether Wise's claim had priority over the claims of the Agra Bank and of the Bank of Bengal.

[159] Mr. *Phillips* and Mr. *Trevelyan* for the executors of Mr. Wise.

Mr. *Bonnerjee* for the Official Trustee.

Mr. *O'Kinealy*, for the Agra Bank and the Bank of Bengal, contended that the banks were entitled in priority to Mr. Wise. The oral agreement and deposit of 1873 was an "oral agreement or declaration" within the meaning of s. 48 of the Registration Act. True it amounted to an equitable mortgage, but that was so only because it was in its essence a verbal contract to mortgage, and would be given effect to on that ground alone.

Mr. *Phillips* contra.—Mr. Wise's equitable mortgage is not an oral agreement within the meaning of s. 48. Here, had not a word been said, but the deed been simply deposited, the equitable mortgage would have been perfectly good, and it could not have been contended that it would come within s. 48. It cannot be said to be an oral agreement within s. 48, simply because there is an oral agreement in *addition* to the deposit.

The following **Judgment** was delivered by

Pigot, J.—The question in this matter, which I thought it worth while to consider, is, whether the equitable mortgage of 1873, as to the factum of which there is no doubt, ought or ought not to be postponed to the subsequent written and registered charge in favour of the plaintiff by reason of the charge being registered under provision of s. 48 of the Registration Act. Or whether such an equitable mortgage, constituted as this was, by deposit of title deeds, is an "oral agreement" under s. 48.

That section enacts that "all non-testamentary documents duly registered, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession."

I can find no authority, and none was cited before me, nor am I aware of any authority, under rulings of the Registration Act in which this section is to be found, exactly bearing on this matter.

[160] In judging of it as a matter, so far as I am aware, of first impression, I have only my own opinion, and that is, that an "oral agreement" under this section must be understood to mean, so far as the present question is concerned, an agreement merely oral; now a mortgage by deposit of title deeds may well

be created without any expression of agreement in words at all; the essence of the transaction is the deposit of the deeds, on which mortgage becomes complete. No doubt as one consequence of it the mortgagee may be entitled to a registered conveyance, but that right is an incident of the transaction, and is not of the essence of it, and hence I do not think counsel's argument can govern the decision of this question, viz., that argument in which he contended that an equitable mortgage was an agreement to execute a conveyance. It is in itself a mortgage, and carries with it a right to a conveyance, but that is not the essential character of the transaction. It is a complete act and not an executory agreement. For these reasons I do not think the case comes under s. 48; the matter is of less importance having regard to the provisions of ss. 58, 59, 1 Transfer of Property Act. From the last paragraph of the latter section it would appear that where the Act is applicable, equitable mortgages outside the towns of Calcutta, Bombay, Madras, Karachi and Rangoon are no longer valid.

*[Sec 58 —(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability

"Mortgage," "Mortgagor" and "Mortgagee" defined.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee

Simple mortgage.

(c) Where the mortgagor ostensibly sells the mortgaged property—

Mortgage by conditional sale.

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

Usufructuary mortgage

(e) where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage]

English mortgage.

† [Sec. 59 :—Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.]

I therefore decide the question of priority against the Banks, and hold that the claim is established in the amount claimed, and in priority to the claim of the Banks.

The costs will, of course, be added to the claim.

Claim allowed.

NOTES.

[This case was followed in (1905) 33 Cal , 410 10 C. W N , 276 4 C L J , 102. See also L. B. R., (1893-1900) 660 , L B R., (1872-1900) Vol., I, 555 (560)]

[11 Cal. 160]

APPELLATE CRIMINAL.

The 7th January, 1885.

PRESENT

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Ina Sheikh.... Appellant

versus

Queen-Empress.....Respondent.

Penal Code—Act XLV of 1860, s. 411—Receiver of stolen property—Presumptions as to possession of property after theft —Possession of stolen property.

A common brass drinking cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884; held in a case [161] in which the accused was tried for receiving stolen property, that his possession of the stolen property, coupled with the fact that he had failed to give an account as to how he became possessed of the property, would, under ordinary circumstances, raise a *probable presumption* of his guilt, but where, as in this case, such possession was not a recent possession, but one eleven months subsequent to the act of theft, the presumption against him was so slight that, taken by itself, he ought not to be called upon to explain how his possession was acquired.

* Criminal Appeal No. 667 of 1884, against the order of sentence made by J. F. Stevens, Esq., Sessions Judge of Mymensingh, dated the 7th of November 1884.

The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen.

Rez v. Adam (3 C. & P., 600), *Rez v. Cooper* (3 C. & R., 318) ; *Rez v. Partridge* (7 C. & P., 551) followed.

ONE Ina Sheikh was charged before the Sessions Judge of Mymensingh under s. 457 of the Penal Code with house-breaking by night in order to commit theft.

It appeared that the house of the complainant was broken into on the night of the 10th October 1883, when a brass drinking cup was stolen therefrom. There was nothing proved at the trial to connect the prisoner with the offence of house-breaking, but the complainant and one Guru Churn, the investigating police officer, both gave evidence to the effect that the prisoner, at the time of the investigation into the case, held in September 1884, produced the drinking cup from some jungle near his house. The cup was identified as the property of the complainant. The prisoner called no evidence save as to character, but made a statement in which he said that the cup was his own property, denying that it had been secreted in the jungle, and said that the police had found his little boy playing with the cup in the jungle, and had taken it from him and put forward the charge.

The Assessors considered that the prisoner should be convicted under s. 411 of the Penal Code, observing that he had not been able to give any proof of his assertion that the property was his.

The Judge closed his judgment with the following words —

"This is one of three cases in which the prisoner has been convicted in the present Sessions, he would therefore appear to be an habitual offender. The conviction is had under s. 411 of the Penal Code, which seems more appropriate than s. 457, as there is nothing to connect the prisoner directly with the actual house-[162]breaking, and nearly a year has elapsed between the theft and the finding of the property in his possession."

"The Court, concurring with the Assessors, finds that Ina Sheikh is guilty under s. 411 of the Penal Code of the offence of dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property, and directs that Ina Sheikh be rigorously imprisoned for two years."

The prisoner appealed to the High Court.

No one appeared for either party.

Judgment of the Court (MITTER and NORRIS, JJ.) was as follows :—

In this case the prisoner has been convicted under s. 411 of the Indian Penal Code of dishonestly receiving a brass drinking cup

The evidence upon the record clearly establishes that the complainant's house was broken into in October 1883, and the cup, which is abundantly identified as the complainant's property, stolen therefrom.

There is no evidence to connect the prisoner with the actual house-breaking; and the question we have to consider is whether there is sufficient evidence to warrant a conviction under s. 411 of the Indian Penal Code.

The cup was stolen in October 1883 and it was not discovered until the 4th September 1884 when, as the prosecution allege, it was produced by the prisoner to the police from under a *rangr* tree in the jungle. At the trial the prisoner denied that the cup was secreted in the jungle. He alleged that his little boy was playing with it in the jungle; that the Police picked it up and falsely stated that it was secreted. The prisoner also alleged that the cup was his own property.

It would appear from the opinion of the Assessors that it was because the prisoner failed to substantiate his assertion that the cup was his own property that they convicted him, their opinion as recorded is as follows:—“Both Assessors consider that the accused should be convicted under s. 411, Indian Penal Code, observing that he has not been able to give any proof that the property is his.”

We are of opinion that, independently of the evidence as to the alleged concealment of the cup, to which we shall refer presently, [163] there was no such case made out against the prisoner as to call upon him to account for its possession.

No doubt the possession of stolen property *immediately* after it has been stolen affords a strong presumption that the person in whose possession it is, is either the actual thief, or a receiver with a guilty knowledge; and this presumption is of course strengthened, if the person, in whose possession the stolen property is, fails to give a satisfactory account of the manner in which he acquired such possession, or gives a false account, or gives accounts which are contradictory, or if the property is secreted. But the possession of stolen property, even if accompanied by a failure to give an account as to how such possession was acquired, or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise not a violent or strong presumption, but a probable presumption merely.

But this is not a case of very recent possession, or of possession some time afterwards, but of possession 11 months after the theft, and such possession, by itself, affords but a slight presumption against the accused, so slight that, taken by itself, he ought not to have been called upon to explain how his possession was acquired.

In the case of *Rex v. ———* (2 C. & P., 459), BAYLEY, J., said “The rule of law is, that if stolen property be found *recently* after its loss in the possession of a person, he must give an account of the manner in which he became possessed of it, otherwise the presumption attaches that he is the thief, but I think, that after so long a period as 16 months has elapsed it would not be reasonable to call upon a prisoner to account for the manner in which property supposed to be stolen came to his possession.”

In *Rex v. Adams* (3 C. & P., 600), PARKE, J., observed that possession of stolen property three months after it was lost was not such recent possession as to put the prisoner upon shewing how he came by it, unless there was evidence of something more than the mere fact of the property being in his possession at that distance of time after the loss of it

[164] In *Reg. v. Cooper* (3 C & K., 318) MANLE, J., said. “Where a man is found in possession of a horse six or seven months after it is lost, and there is no other evidence against him but that possession, he ought not to be called to account for it.”

In *Rex v Partridge* (3 C. & P, 551) PATTESON, J., pointed out that the question of what is or is not such a recent possession of stolen property as to require the person in whose possession it is to give an account of how such possession was acquired, was to be considered with reference to the nature of the articles stolen, adding “if they are such as to pass from hand to hand readily, two months would be a long time.”

The stolen article in this case was not of an unique or unusual character, but such as is possessed in every native house-hold and would pass readily from hand to hand.

Upon the authority of these cases, we are of opinion that the mere fact of the prisoner's possession of the cup 11 months after it was stolen, was not such a recent possession as to put him to proof of how such possession was acquired.

But no doubt there was other evidence besides that of possession to be considered, and if we felt that we could credit the evidence of the concealment of the cup, we should hesitate to interfere with this conviction, but we are not prepared to accept this evidence, and consequently we set aside the conviction.

Conviction set aside.

NOTES.

[Possession of stolen articles of a common sort after a fairly long interval was held insufficient.—(1906) 29 All., 188. 3 A. L. J., 808 (1906) A. W. N., 314. See also Ratanlal, 594.]

[11 Cal. 164]

APPELLATE CIVIL.

The 23rd January, 1885

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY.

Peru Bepari.. (One of the Defendants)

versus

Ronuo Maifarash (Plaintiff) and Shaik Taiah...(Another Defendant.)

Execution of decree—Attachment—Attachable property—Doors and windows—Immoveable property.

The doors and window-shutters of a *pucca* building cannot be separately attached in execution of decree, forming as they do part of an immoveable property, and having no separate existence.

[165] THE plaintiff, Sheikh Ronuo, obtained a decree against the defendant Taiah, and in execution thereof attached, as the property of the judgment-debtor, sixteen pairs of doors and four pairs of window-shutters, which were the doors and window-shutters attached to a *pucca* building alleged to be the property of Taiah. The defendant, Peru, claimed in the execution proceedings the *pucca* building and the land on which it stood under a purchase from Taiah and others, the owners thereof in 1275 B. S. The property was released from attachment, and thereupon the present suit was brought to have it declared that the attached property was the property of the judgment-debtor, alleging that the purchase of 1275 was a *benami* transaction. The Court of First Instance gave the plaintiff a decree, and this decision was affirmed on appeal. The defendant Peru appealed specially to the High Court, on grounds impugning the decision of the lower Appellate Court on the merits, and also on the ground that the suit was one cognizable by a Court of Small Causes only.

Baboo Lall Mohun Das for the Appellant.

* Appeal from Appellate Decree No. 1449 of 1883, against the decree of Baboo Girish Chunder Chowdhry, Second Subordinate Judge of Dacca, dated 12th of March 1883, affirming the decree of Baboo Sham Kishore Bose, Extra Munsiff of that district, dated 31st of May 1882.

Baboo Gopi Nauth Mookerjee for the Respondent.

The Judgment of the Court was delivered by

Pigot, J.—In this matter, as it comes before us in second appeal, we think we are bound by the rule followed by the Chief Justice in the case of *Tofail Ahmud v. Banee Madhub Mookerjee* (24 W. R., 394). That was a suit by an execution-creditor to establish the title of his judgment-debtor to a certain property which was erroneously held in the lower Court to be moveable property, and which this Court pointed out was in truth immoveable property. Notwithstanding which, the Court held (p. 395) "that the only question which could properly have been tried in this case is, whether the property seized did really belong to the execution-debtor as against the defendant in this suit." In this case, that matter has been found as a fact by the two Courts, and we shall follow the case that we have referred to in not reviewing the finding upon a question of fact. That is the first point

[166] But secondly, this property cannot be attached, forming part, as it does, of an immoveable property, and having no separate existence

Thirdly, these singular proceedings, in which the right to property, of which these doors and window-frames admittedly form a part, has been incidentally enquired into (as to which the Courts below have expressed a decision), cannot be held as in any way establishing any right or absence of right in any person to the house.

The attachment ought never to have been granted, and the suit ought never to have been entertained. And although, in second appeal, we do not set aside the decree of the lower Court, that decree must be altered by striking out of it so much as orders that the door-frames and window-frames shall be liable to attachment or sale.

Each party must bear his own costs throughout.

Decree altered.

NOTES

[This was followed in (1890) 13 Mad , 518 , see also 14 Mad , 467 , 16 I. C , 877 (Mad)]

[11 Cal. 166.]
APPELLATE CIVIL.

The 7th January, 1885.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Rung Lall and another....Judgment-debtors
versus
Hem Narain GirDecree holder.*

Civil Procedure Code—Act XIV of 1882, s. 258—Certifying part payment of decree—"To show cause," Meaning of.

In determining under s. 258 of Act XIV of 1882 whether or no the cause shown by the decree-holder is sufficient, it is incumbent upon the Court to investigate and decide any questions of fact upon which the parties may not be agreed.

In such an investigation the evidence may be given either orally or by affidavit.

The term "to show cause" does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

THE judgment-debtors in this case applied within the time allowed by law to the Additional Subordinate Judge of Gya [167], under s. 258 of the Code of Civil Procedure, for the issue of a notice upon the decree-holder, calling upon him to show cause why a payment of Rs. 1,000 made by them in favour of the decree-holder out of Court in part satisfaction of a decree obtained against him by the decree-holder should not be recorded as certified.

The decree-holder appeared in accordance with the notice, and denied having received any sums of money from his judgment-debtors in part satisfaction of this decree.

The Additional Subordinate Judge, after hearing the denial of the decree-holder, declined to receive evidence of the payment, or to enquire otherwise into the matter, as he was of opinion that the Code of Civil Procedure made no provision for any such enquiry, and he thereupon dismissed the application.

The judgment-debtors appealed to the District Judge. The District Judge, agreeing with the lower Court, dismissed the appeal.

The judgment-debtors appealed to the High Court.

Moulvi Mahomed Yusuf and Moulvi Serajul Islam for the Appellants.

Mr. C. Gregory for the Respondent.

Judgment of the Court (MITTER and NORRIS, JJ.) was as follows :—

In this case the judgment-debtors, appellants, informed the lower Court that they had paid out of Court to the decree-holder, respondent, Rs. 1,000 in part satisfaction of the decree, and applied, under s. 258 of the Civil Procedure Code, for the issue of a notice upon the respondent to show cause why the said payment should not be recorded as certified. The respondent appeared and denied the receipt of the money. The lower Courts, being of opinion that, under the section in question, the appellants were not entitled to go into evidence to establish their allegation, rejected their petition without taking any evidence upon the disputed question of fact.

* Appeal from Appellate Order No. 218 of 1884, against the order of T. Smith, Esq. Officiating Judge of Gya, dated the 6th of July 1884, affirming the order of Baboo Dinesh Chunder Rai, Subordinate Judge of that district, dated the 14th of June 1884.

We are of opinion that the lower Courts are in error in not allowing the parties opportunity to establish their respective [168] allegations. The section says that, if the decree-holder fails to show cause why the payment should not be recorded as certified, the Court shall make the rule absolute. It appears to us that in determining whether the cause shown is sufficient or not, it is incumbent upon the Court to investigate and decide any question of fact, upon which the parties may not be agreed, upon such materials as they may legally place before it. In investigating this matter, the Court may take oral evidence, or may, under Chapter XVI of the Civil Procedure Code, allow the disputed fact to be proved by affidavit according as the one or the other course may appear to it convenient.

The language of s. 526 is similar to that of s. 258, and in *Dandekar v. Dandekar* (I. L. R., 6 Bom., 663) it was held that the term "to show cause" in s. 526, "does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court." Following this decision, we think that the same construction should be put upon the term "to show cause" in s. 258.

We reverse the decisions of the lower Courts and remand the case to the Court of First Instance to decide upon evidence whether the cause shown is sufficient and satisfactory. The costs will abide the result.

Case remanded.

NOTES.

[This was approved in (1893) 21 Cal., 213 (232) F B which related to awards.]

[169] APPELLATE CIVIL

The 23rd January, 1885.

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Sri Bullov Bhattacharji Judgment-debtor

versus

Baburam Chattopadhyaya and another.Decree-holders.*

Execution of Decree—Second appeal from order passed in execution of decree upon a bond specially registered under s. 53 of Act XX of 1866—

Mofussil Small Cause Courts, Suit cognizable by—Act XX of 1866, ss. 53 and 55—Code of Civil Procedure, Act XIV of 1882, ss. 244 and 586.

A suit upon a bond specially registered under the provisions of s. 53 of Act XX of 1866 for an amount less than Rs. 500 is cognizable by a Mofussil Court of Small Causes, and under s. 586 of the Code of Civil Procedure no second appeal lies to the High Court against an order passed on an application for execution of a decree made in such a suit.

Quere, whether an appeal lies at all against such an order passed in proceedings taken in execution of such a decree.

THE decree, of which the right to execution formed the subject of this appeal, was dated the 13th July 1871, and was passed upon a bond, specially

* Appeal from Appellate Order No. 241 of 1884, against the order of W. F. Meres, Esq., Judge of Midnapur, dated the 11th of July 1884, modifying the order of Baboo Joy Gopal Sinha, Munsiff of Tamruk, dated the 17th of November 1883.

registered under the provisions of s. 53 of Act XX of 1866, the amount of the bond being less than Rs. 500.

In the Munsiff's Court the judgment-debtor objected to execution of the decree being granted on the ground that the right thereto was barred by limitation, that the interest claimed by the decree-holder was excessive; and that he was not in possession of any property belonging to his deceased father against whom the decree had been passed.

The Munsiff held that the decree was not barred by limitation, that the decree-holder was not entitled to interest at a higher rate than 12 per cent. per annum, and that the allegation by the judgment-debtor as to the non-possession of any property belonging to his father's estate was unfounded. The Court accordingly granted execution allowing interest at the modified rate.

Both parties appealed to the Judge against this decision, the judgment-creditor contending that the lower Court erred in awarding interest at a rate lower than that claimed.

[170] The plea of limitation was abandoned by the pleader for the judgment-debtor, who contended that the Court was wrong in granting execution against his client at all, and there was no proof that he had inherited any property from his father.

The lower Appellate Court, however, upheld the decision of the Court below as to the right to execution, and further held that the judgment-creditor was entitled to interest at a rate higher than that allowed by the Munsiff and modified the order accordingly.

The judgment-debtor now specially appealed to the High Court, and the only point raised in the appeal was the preliminary question raised on behalf of the respondent that no second appeal lay at all, and the contention raised on behalf of the appellant that, if that were so, no appeal lay at all from such an order.

Baboo *Uma Kahl Mukerjee* for the Appellant.

Baboo *Doorga Mohun Dass* for the Respondent.

The nature of the arguments upon the preliminary objection appears sufficiently in the **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ.) which was delivered by

Tottenham, J.—The respondent's pleader has taken a preliminary objection to the hearing of this appeal. He has contended that no second appeal lies to this Court in this case, and also that no appeal lay in the case at all from the decision of the first Court.

The subject of the appeal is as to the amount of interest to be recovered under a certain decree. The decree is dated the 13th July 1871. It was passed upon a bond specially registered under Act XX of 1866, and was made under the provisions of s. 53 of that Act. The amount of the bond was less than Rs. 500. The respondent's pleader has urged that, so far as this second appeal is concerned, the original suit having been one in the nature of a case cognizable by a Court of Small Causes, and the amount involved in it having been less than Rs. 500, a second appeal to this Court is barred by s. 586 of the Code of Civil Procedure. He has further contended that, by the terms of s. 55 of Act XX of 1866, no appeal at all lay from the order of the first Court. For the appellant it has [171] been urged that the case was not one cognizable by a Court of Small Causes; that nothing in Act XX of 1866 bars an appeal against an order passed in the execution of a decree made under s. 53; and that the order in question passed by the lower Appellate Court, being one of a nature contemplated by s. 244 of the Code, a second appeal would lie.

The decisions in this Court have been to the effect that no appeal lies against any order passed even in the execution department connected with a

decree made under s. 53 of Act XX of 1866; but a different view of that question has been taken in Bombay and Allahabad. The High Courts in those places have held that, although the decree itself under s. 53 is final, there is no bar to an appeal upon any question raised in the execution department. Upon that point we propose to give no decision in the present instance; for we think that this appeal can be disposed of upon the other ground taken by the respondent's vakil, namely that no second appeal lies to this Court.

For the appellant it has been contended that this case cannot be treated as one of a nature cognizable by a Court of Small Causes, because the decree was made under the special provisions of s. 53 of Act XX of 1866. A ruling of this Court in the case of *Nilcomul Banerjee v. Mudoosoodun Chowdhry* (14 W. R., 478; 6 B. L. R., 177), was brought to our notice. The head-note is that the Small Cause Court of Calcutta had no jurisdiction to make a decree under s. 53 of the Registration Act; and that is the only authority which the appellant's vakil was able to show in support of his contention, that the present suit is not of a nature cognizable by a Court of Small Causes. It appears to us, however, that this ruling does not govern Small Cause Courts in the mofussil. The particular reasons given by the High Court for that decision do not apply to Mofussil Courts. We see nothing which would take away from Mofussil Small Cause Courts the jurisdiction to deal with a claim passed upon a bond specially registered under Act XX of 1866. We think that the suit was clearly one of a nature cognizable by a Small Cause Court in the mofussil. It has been ruled also in this Court that s. 586, which bars a second appeal in cases of that nature in which the original suit relates to a [172] sum less than Rs. 500, applies equally to proceedings in execution as to a decree itself. The ruling is to be found in the case of *Debee Pershad Singh v. Syud Delawar Ali* (12 W. R., 86), and the contention before us of the appellant's pleader himself, if correct, shows that s. 586 is equally applicable to proceedings in execution and to decrees; for, according to him—and he is probably right—the order passed by the lower Court comes within the purview of s. 244, and is therefore a decree. Section 586 relates to appeals from appellate decrees, not to appeals from orders.

The vakil for the appellant further urged that the amount now in dispute is more than Rs. 500, and that, therefore a second appeal will lie. But the terms of s. 586 do not refer to the amount in dispute at the time the appeal is preferred, but to the amount or value of the subject-matter of the original suit. In this the original suit related to a sum less than Rs. 500. It seems to us, therefore, clear that no second appeal lies.

The pleader for the appellant asked us that, should we hold that no second appeal lies, to decide further that no first appeal lay, and that upon that ground the order he complains of should be set aside. But this is not a point which is properly before us at the present time. Should it come before the Court in proper form it will have to be considered.

The appeal is dismissed. We make no order as to the costs of this appeal.

Appeal dismissed.

NOTES.

[SECOND APPEALS—SMALL CAUSE SUITS—

Second appeals are barred as well in execution proceeding as in original decrees:—12 Mad., 116 (117); 25 Cal., 872; 27 Cal., 484; 11 C. W. N. 861, 12 All. 879; 18 All., 481; 30 Bom. 118; 12 C. P. L. R. 12.

The test is the original subject matter of the suit—not the amount claimed in execution nor the amount disputed at the time of appeal.—15 C. W. N. 454; 7 I. C. 778; 15 C. L. J. 49; 82 Bom. 356; 30 Mad., 212; 17 M. L. J. 376.]

[11 Cal. 173]
APPELLATE CIVIL.

The 3rd February, 1885.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

Ambica Dasia.Plaintiff

versus

**Nadyar Chand Pal (and on his death his sons, Akhai Coomar Pal
and others).....Defendants ***

*Appeal—Award—Order setting aside decree upon award— Civil Procedure
Code (Act XIV of 1882, s. 521).*

All matters in dispute in a suit were referred to arbitration. An award was duly made and filed, and a decree passed in accordance with the terms thereof. Subsequently, on the application of the plaintiff in the suit, the Court passed an order setting aside the decree and the award, and ordering the case [173] to be set down for hearing upon the ground that the proceedings in connection with the arbitration had been taken, and the award had been filed, without notice to the plaintiff, and that, although the award was alleged to have been made with the consent of the parties, the plaintiff had not consented to it.

Held, that no appeal lay from such order.

Howard v. Wilson (I. L. R., 4 Cal., 231) dissented from; *Mothooranath Tewaree v. Brindaban Tewaree* (14 W. R., 327) followed.

THE facts of this case were as follows :—

Ambica Dasia, the plaintiff, who was a Hindu widow, sought to recover possession of her husband's share in certain property from the defendants, who were her husband's agnate relatives. One of the questions raised in the suit was as to whether her husband predeceased his father. When the suit was pending it was referred to arbitration, and in due course an award was made, alleged to be with the consent of the parties, allowing the plaintiff 5½ biggahs of land, and a sum of Rs. 100 in satisfaction of all her claim. This award was filed in Court, and no objection being made by either party within the time limited, a decree was passed in accordance with its terms. Subsequently the plaintiff came before the Court, and applied to have the award set aside, alleging that she had not consented to the award, and that it had been made behind her back without any notice to her, that the arbitrators were about to deal with the matter. She further stated that she had had no notice that the award was filed, or that a decree had been passed upon it. It was found by the Munsif that the arbitrators had acted on the consent of the plaintiff's son-in-law, who looked after the case on her behalf, and who was at the time residing with her, but he held that the plaintiff was not bound by his act, and consequently he set aside the decree and the award, and restored the case to the file, and ordered it to be set down for hearing.

Previous to the date so fixed for hearing the defendants appealed, and the lower Appellate Court set aside the order of the Court below, finding, as a fact,

* Appeal from Appellate Order No. 198 of 1883, against the order of Babu Brojendra Coomar Seal, Rai Bahadur, Judge of Bankura, dated 23rd of January 1883, reversing the order of Babu Jogendra Nath Bose, Rai Bahadur, Munsif of Gungajolghati, dated the 4th of December 1882.

that the plaintiff was well aware of the award and all the proceedings in connection therewith, and that the case was decided in the presence of her pleaders; not [174] having objected to the award within the time allowed, the Court held that she had no right to have the decree set aside, and consequently decreed the appeal with costs.

The plaintiff now specially appealed to the High Court upon the ground that no appeal lay from the Munsif's order, and that the decision of the lower Appellate Court upon the finding of facts come to by it was erroneous.

Baboo Harendronath Mukherji for the Appellant.

Baboo Dwarka Nath Chakrabati for the Respondents.

The Judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

In this suit one Ambica Dasia, a Hindu widow, sued to recover possession of her husband's property out of the hands of the defendants. During the progress of the case the dispute was submitted to arbitration, and an award was delivered, which was set aside by the Munsif under s. 521 of the Civil Procedure Code on the objection of the plaintiff. The case was then set down for trial, but before judgment was delivered, or any decision was had on the merits of the case, the defendants appealed to the District Judge, who came to the conclusion that the Munsif was not justified in setting aside the award of the arbitrators. He, therefore, decreed the appeal, and gave judgment in terms of the award. Against this decision the present appeal has been filed.

The question we have to decide in this case is, whether an appeal from the order of the Munsif lay to the District Judge. In the case of *Mothooranath Tewaree v. Brindabun Tewaree* (14 W. R., 327), it was decided that an order setting aside an award was merely an interlocutory order, which was not subject to appeal, but only liable to revision by an Appellate Court when the final decree was appealed from. In a later case, namely, the case of *Howard v Wilson* (I L. R., 4 Cal., 231) a different conclusion was arrived at.

There it was held on appeal from a similar order passed on the Original side of this Court that the order was a judgment under the Charter from which an appeal lay direct. But it does not appear that in this case the previous decision of Sir RICHARD COUCH was either cited or taken into consideration. Moreover, this decision has not been followed, for in the case of [173] *Sree Ram Chowdhry v. Denobundhoo Chowdhry* (I. L. R., 7 Cal., 490) another Division Bench of this Court held that no appeal lay from an order under s. 521. We are of opinion that we should follow the decision of Sir RICHARD COUCH in *Mothooranath Tewaree v. Brindabun Tewaree* (14 W. R., 327) and holding that the lower Appellate Court had no jurisdiction to receive this appeal, we set aside the judgment of that Court.

To this our decision is limited. We do not decide any question whatsoever regarding the validity of the award, and whether it is binding upon the parties or not. These questions, if they are ever raised, must be raised in appeal from the final decision of the Munsif.

Appeal allowed.

NOTES.

[Similar rulings were given in the following cases.—22 Mad., 202, 31 Mad., 345, 18 M. L. J., 228; (1912) 15 I. C. 62. See also C. P. C. 1908, sec. 105 (1), 28 All. 408.]

[11 Cal. 176]
FULL BENCH.

The 9th January, 1885.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE PRINSEP, MR. JUSTICE TOTTENHAM AND MR. JUSTICE PIGOT.

Chultan Mahton.....Defendant

versus

Tilukdari Singh and others.....Plaintiffs.

"*Abwabs*," *Illegality of—Cesses—Reg. VIII of 1793, s. 54—Reg. IV of 1794—Reg. V of 1812, s. 3—Beng. Act VIII of 1869, s. 11—Act X of 1859, s. 10—Contract Act—Act IX of 1872, s. 23.*

Where it is not actually proved that *abwabs* have been paid or have been payable before the time of the permanent settlement, a landlord is not legally entitled to recover them as against his ryots, even assuming that by the custom of the estate the ryots, and their ancestors before them, have for a great number of years paid such *abwabs*.

Semble, that a claim for the recovery of *abwabs* existing before the time of the permanent settlement would not be enforceable.

THIS was a reference to a Full Bench arising out of a case in which the plaintiffs, who were the ticcadars of a certain mouzah, sought to recover from a ryot Rs. 1,105-1-3, as arrears of *nagdi* and *bhowli* rent for the years 1286 to 1288, together with certain [176] "customary *abwabs*" which the plaintiffs alleged had been prevalent in the village from time immemorial. On the *nagdi* tenure measuring 14 bighas 7 cottahs, the following cesses were claimed:—

	Rs.	As	P.	
Rent	75	9	0	
Dastur	0	7	9	At ½ anna per bigha
Hujatana	0	1	0	
Sonari	2	6	0	At ½ anna per rupee.
Batta Mal	3	11	0	At 3 pice per rupee.
Batta Company	3	13	6	Do
Dak Cess	1	11	0	
Road Cess	12	10	9	
Total Rs.	108	6	0	

On the *bhowli* tenure, the following dues were claimed *viz.*:—

The *neg* or landlord's due of 1 seer 4 chittaks per maund.

The *punsera* or harvest fee of 5 seers.

The *bodhwara*, 2 chittaks per maund for payment of the wages of the village watchmen.

The *pohwi* 4 chittaks per maund for payment of the wages of the priest.

The *nochha*, 8 chittaks per maund for payment of the wages of the village establishments *viz.* the *putwari* 2 chittaks, the *gomashta* 2 chittaks, the *amin* 2 chittaks, the *pales* 1 chittak, the *nawinsinda* 1 chittak.

The *mangan*, 30 seers per plough.

The *siddha*, 10 seers per plough (putwari's due).

* Full Bench Reference on Special Appeal No 1076 of 1883, against the decree of the District Judge of Zillah Gya, dated 21st March 1883, modifying the decree of the Extra Subordinate Judge of that District, dated the 31st May 1882.

The defendant denied that any arrears of rent were due; but whilst admitting that he was liable to pay 1 anna per ryot for *Hujatana*, and 3 pice per rupee for *Batta Company*, contended that the other items were illegal cesses and were not recoverable. The Subordinate Judge found that the defendant was liable for road-cess and for the items admitted by him, but as regarded the remaining items other than the *assul rent*, he held that they were illegal, as being contrary to s. 54 of Regulation VIII of 1793. The District Judge found that the evidence given satisfactorily established a custom showing that the cesses claimed on the *nagdi* tenure had been prevalent in the village for very many years, and that they had been paid by other ryots for a long [177] period; and as regarded the dues claimed on the *bhowli* lands, that the evidence established (1) that these dues had been collected and paid from time immemorial; and (2) that having regard to the *bhowli* system that they were not excessive; he therefore held, on the authority of *Budhna Orawan Mahtoon v. Jemadar Babu Jogeshur Doyal Sing* (24 W. R., 4), that such cesses were not illegal, and gave the plaintiffs a decree.

On the defendant coming up before the High Court on special appeal the Court (GARTH, C.J., and BEVERLEY, J.) having doubts as to whether the claim for *abwabs* could be enforced under the present Rent Law, and having regard to the conflicting authorities on the point, referred the following question to a Full Bench:—

Whether, assuming that the *abwabs* in question have, by the custom of the estate of which the lands form part, been paid by the defendant and his ancestors, for a good many years, they are legally recoverable by the plaintiffs, although they are not actually proved to have been paid or payable before the time of the permanent settlement?

Baboo Chunder Madhub Ghose and Baboo Saligram Singh for the Appellants.

Baboo Chunder Madhub Ghose.—Regulation VIII of 1793, s. 54, lays down that *abwabs* should be consolidated with the *assul*, and this claim is in contravention of that section. Regulation V of 1812, s. 3, although altering portions of Regulation VIII of 1793, declares that nothing therein contained shall legalize an imposition of arbitrary cesses. Section 10 of Act X of 1859 and s. 11 of Beng. Act VIII of 1869 provides that damages shall be payable by any person exacting from tenants excess rents under the name of *abwabs*.

The cases which show that such arbitrary cesses are prohibited are—*Kumola Kant Ghose v. Kanoo Mahomed Mundal* (11 W. R., 395), *Nobin Chunder Roy Chowdhry v. Gooroo Gobind Surmah Mojomdar* (14 W. R., 447), *Dhalee Paramanick v. Anund Chunder Tolaputtur* (5 W. R., 86), [178] *Sqnnum Sookul v. Shaikh Elahee Buksh* (7 W. R., 453), *Orjoon Sahoo v. Anund Singh* (10 W. R., 257), *Burmah Chowdhry v. Sreenund Singh* (12 W. R., 29), *Mengur Munder v. Baboo Huree Mohun Thakoor* (23 W. R., 447), *Nobin Chunder Roy Chowdhry v. Gooroo Gobind Mojomdar* (25 W. R., 8). The case of *Jeetoolah Paramanick v. Jugodindro Narain Roy* (22 W. R., 12) is distinguishable, as there the tenant consented to pay the cesses.

The case of *Lachman Rai v. Akbar Khan* (I. L. R., 1 All., 440) shows, where a custom regarding the payment of cesses is alleged, how such custom should be proved, and lays down that it must be definite to be good.

Mr. Evans, Baboo Anoda Prosad Banerji, and Moulvi Mahomed Yusuf for the Respondent.

Mr. Evans contended that the liability relating to the payment of the *abwabs* flowed from the incidents of the contract under which the lands were

let to the defendant and his ancestors, such incidents, though not expressly mentioned in the contract, being still deducible from the usage or custom established on the evidence. The Courts below have found that these payments have been paid from time immemorial; there is not, nor has there been, any legal enactment which renders *abwabs* which were collected at the time of the permanent settlement, illegal. Reg. V of 1812, s. 3, lays down that such cesses may be enforced in certain cases by the Courts, and the evidence of custom sufficiently shows that there was a contract, express or implied, between the parties for the payment of these dues; and s. 9 of Reg. IX of 1825 saves certain cesses, levied according to ancient custom, from being affected by certain Regulations which abolished such cesses. A claim for the recovery of *abwabs* existing before the permanent settlement would be enforceable notwithstanding the provisions of Reg. V of 1812, Reg. VIII of 1793, Reg. IV of 1794, Act X of 1859 and Beng. Act VIII of 1869, because s. 54 of Reg. VIII of 1793 contains merely a direction for the consolidation of *abwabs* with the *assul* rent, but no penalty [179] under the Regulation was attached to an omission on the part of the landholders who might act in contravention of that direction.

Section 61 of Reg. VIII of 1793 provides that persons suing on engagements in which the *assul* and *abwabs* shall not appear to have been consolidated shall be non-suited, but this is not a penalty which would render the engagement illegal, but merely a bar to success, and besides it refers to written engagements which were by that Regulation rendered obligatory. But all the formalities as regards such engagements were abolished by s. 3 of Reg. V of 1812, and it has been settled and undoubted law for sixty years that no written engagements or special forms are necessary. The bar of section 61 having been long removed, there is nothing illegal in a contract to pay items, which are lawful under s. 3 of Reg. V of 1812, or which were lawful at the time of the permanent settlement, and have ever since been paid as a customary term embodied in the unwritten contract under which the ryot holds.

The items in dispute are described in the plaint, it is true, as "old usual *abwabs*," yet I submit they are not *abwabs*, but part of the rent, inasmuch as they are definite and certain items, and anything which is not uncertain or indefinite is not an *abwab* within the meaning of the Regulations.

Harrington's Analysis, Vol. II, p. 19, shows that the committee of circuit in 1772 proposed that such cesses as were oppressive or of late establishment should not be allowed, but that such as were of long standing and had been cheerfully submitted to by the ryots should not be considered illegal. As regards the *putwari* dues, Reg. XII of 1817 shows that they may be paid in money, grain, or land, or in any legal manner whatsoever. The note on *abwabs* in *Fried's Regulations*, p. 61, was also cited.

Baboo Mohesh Chunder Chowdhry on the same side, contended that, although there was no written agreement to pay these cesses, yet a contract to do so must be inferred, and cited—*Mahomed Fayez Chowdhry v. Jamoo Gaze* (I. L. R., 8 Cal., 730), *Jeeatoollah Paramanick v. Jugundiro Naram Roy* (22 W. R., 12). Payments which [180] were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform, and had been paid by the ryot from the beginning, according to custom, were held not to be illegal cesses—*Budhna. Orawan Mahtoon v. Jemadar Babu Jogeshur Doyal Singh* (24 W. R., 4).

Baboo Madhub Chunder Ghose in reply cited s. 4 of Reg. IV of 1794.

The Opinions of the Full Bench were as follows:—

Garth, C. J.—I think that the sums in question are not recoverable.

They are called *abwabs* by the plaintiff himself, and they are *abwabs*, as it seems to me, to all intents and purposes, and I consider that the Regulation of 1793, as well as the Rent Law of 1859, intended to put an end to the *abwab* system, and to render them illegal.

It has been argued that to abolish this system is contrary to the wishes of both landlords and ryots, and I believe that to be true.

Landlords often find it a convenient means of enhancing their rents in an irregular way; and the ryots, as a rule, would far rather submit to pay *abwabs* than have their *assul* rent increased.

But the system appears to me to be clearly illegal, and I consider that the Civil Courts should do their best to put an end to it.

The plaintiffs' suit will therefore be dismissed as regards the disputed items, with costs in the lower Appellate Court and in this Court, as well as with the costs of this reference.

Mitter, J. (TOTTENHAM and PIGOT, JJ., *concurring*).—I am of opinion that the question referred to us should be answered in the negative.

The plaintiffs claim the disputed items as "old usual *abwabs*." In the zamindari accounts they are also entered as *abwabs*. The defendant denied that he ever paid them. The District Judge, on appeal, awarded a decree in favour of the plaintiffs in respect of these items, on the ground that they had been realized by the plaintiffs and their predecessor in title from the defendant and other ryots in the estate for many years. In fact, the District Judge finds that, according to the custom of the estate of which the defendant's lands form part, these items have been paid by the defendant and his ancestor for many years.

On these findings of fact it has been contended before us on behalf of the plaintiffs that the liability relating to the payment of these *abwabs* flows from the incidents of the contract under which the lands were let to the defendant and his ancestors, such incidents, though not expressly mentioned in the contract, being still deducible from the usage or custom established on the evidence.

I am of opinion that this contention, so far as it goes, is sound; but the question is whether, having regard to the laws in force relating to *abwabs*, such a contract is enforceable. The solution of this question depends upon another question, namely, whether the imposition of such *abwabs* as these is prohibited and made unlawful by any law in force in this country? If the affirmative be the correct answer of this latter question, it does not admit of any doubt that the plaintiffs are not entitled to enforce the contract and to recover the disputed items, "because every contract made for or about any matter or thing which is prohibited and made unlawful by Statute is a void contract" (Section 23, Indian Contract Act).

Section 54, Regulation VIII of 1793, says: "The imposition upon the ryots under the denomination *abwab*, *mathoot*, and other appellations, from their number and uncertainty having become intricate to adjust and a source of oppression to the ryots, all proprietors of land and dependant taluqdars shall revise the same in concert with the ryots and consolidate the whole with the *assul* into one specific sum." Then the section in question fixes the end of the Fasli year 1198 in the Behar districts as the time within which the consolidation was to be effected. The next section provides: "No actual proprietor of land, or dependent taluqdar, or farmer of land, of whatever description, shall impose any new *abwab* or *mathoot* upon the ryots under any pretence whatsoever." This section further provides a penalty for the infraction of the

aforesaid provision. Section 61 of the same Regulation has laid down that, "in the event of any claims [182] being preferred by proprietors of estates or dependent taluqdars, farmers or ryots on engagements wherein the consolidation of *assul*, *abwab*, etc., shall appear not to have been made, they are to be nonsuited with costs." Section 3 of Regulation V of 1812 provides as follows : "Such part of Regulation VIII of 1793 and of Regulation IV of 1794 as require that the proprietors of land shall prepare forms of pottahs, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the regulations in question shall be deemed to be invalid, are likewise hereby rescinded, and the proprietors of land shall henceforward be considered competent to grant leases to their dependent taluqdars, under-farmers, and ryots, and to receive correspondent engagements for the payment of rent from each of these classes or any other classes of tenants according to such form as the contracting parties may deem most convenient and most conducive to their respective interests, provided, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses whether under the denomination of *abwabs*, *mathoot*, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void ; but the Court shall notwithstanding maintain and give effect to the definite clauses of the engagements between the parties, or, in other words, enforce payment of such sum as may have been specifically agreed upon between them." Section 10 of Act X of 1859, and s. 11 of Beng. Act VIII of 1869, declared the exaction of any sum in excess of the rent specified in the pottah of an under-tenant or a ryot, or payable under the provisions of the aforesaid Act as *abwabs*, etc., to be illegal.

Under the provisions of the Regulations and Acts cited above, it seems to me that a contract for the payment of *abwabs* is unlawful and is not enforceable by law. It has been contended before us that a claim for the recovery of the *abwabs* existing before the permanent settlement is enforceable notwithstanding these provisions, because s. 54 of Regulation VIII of 1793 contained only a direction for the consolidation of the *abwabs* with [183] the *assul jumma*, but no penalty was attached to an omission on the part of the landholders to act according to that direction. But it seems to me that this contention is not correct, because s. 61 of the said Regulation, in my opinion, provided the penalty in question, that penalty being the non-suiting of the claim for the recovery of the *abwabs*. Even supposing that this contention is valid, still the plaintiffs cannot succeed in this case. There being this plain direction in the Regulation, if it was not complied with, it is for the landlord to prove that these *abwabs* existed at the time of the permanent settlement. The plaintiffs in this case have not established this fact.

It has been next contended that, although the disputed items in the plaintiffs' claim are described in the plaint as 'old usual *abwabs*,' and in the zamindari accounts also they are designated as *abwabs* separate and distinct from the specified rent, yet they are not *abwabs* but part of the rent. This contention is mainly based upon the ground that anything which is certain and definite does not come under the class of *abwabs*, the imposition of which is prohibited by the Regulations. Although the Regulations did not clearly define what an *abwab* is, still I think that it cannot be maintained that anything which is definite and certain is not an *abwab* under the Regulations, although the parties to the contract may call it so. It seems to me that the Regulations, without defining accurately what an *abwab* is, left this question for the determination by the Court in each case upon the evidence. I cannot find anywhere in the

Regulation the precise definition of the word *abwab* which would justify me to treat the disputed items of claim as part of the specified rent, although the plaintiffs claim them in the plaint and entered them in the zamindari accounts as "*abwabs*."

It has been further said that as there is a contract between the parties for the payment of these dues under the latter portion of s. 3, Regulation V of 1812, the plaintiffs are entitled to recover them. But the language of that section does not, in my opinion, support this contention; on the other hand, it provides "that nothing therein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses whether under the denomination of *abwabs*, *mathoot*, or any other denomination" [184] The last four lines of the section in question provide that the engagement for the payment of any sum as may have been specifically agreed upon between the parties shall be enforced. This provision, it seems to me, refers only to the amount which is by the contract fixed as the rent payable to the landlord. The section in question provides mainly that the proprietors of land shall thenceforth be competent to grant leases to ryots, etc., and to receive corresponding engagements *for the payment of rent from them*. Having regard to the words of the section in question italicized, I think the words "sum specified" refer to the amount of the rent specified.

I do not think it necessary to notice in detail the decided cases on this point. There is a clear conflict in these decisions, some of them supporting the view which I take. Those in which a contrary view has been taken have been decided either upon the ground that the *abwabs* claimed in them, not being indefinite and uncertain, did not come within the class of *abwabs* prohibited by the Regulations, or, upon the ground that there were clear contracts between the parties for the payment. The last-mentioned ground is evidently based upon the construction of s. 3, Regulation V of 1812, for which the learned counsel for the plaintiffs contended.

For the reasons given above I am unable to adopt this construction. The view which I take of the section in question is supported by the decision of Sudder Dewanny Adawlut, in *Radha Mohun Serma Chowdhry v Gungapershad Chuckerbuttee* [7 Sel Rep. 142 (o e), 166 (n. e.)]. As regards the other ground, *viz.*, that anything which is not uncertain or indefinite is not an *abwab* within the meaning of the Regulations, I have already dealt with it.

I am of opinion that the plaintiffs' suit, so far as the disputed *abwabs* are concerned, should be dismissed.

Prinsep, J.—I agree in the judgment delivered by MITTER, J. The moneys claimed beyond the *assul jumma*, or actual rent, are clearly *abwabs*, and if exacted by the landlord would, under s. 11 of Beng. Act VIII of 1869, entitle the tenant to recover as damages double the sum so exacted.

In determining the matter referred to us by the Division Bench it has been necessary to trace the course of legislation [185] from the permanent settlement, and for this purpose to make use of the edition of the Regulations and Acts of the Legislature recently published by and under the authority of the Legislative Department. This publication reproduces the Regulations and Acts as they now stand on the Statute Book with full effect given to all the amendments and repeals. Attention is nowhere drawn to any alteration in any particular Regulation or Act as it was originally passed. We have been consequently much embarrassed, and might have been misled, in determining the meaning and object of the law, and our time, during the course of the argument, has been wasted in understanding a section of Regulation V

of 1812. which, as it is represented in the recent publication by the Legislative Department, contains only a fragment of the section as it was originally enacted. In order to understand s. 2, Regulation V of 1812, it is absolutely necessary that the entire section should be read, and from this it will appear that its object was to withdraw the restriction previously placed on the power of zamindars to grant leases for a period exceeding ten years. The first portion of that section has been repealed, and, if I may venture to express an opinion, inconsiderately repealed. The mutilated section which is now alone law has been republished by the Legislative Department, and if read by itself would reasonably imply that in 1812 the Legislature, for some reason not stated, declared that proprietors of land were competent to grant leases for any period which may seem most convenient to themselves and their tenants, and most conducive to the improvement of their estates.

Other similar instances may doubtless be adduced in which great inconvenience, and probably mischief, will result from the danger of implicitly relying on a mutilated publication of the law emanating from so high an authority as the Legislative Department. I, therefore, desire to draw attention to this matter, that those whose duty it is to interpret the law may be warned, and I hope also that the Legislative Department may, on a suitable opportunity, remedy this inconvenience in such manner as may seem most conducive to the public interests involved.

Appeal allowed.

NOTES.

[ABWABS—

These were not held to be *abwabs* — *Tehwars, salams*, (1888) 15 Cal , 828 ; certain collection charges (1904) 31 Cal., 834 8 C. W N , 529 (531) ; certain weighment fees (1889) 9 A W. N , 89 , but *sarak, neg*, and *khurucks* were held to be *abwabs* (1890) 17 Cal , 726 F.B. ; similarly, *batta usual, dustui, hazzatana, sonari, chanda. salams and percentages* :—(1907) 7 C. L. J. 251 , *batta company* depends on its creation before or after 1836 —7 C. L. J. 251 , 7 C. L. J. 202.]

[186] PRIVY COUNCIL.

The 28th June and 1st, 2nd and 3rd July, 1884.

PRESENT.

LORD WATSON, SIR B. PEACOCK, SIR M. E. SMITH,
SIR R. P. COLLIER AND SIR A. HOBHOUSE.

Pertabnarain Singh.....Defendant

versus

Trilokinath SinghPlaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Representation of the estate of a Hindu Talukdar by his widow in a suit for the succession—Act I of 1869—Res judicata—Act XXIV of 1870, s. 25.

Issues substantially the same as those raised in the present suit, relating to the succession to a taluqdari estate, had been decided in a former suit, in which an order of Her Majesty in

Council declared who had the right to succeed. *Held*, that a claimant, whose interest was such as would vest in him only upon the death of the widow of the last taluqdar, was bound by the order so made, on the ground that he was privy to the former suit, the whole estate, for the purpose of representing it, being vested in the widow, who was a party to that suit. *Katama Natchiar v. The Raja of Shwagunga* (9 Moore 1 A : 604) referred to and followed.

That order declared that a will made by the last taluqdar, whereby a power to appoint a successor in the taluqdari had been given to the widow, had been revoked, and determined the right to succeed as upon an intestacy. The person whom the widow had appointed, by her will, now contending that he was not bound by the order, having been, when the former suit was instituted, a minor, without any duly appointed guardian, it was *held*, that whether he had, or had not, by acts after attaining full age (having been nominally a party), become estopped from setting up the above, he was, at all events, bound by the order, on the ground that the widow, holding an estate at least as large as that of a Hindu widow in her husband's property, was the full representative of the estate in the former suit, the appointment made by her being such as would operate only on her death. *Held*, also, that although a manager of the estate had been appointed under the provisions of Act XXIV of 1870 (the Oudh Taluqdars' Relief Act), but had not been made a party to the suit, this omission did not, under section 25, affect the *validity* of the decree between the parties.

APPEAL from a decree (22nd July 1882) of the Officiating Judicial Commissioner of Oudh, reversing a decree (29th August 1881) of the District Judge of Faizabad.

[187] The principal matter in this appeal was whether or not the respondent was bound by the order of Her Majesty in Council, in a former suit, making declarations on questions substantially the same as those involved in the present.

The suit out of which this appeal arose related to the title to succeed to the estates of the late Maharaja Man Singh, who died on the 11th October 1870, at Adjudeha without leaving a son. The suit was brought by the respondent Trilokinath Singh, the younger son of a brother of the Maharaja, against the appellant Pertabnarin Singh, the son of a daughter of the Maharaja.

The suit followed after two judgments of the Judicial Committee, and orders of Her Majesty in Council thereupon, on questions with which the present was connected. The first, dated 13th August 1877, was made upon the appeal of Pertabnarin Singh through his guardian Mussamat Bachu Sahiba against the respondent Maharani Subhao Kunwar, widow of the deceased Maharaja Trilokinath Singh, represented by Lachminath, his brother and guardian, and Daroga Samdhar Singh, another brother (I L. R., 3 Cal., 626, L. R., 4 I. A., 228). This order gave the succession to Pertabnarin, as upon an intestacy. The other (I. L. R., 4 Cal., 185, L. R., 5 I. A., 171) dismissed a petition presented by Trilokinath Singh praying to have the decision of 1877 re-opened as against him. In their judgment advising this dismissal (I. L. R., 4 Cal., 185; L. R., 5 I. A., 171), their Lordships intimated that Trilokinath's allegations to the effect that he neither had been a party to the former suit (having been an infant during part of the time of its pendency), nor had been properly represented by anyone upon it, could be properly heard only upon a fresh suit bringing forward the facts.

The present suit was instituted on the 3rd June 1879 to have declared Trilokinath's right to the taluqdari in virtue of his having been appointed under a power of appointment given by a will executed by the late Maharaja, on the 22nd April 1864, to his wife, the Maharani Subhao Kunwar, to nominate a successor—a power which she had exercised on the 16th August 1872 in favour of the plaintiff. A declaration was also prayed that Trilokinath Singh was not bound by the order of the 19th August 1877.

[188] The judgment of 19th July 1877 (I. L. R., 3 Cal., 626 ; L. R., 4 I. A., 228), on which that order was based, sets forth the will of the late Maharaja, and the facts material to this report. That judgment in effect declared the revocation by parol of the Maharaja's will of 2nd April 1864, such revocation having been effected by the giving oral instructions by the testator to the Officiating Commissioner of the Faizabad Division of Oudh ; and in that judgment it was also decided that Pertabnarain Singh was entitled to succeed to the taluqdari, having been, by the Maharaja Man Singh's treatment of him, brought within the meaning of the enactment of the 4th clause of s. 22 of Act I of 1869.

On the present suit coming on for hearing in the Court of First Instance, it was held that Trilokinath had not been made a party to the former suit, or represented in it ; and that he was not bound by the proceedings of 1877, in regard to the question of revocation of the will of 1864, as to which, however, the Judge found upon the evidence that the will had been revoked.

The Judicial Commissioner of Oudh held, on appeal, that the suit was not barred by Trilokinath's having been a party to the former suit, or represented in it. He reviewed the facts and expressed his opinion thus "To hold, under these circumstances, that, by reason of Trilokinath's name having been retained in the titles of the cause, of Mr Wilson's clerk having accepted service of notice of the appeal on behalf of the respondents, and of Trilokinath's having taken an active part in securing funds for, and in conducting the correspondence about, the defence of the appeal, Trilokinath was a party and was bound by the order of August 1877, would, it seems to me, be unjust." The Judicial Commissioner also held that the Maharaja's estate was not so completely represented by the widow in the former suit that Trilokinath was bound by the decision against her. He was, on the contrary, of opinion that the Maharani devested her estate, by the execution of the instrument appointing Trilokinath in 1872, the Maharajah's estate having thereupon become, "so far as it could then become, *in bonis* of the nominated successor." Trilokinath, in his opinion, took as successor of the [189] Maharaja, not of the widow, and his interest vested (although his enjoyment of the benefits of that interest was postponed) on the 16th August 1872, the date on which the widow appointed him.

The Judicial Commissioner also held, reversing the decision of the Court of First Instance on this point, that, on the evidence (material parts of which he found not to have been on the former record), no revocation of the will of the Maharaja, dated 22nd April 1874, had taken place. He further held that, as a matter of law, this will, though made before the passing of the Oudh Estates Act, 1869, could not, after the coming into force of that Act, be revoked by parol. He, therefore, made a declaratory decree in favour of the appellant.

Mr. J. F. Leith, Q. C., and Mr. J. Graham, Q. C., (with whom was Mr. G. T. Woodroffe) for the Appellant, argued that the judgments of the Courts below were wrong, in regard to the provisions of Act X of 1877, s. 42. The proceedings in the former suit, and the final declaration of the title of the present appellant, were conclusively binding upon the respondent, considered merely as the final decree in the suit according to the Indian procedure in force at the time. The order in Council of 19th August 1877 was binding on Trilokinath for two reasons. First, in regard to his conduct upon the appeal in the former suit. On this point, it had appeared that he, while his name was on the record, actively defended his interest. If not of full age, having been upwards of sixteen years of age when Pertabnarain's suit was instituted, he attained it

while the appeal was pending, and should then have put forward the objection on which he now attempted to insist. The second reason was that Trilokinath, claiming derivatively under the will of Man Singh, by the appointment of the widow of the latter, was bound by the decree against the widow, who represented her deceased husband's estate, she having been a party to the suit. It was not the case, as had been supposed by the Judicial Commissioner, that the Maharani Subhao Kunwar ceased, on appointing Trilokinath to be successor, to represent the estate. She represented it until the coming into operation of the instrument, whereby she appointed Trilokinath to succeed to the taluqdari; and that was until her death, the instrument being [190] testamentary. No present estate had been conferred by the widow on Trilokinath. In regard to the representation of an estate by a Hindu widow, reference was made to *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (9 W. R., 505), *Aumurtolall Bose v. Rajoneekant Mitter* (L. R., 2 I. A., 113), *Kalima Natchiar v. The Raja of Shiwagunga* [9 Moo. I. A., 539 (604)].

Sir H. James, Q.C. (Attorney-General) and Mr. T. H. Cowie, Q.C. (with whom were Mr. R. V. Doyne, Mr. J. D. Mayne and Mr. Howard), for the Respondent, contended that Trilokinath not having been made party to the former suit, and not having been represented in it (to which, if he was to be bound by the decision, he was a necessary party), was not bound by the order of Her Majesty in Council. They examined the facts as to Lachminath's having been nominally Trilokinath's guardian on the record, and argued that the latter had neither been actually a party, nor had he been properly represented. As to the argument that the widow had sufficiently represented all future and contingent interests in the estate, and therefore had represented Trilokinath in the suit, it must be considered that the latter claimed title not under the widow, but under Man Singh's will. The widow and the instrument of 1872 merely effected Man Singh's intention. The power of appointment was absolute, and could only be exercised once for all according to the testator's intention. It was exercised in 1872, and operated as a present irrevocable appointment, Trilokinath obtaining a vested interest. Reference was made to Jarman on Wills, 143, *Duke of Marlborough v. Lord Godolphin* (2 Ves. Sen., 61).

Another defect in the former suit, as to parties, was this—The whole estate having been, at the time when the former suit was brought, under a manager appointed in accordance with the provisions of the "Oudh Taluqdars' Relief Act," XXIV of 1870, that manager was by s. 25 a necessary party.

Mr. J. F. Leith, Q.C., replied.

Their Lordships' **Judgment** on a subsequent day (July .23rd) was delivered by

[191] **Sir Montague E. Smith.**—This appeal arises in a suit brought by the respondent, in which he sought a declaration that he was entitled to succeed to the large taluq of Mahdona in Oudh and other property which belonged to the late taluqdar, Maharaja Sir Man Singh. The District Judge of Faizabad dismissed the suit, but, on appeal, the Officiating Judicial Commissioner reversed his decree, sustained the respondent's suit, and made the declaration he prayed. This declaration is directly opposed to the declaration made by the Queen in Council on the report of this Board in a former suit brought by the present appellant, in which substantially the same issues relating to the succession to the taluq as those arising in the present suit were raised and decided.

The first question to be considered, therefore, in the present appeal is whether the respondent is bound by the judgment in the former suit, for, if so bound, the question on the merits need not be discussed.

It has scarcely been denied that the cardinal issues which were decided in the former suit are identical with those raised in the present; and the principal dispute arising on the defence of *res judicata* has been, whether the respondent is bound either as party or privy to that former suit.

The facts relating to the succession are fully stated in the judgment of this Board in the former appeal (L. R., 4 I. A., 228; I. L. R., 3 Cal., 626). But it will be convenient for the elucidation of the question of *res judicata*, to which their Lordships' observations will be confined, to re-state some of these facts.

The late Maharaja was one of the great landholders of Oudh, whose status and rights are the subject of Act I of 1869. He died on the 11th October 1870, leaving a widow, the Maharani Subhao Kunwar, a daughter by a deceased wife, and a grandson (the appellant), son of that daughter. He also left two brothers surviving him, both having sons; one of these brothers, Raghubar Singh, being the father of Lachminath, and of Trilokinath (the respondent), the latter being the younger.

Some years before the passing of Act I of 1869, viz., on the 22nd April 1864, the Maharaja executed a will, and deposited [192] it with the Commissioner of the district. This will (using the translation given in the judgment of the Officiating Judicial Commissioner, which was adopted at the Bar) is in these terms:—

"In the name of the Mighty Lord Ganesh

"I am Maharaja Man Singh, Badadur, Kaim Jang, taluqdar of Raj Shuhganj, Raj Gonda, and other places

"Whereas my intention as regards making any boy representative has not yet become fixed, I, therefore, for the present declare my aforesaid Maharani representative and proprietor of my estate and property, moveable and immoveable; until she make some one representative, let her remain representative like myself, without power to alienate, and as regards my property, moveable and immoveable, no sharer or partner has any claim. Therefore, having written these few words of the nature of a Will, I have deposited with the Government, that it may remain a record, and be of use in time of need "

About two years after the Maharaja's death, and on the 16th August 1872, the Maharani executed a document, of which the following (also taken from the above-mentioned judgment) is a translation —

"I am Maharani Subhao Kunwar, widow of Sir Maharaja Man Singh, Sahib Bahadur, Kaim Jang, K. C. S. I., Taluqdar of the Raj of Mahdona, Gonda, &c

"Whereas the late Maharaja Sahib Bahadur, my husband, departed this life on the 11th October 1870, corresponding with Katik Badi 2nd, Sambat 1927, and from that time up to date I am, under the Will executed by my husband on the 22nd April 1864, in proprietary possession of the entire Raj and estates, and of the property, moveable and immoveable, of the Maharaja, my husband; and whereas life is uncertain, and after my death disputes may arise with regard to the succession to the Raj and dignity of the late Maharaja, my husband, it is therefore right that I should make a Will regarding the appointment of an heir and representative, after myself, in place of the Maharaja, now in heaven, my husband.

"I, therefore, being in good health, and of sound mind, have, of my own entire free will, and under no pressure or compulsion, appointed the youth Trilokinath, son of Rajah Raghubar Singh, Sahib, deceased, nephew of my husband, heir and representative, in place of my husband, of all the rights and dignities conferred on the Maharaja Sahib Bahadur, now in heaven, by the British Government, and of the entire estate, and all property, moveable and immoveable. The said youth shall, after my death, remain from generation to generation, in the enjoyment of all the rights and dignities, in place of the Maharaja Sahib Bahadur, now in heaven; and the said youth will also own, and enjoy, the property belonging to me, moveable and immoveable. I will fix such maintenance as I may think fit for the

[193] youth Partab Narain Singh, and for Darogah Sham Dhar. These allowances shall continue to be paid by the said youth, and by his successors, for ever, after my death; and the said youth, and his successors, shall also discharge any money debts, or verbal contracts, binding on me, or on the estate I have, therefore, written these few words of the nature of a Will, that after my death they may be of use when required."

At the time the former suit was commenced, viz, on the 7th November 1872, the respondent's title, if any, rested entirely on these documents, for, as the younger son of a living brother of the late Maharaja, he was not entitled to succeed to the taluq as heir.

The claim of the appellant, the son of a daughter of the Maharaja, rested on a clause inserted, at the instance of the Maharaja himself, in Act I of 1869, providing that, in default of a son or son's descendants, taluqs should descend to such son, if any, of a daughter of the taluqdar, "as has been treated by him in all respects as his own son." (Section 22, clause 4.)

The former suit was brought by the appellant, against (1) the Maharani, (2) the respondent, alleged to be represented by Lachminath, his brother and guardian, (3) Darogha Sham Dhar, brother of the Maharani, (4) Lachminath. The appellant, in his plaint, asserted his title to succeed to the taluq as heir, by virtue of Act I of 1869, being, as he alleged, a daughter's son, who had been treated by the Maharaja as a son, and prayed that the above-mentioned documents of the 22nd April 1864 and the 16th August 1872 be cancelled.

This plaint is very general and informal, but it appears from the judgment of the Deputy Commissioner of Faizabad that (in his own words) "the pleadings gave rise to the following issues, which, as amended at the suit of the parties, ultimately stood thus." The 1st, 2nd, and 4th are as follows:—

- (1) Did the Maharaja leave a Will, and if so what was the effect of it?
- (2) Did he ever direct the destruction of the Will?
- (4) Was plaintiff ever adopted as a son by the Maharaja or treated by him as his own son?

Evidence having been given on these issues, both the Courts in Oudh decided that the Maharaja had left a Will, and had not revoked it, and thereupon dismissed the suit of the appellant.

[194] The appellant appealed from these decisions to Her Majesty in Council, and obtained their reversal.

In the judgment of their Lordships, the questions for decision are thus stated:—

"It is now admitted, if it were ever seriously doubted, that the appellant can only succeed in his suit by establishing both the following propositions —

"1 That the testamentary disposition, which the Maharaja had undoubtedly power to make, and did make in 1864, was revoked or became inoperative in his lifetime.

"2. That the appellant is entitled to succeed to the taluq as the son of a daughter of the Maharaja, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of s. 22 of Act I of 1869 "

After careful consideration of the evidence bearing on these propositions, this Board came to the conclusion that the appellant had established both, the result being that the affirmance of the first destroyed the foundation of the respondent's title, which rested on the Maharaja's Will, whilst the affirmance of the second established the right of the appellant to succeed to the taluq as heir. This Board, therefore, advised Her Majesty to reverse the decree appealed from, and to declare that the Will of the Maharaja was duly revoked by him

in his lifetime, and that the appellant was entitled, under Act I of 1869, to succeed, as *ab intestato*, to the taluqdari estate of the late Maharaja. A declaration to this effect was accordingly made by Her Majesty in Council.

On the 3rd January 1879 the present suit was brought by the respondent, raising the same issue upon the revocation of the Will as that stated in the judgment of this Board, and decided against him, the fourth prayer in the present plaint being that it may be declared that the Will of the Maharaja was not revoked, but was a good and valid Will at his death.

The respondent contends that he is not bound by this judgment, because he was a minor when the former suit was commenced, and Lachminath, who is represented on the record to be his guardian, was not duly appointed.

It appears that the respondent was of the age of 16 years and 10 months when the former suit was commenced, and did not [195] attain his legal majority, which in Oudh is the age of 18, until the 7th February 1874, after both the judgments in Oudh had been given. This is not disputed by the appellant, nor is it contended that Lachminath was properly appointed as guardian *ad litem*. But it is insisted that the respondent is bound by the judgment in the former suit in two ways —

1st.—By having, with knowledge that he was nominally a party to the suit, taken upon himself the prosecution of the appeal to the Queen in Council, not only after he had become of full age, but after the taluq had been actually transferred to him by the Maharani by an instrument to be presently adverted to, and so had waived the defect of a due appointment of guardian, or was estopped from setting it up.

2nd.—That, if he be not bound as a party to the suit, the Maharani fully represented the estate in the previous litigation, and consequently that the judgment in the former suit against her binds the respondent.

With reference to the first of these points, which was that first argued at the Bar, their Lordships at once intimate that they do not propose to discuss it at length, as their decision will not turn upon it. But to complete the history of the former suit, and to show the position of the parties when the present was commenced, it will be necessary to refer shortly to some further acts and proceedings. Evidence was given in the present suit that the respondent was personally served with the original summons in the former one, and that from time to time he was present with the legal advisers for the defence when the case was discussed, but as all these things took place whilst he was still a minor, they are only material to show his knowledge of the earlier proceedings when he prosecuted the appeal to Her Majesty in Council.

After the appellant had obtained leave in the former suit to appeal here in that suit, and during the pendency of that appeal, the Maharani, on the 20th May 1875, transferred by deed the full ownership and immediate possession of the taluq to the respondent, who, at the same time, executed a counter-deed pledging himself to obey her as a son, and to carry on the business of the estate according to her advice. The respondent having thus become the owner of the taluq, as far as the Maharani could make [196] him so, appears upon the evidence to have corresponded with Mr. Wilson, the solicitor engaged in the appeal, upon the conduct of it, and to have supplied funds for its prosecution. Although it seems that no formal appearance was entered for him, his name appears in some of the proceedings as a party to the suit. Whether in thus carrying on the appeal he should be deemed a party to it, and bound as a party by the final order of the Queen in Council, their Lordships, as already intimated, do not think it necessary to decide. It may here, however, be observed

that, although after the transfer of ownership of the taluq had been made to him, *pendente lite*, by the Maharani, he carried on the appeal in the manner just mentioned, he did not think fit to bring that transfer to the notice of this Board until the order in Council had been issued, and upon his application for a rehearing.

Their Lordships now proceed to consider the second question, *viz.*, whether the Maharani fully represented the estate in the former suit, which mainly depends on the construction and effect to be given to the will of the Maharaja, and to the first instrument executed by the Maharani.

There can be no doubt that the will of the Maharaja is a testamentary instrument. According to the translation of it before set out, he states as a reason for making it, that his intention as regards making any boy representative had not become fixed. "Therefore, for the present," obviously pointing by this expression to the possibility of his making another disposition before his death, he declared the Maharani "representative and proprietor of my estate, until she make some one representative, let her remain representative, like myself, without power to alienate." This language in its natural meaning plainly discloses an intention to vest the whole estate in the Maharani, until she should divest herself of it "by making some one else representative," and the words are sufficient and apt words to accomplish this intention.

As if to leave no doubt of his wish to make his widow proprietor of the taluq, until by her own act she appointed another, the Maharaja adds that, until she does so, she is to remain representative "like myself," the plain meaning of these words being [197] that, until such appointment, she was to own and represent the estate as fully as he himself owned and represented it.

It is not necessary to consider whether the prohibition against alienation was or was not an effectual restraint, for, however that may be, it is clear that this provision would not prevent the vesting of the whole estate in the Maharani.

In what manner the succession would have gone, under this peculiar will, if the Maharani had died without appointing a representative to the estate, is a question which does not now arise. It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharani's estate in the taluq was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga* case (*Katama Natchiar v. The Raja of Shivagunga*, 9 Moo I A, 539,) is applicable to hers. "The whole estate would, for the time, be vested in her absolutely for some purposes, though, in some respects, for a qualified interest, and until her death, it could not be ascertained who would be entitled to succeed, . . . it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." (See 9 Moore I. A., p. 604).

The Officiating Judicial Commissioner did not disaffirm the proposition that, assuming no appointment had been made by the Maharani, she would have fully represented the estate. He rests his judgment on the ground, "that, with reference to the conditions of the Maharaja's will, the Maharani divested her estate by the execution of the document of 1872, and the Maharaja's estate became, so far as it could then become, *in bonis* of the nominated successor." This is the principal ground on which his decree was sought to be supported in the arguments at the Bar. It was contended for the

respondent that the document of 1872 was a present irrevocable appointment; whilst the contention for the appellant was that it was a will taking effect only on the death of the Maharani, and ambulatory and revocable in her lifetime.

[198] Their Lordships are of opinion that the latter is the true nature of the document. It commences with a recital of the will of the Maharaja styling it "a will." The Maharani then says that life is uncertain, and that after her death disputes might arise as to the succession to the Raj, and proceeds. "It is, therefore, right that I should make a will regarding the appointment of an heir and representative, after myself, in place of the Maharaja; I, therefore, being of good health and sound mind, have appointed the youth, Trilokinath, nephew of my husband, heir and representative." She proceeds to say that the youth will enjoy the property after her death. She also bequeaths to him her own property. She says she will fix allowances for maintenance to relatives, which are to be paid after her death by Trilokinath, who is also to pay her debts. She concludes by saying she has written these few words "in the nature of will," that after her death they may be of use.

The document, both in its beginning and its end, is expressly styled a will. In the beginning, it is so styled after reference to the Maharaja's "will," and an instrument of the same nature as his was evidently contemplated. It is also plainly declared by the Maharani that Trilokinath was to become representative only after her death, and there is no indication whatever that she intended to divest herself of her husband's property during her lifetime, any more than of her own, which she also bequeaths.

It is to be observed that, when the Maharani sent a copy of the document to the Superintendent of the Court of Wards to inform him that she proposed the respondent to be successor of the Maharaja after her death, she calls it "a will."

It was argued that the document was evidence that she had made an immediate appointment, because the words "I have appointed" are used. There is no pretence for saying that she had appointed the respondent otherwise than by the instrument itself. These words, therefore, can only have operation according to the nature of the instrument. They are not in themselves inconsistent with a disposition by will, and are altogether insufficient to countervail the express description of the document as a will, and its general tenor.

[199] It was but faintly contended that the Maharani had no power to make the appointment of a successor to the taluq by will, and, therefore, to give effect to the instrument of 1872, it must be construed as a present appointment. But it would be impossible to give effect to the instrument contrary to the intention of its author. Treating it then as a will, which their Lordships hold it to be, the respondent took no estate by virtue of it, and, of course, if the Maharani had no power to appoint by will, he never could have taken any. The estate, therefore, assuming the Maharaja's will had been unrevoked, would have remained in the Maharani until the execution of the deed of 22nd May 1875, which, being made *pendente lite*, cannot affect the present question.

An objection to the efficacy of the judgment in the former suit was made during the argument, on the ground that the manager of the estate, appointed under "The Oudh Taluqdars' Relief Act" (XXIV of 1870) had not been made a party to it.

On the 4th December 1870 the Maharani presented a petition under the above-mentioned Act, which after stating that she had succeeded to the estate of her husband, prayed that, the estate might be placed under the management

of the Government; and, on the 3rd June 1871, an order was made by the Officiating Chief Commissioner, appointing the Deputy Commissioner of Faizabad to be manager.

The objection was rested on the 25th section of the above-mentioned Act, which is as follows "Nothing in this Act precludes the Courts of the Province of Oudh having jurisdiction in suits relating to the succession to, or the rights of, persons claiming maintenance from, any immoveable property brought under the operation of this Act, from entertaining and disposing of such suits, but to all such suits the manager of such property shall be made a party."

It appears that in settling the issues in the present suit, the District Judge was asked to frame an issue raising this point. The Judge declined to do so, and the point apparently dropped out of the suit. However that may be, their Lordships think the omission to join the manager as a party does not affect the validity of the decree as between the appellant and the res-[200]pondent. The appointment of the manager did not vest the estate in him. It remained in the Maharani as before. Nothing in the previous part of the Act takes away the jurisdiction of the Courts in suits relating to succession, and the 25th section expressly declares that it is not taken away. The defendants to the suit might have objected to the nonjoinder of the manager, or the manager might have intervened under the provision at the end of this section, but the section does not enact or purport to enact that judgments given in such suits shall be void as between the parties contesting the right to the succession.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to order that the suit of the respondent be dismissed, and that he do pay the costs in the Courts below. The respondent must also pay the costs of this appeal.

Solicitors for the Appellant Messrs. *Watkins & Latley*

Solicitors for the Respondent Messrs *Barrow & Rogers*.

Appeal allowed.

NOTES.

[A decree obtained against a Hindu widow as representing her husband's estate is binding upon the reversioners.—6 C L J 490, 621, 33 Cal., 1001 10 C W N 955, 9 O. C 339; (1906) P R 107, (1895) P R 29, 5 Bom L R. 585

See also the Notes to 10 Cal. 823, 985 in the 'LAW REPORTS REPRINTS']

[11 Cal. 200]
FULL BENCH.*The 19th January, 1885.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE PRINSEP, MR. JUSTICE TOTTENHAM AND MR. JUSTICE PIGOT.

Lala Mobaruk Lal and others.....Plaintiffs

versus

The Secretary of State for India in Council and others.Defendants.*

*Sale for arrears of revenue—Material irregularity—Substantial injury—**Act XV of 1859, ss. 6, 7, 20, 28, 33—Certificate—Bengal**Act VII of 1868, s. 8.*

Per GARTH, C J, MITTER, PRINSEP and PIGOT, JJ — A non-compliance with the provisions of s 6 of Act XI of 1859 is not a mere irregularity, and is not one of those errors in procedure which are intended to be cured by s 8 of Bengal Act VII of 1868. Where a sale for arrears of revenue has been held, and non-compliance with s 6 has been found, such a sale is null and void, as not being a sale under the provisions of Act XI of 1859

[201] *Semle*.—That no positive rule can be laid down permitting an inference to be drawn in all cases that the inadequacy of the price realized by a sale is due to the irregularity of the sale proceedings

Per TOTTENHAM, J — Where the date fixed for a sale in the sale notification is less than thirty clear days from the date on which the notification is affixed in the Collector's office, there is a legal defect in the notification, which is not cured by s 8 of Bengal Act VII of 1868, but a sale held under such conditions is not *ipso facto* null and void, but is liable to be annulled only on proof that the person whose land has been sold has sustained injury by reason of the informality in the notification *

That with regard to the existence of the particular legal defect found in the present case, the Court was not at liberty to infer that the inadequacy of the price realized by the sale was due to the irregularity of the sale proceedings

THIS was a suit brought on the 20th September 1880, by one Mobaruk Lal and 23 others who were, previous to the sale hereafter mentioned, co-proprietors of Mehal Barharia, against the Secretary of State for India in Council, and 18 persons who were also co-proprietors in the mehal (but who had refused to join as plaintiffs in the suit), and two other persons who were the auction-purchasers of the mehal at a sale held for arrears of revenue. The object of the suit was to set aside a sale of the mehal held on the 2nd June 1879, under Act XI of 1859, on account of the revenue of the estate having fallen into arrear

Under the provisions of Act XI of 1859, separate accounts were opened in respect of certain shares in this mehal, and the sum of Rs. 801-9-11 was separated as the amount of revenue payable on such shares. The residue of the mehal after this separation of account bore the annual revenue of Rs. 205-8-8. On the 22nd April 1879, the Collector issued a notice notifying that this last-mentioned portion of the mehal would be sold for arrears of Government revenue, amounting to Rs. 12-11-10, out of an instalment which fell due on the 28th March 1879. There was no direct proof that this notice

* Full Bench Reference on Regular Appeal No. 304 of 1881, against the decree of the First Subordinate Judge of Sarun, dated the 26th of August 1881.

had been affixed in the Collectorate till the 2nd May. Under this notice the date of sale was originally fixed for the 31st May 1879, but was subsequently altered to the 2nd June 1879, and notice of this alteration was duly given. On that date the portion of the Mehal set out in the notice was sold, and purchased by two of the defendants for Rs 1,700. The plain-[202]tiff Mobaruk and the predecessors in title of the plaintiffs Nos. 6 and 7 alone appealed, but unsuccessfully, to the Commissioner under s 33 of Act XI of 1859.

The plaintiffs sought to set aside the sale on the following grounds .—

(1) That the notices issued under sections 6 and 7 of Act XI of 1859 were not in accordance with the provisions of the Act

(2) That the sale was held before the expiry of thirty clear days from the date on which the sale notification was suspended in the Collectorate.

(3) That the order altering the date of the sale from the 31st May to the 2nd June was not warranted by Act XI of 1859

(4) That, in consequence of these irregularities, property worth Rs. 33,000 was sold for Rs 1,700.

The Secretary of State denied that any irregularity had taken place either before or after sale, and the auction-purchasers contended that only such of the plaintiffs as had appealed to the Commissioner had any right to sue, and that the sale was held just thirty clear days from the date of suspension of the notice, and that as the 31st May was a gazetted holiday, and the 1st of June was a Sunday, the Collector, in accordance with s 20 of Act XI of 1859, issued a second notification on the 26th May, fixing the 2nd June as the date of sale, but that, even supposing the irregularities complained of were established, the plaintiffs were precluded by s 8 of Beng Act VII of 1868 from setting them up, as a certificate of sale had been granted to them under s. 28 of Act XI of 1859.

The Subordinate Judge found that the plaintiffs had entirely failed to prove that the sale had been conducted contrary to the provisions of Act XI of 1859, and, holding that it was therefore unnecessary to enter into the question as to whether they had sustained any substantial injury, dismissed the suit, stating that only such of the plaintiffs who had appealed to the Commissioner in accordance with s. 33 could have, in any case, been entitled to bring the suit.

The plaintiffs appealed to the High Court

Mr. Justice MITTER was of opinion that the question, whether the notices under s. 7 of Act XI of 1859 were properly published, was immaterial, inasmuch as even if the irregularity had been [203] proved, it could not have affected the price fetched, and as to whether the notification was properly framed and published in accordance with s 6 of Act XI of 1859, and as to whether the fact that the auction-purchasers had obtained a certificate under s. 28, which precluded the plaintiffs setting up the irregularities complained of by reason of s. 8 of Beng Act VII of 1868, the learned Judge, following the principle of the case of *Bal Mokund Lal v Sirjoodhun Roy* (11 C. L. R., 466) held that notices under s. 8 of Beng. Act VII of 1868, referred to notices under s 5 of that Act, viz., to notices containing information upon any particular matter, to any particular person or class of persons, and that the notification under s. 6 of Act XI of 1859 was not a notice of that description, but was in the nature of an advertisement of sale conveying no information to any defined person or class of persons, but to the public generally; and that, therefore, the certificate under s. 28 did not preclude the plaintiffs from setting up irregularity. He further was of opinion that the sale, in this

case, had been held before the expiry of thirty clear days from the date of suspension of the notice, and therefore was irregular, and that the sale was illegal, and that the Judge was not warranted by s. 20 of Act XI of 1859 in altering the date of the sale. That as regarded the question of the plaintiffs having sustained injury arising from the irregularity, he found that they had sustained injury, inasmuch as the property had been sold at an inadequate price, and that a fair inference to draw in the case was, that the inadequacy of the price was the result of the irregularity. It being, in the learned Judge's opinion, a reasonable inference to draw in cases in which the irregularity complained of was of such a nature that it would ordinarily affect the number of bidders present at the sale, the inadequacy of the price not being accounted for in any other way; and as authority for this proposition cited the cases of *Gopeenath Dobey v. Roy Luchmeput Singh Bahadur* (I L R., 3 Cal., 542), *Kalytara Chowdhram v. Ramcoomar Goopta* (I L R., 7 Cal., 466) and *Bonomali Mozumdar v. Woomesh Chunder Bundhopadhya* (I L R., 7 Cal., 730) and he, therefore, was of opinion that the sale should be set aside.

[204] Mr. Justice TOTTENHAM was of opinion that, so far as the alleged irregularity consisted in the notice of sale not having been posted in proper time, the Court could not find in favour of the plaintiffs, inasmuch as the certificate obtained by the auction-purchasers, under s. 28 of Act XI of 1859, was *conclusive evidence* in favour of the auction-purchasers that such notice was duly posted. And that the words "duly posted" meant posted in the proper place and at the proper time, as well as in a proper manner. And further held that the notification under s. 6 of Act XI of 1859 was a notice within the meaning of s. 8 of Beng. Act VII of 1868, but that, although such certificate was conclusive on the point as to its having been duly posted, the Court was still competent to enquire whether the notice was a proper one, and whether its contents were such as were required by s. 6 of Act XI of 1859. That in the case before him there was nothing on the face of the notification to show that the notice had not been suspended for thirty days before the sale, and the only evidence given as to its not having been so suspended was the fact that the Nazir's report as to the posting was dated the 2nd of May, and the fact that the auction-purchasers in their written statement appeared to have admitted or assumed that the 2nd May was the date of posting; he, therefore, held, after weighing this evidence, that the presumption was in favour of its having been posted on the day it bore date, *viz*, the 22nd April. He, therefore, on the whole case, found that the notification of sale was in proper form, and correct in substance, that it was duly posted, and that there was nothing contrary to law in the sale, and no ground made out for any further enquiry as to whether the sale had inflicted substantial injury on the plaintiffs; but inasmuch as it might be argued that, notwithstanding the conclusive evidence afforded by the certificate, the defendants were held bound by the sort of admission made in their written statement, the learned Judge found that there was no proof that the alleged irregularity was the cause of the substantial injury caused by the inadequate price obtained at the sale, for it could not be inferred that the price was affected by the supposed fact that the sale proclamation was affixed in the Collector's office a day later than it ought to have been. and was further of opinion that the cases [205] of *Gopeenath Dobey v. Roy Luchmeput Singh Bahadur* (I. L. R., 3 Cal., 542), *Kalytara Chowdhram v. Ramcoomar Goopta* (I. L. R., 7 Cal., 466), *Bonomali Mozumdar v. Woomesh Chunder Bundhopadhya* (I. L. R., 7 Cal., 730), did not intend to lay down a broad rule in all cases that a material irregularity is to be presumed to be the cause of the inadequacy of the price bid, and should be so treated without further evidence, but that, even if that was the meaning of those cases, the case of *Olpherts v. Mahabir Pershad Singh* (11 C. L. R.,

494) had corrected that error by laying down that the Courts cannot, without evidence, and upon mere supposition, properly find that the irregularity caused the injury. He, therefore, affirmed the decree of the lower Court.

The two learned Judges having differed in opinion, the case was referred to the Chief Justice under s. 575 of the Code of Civil Procedure. And the learned Chief Justice having heard the case argued, and finding that there were conflicting decisions of the Court on both the points argued, referred the two disputed points to a Full Bench. The referring order, after stating the purport of the suit, continued as follows —

The two points arise thus: The first is that the sale in question was fixed to take place at a time less than thirty clear days from the day "when the notification was affixed in the office of the Collector, and that for this reason the provisions of s. 6 of Act XI of 1859 were not complied with, and the sale was consequently void."

In point of fact, the sale notification was dated on the 22nd of April, and it is stated that the sale would take place on the 31st of May, but it was not affixed in the Collector's office until the 2nd of May, which was less than thirty days from the day of sale.

It was contended by the defendants that this was a mere irregularity, which was cured by s. 8 of Beng Act VII of 1868, which provides that where a certificate of title has been given to a purchaser under s. 28 of Act XI of 1859, it shall be conclusive evidence that all notices in or by that Act or Act XI of 1859, required to be served or posted, have been duly served [206] and posted, and that the title of any person who has obtained such a certificate shall not be impeached by reason of any omission, informality or irregularity as regards the serving or posting of any notice in the proceedings under which the sale took place.

Mr Justice MITTER was of opinion that the non-compliance with the provisions of s. 6 of Act XI of 1859 was not a mere irregularity, but that it avoided the sale, and that it was not cured by the purchaser having obtained a certificate under s. 8 of Beng Act VII of 1868. In support of that opinion he referred to the case of *Bal Mokund Lal v Jirjoodhun Roy* (11 C L R, 466).

Mr. Justice TOTTENHAM was of a contrary opinion. He considered that the non-compliance with s. 6 was a mere irregularity, and he is supported in that view by several decisions of this Court, and, amongst others, by two which are unreported, one the case of *Jagut Chunder Waddadar v The Secretary of State for India* (an appeal from Original Decree No 297 of 1881), decided by Mr. Justice MACPHERSON and myself, and the other the case of *Horo Das Chowdhry v Ram Kumar Gupta* (S. A No 2580 of 1882), decided by Mr Justice BEVERLEY and myself. Both these decisions are in accordance with the view of Mr Justice TOTTENHAM, but on hearing the point again argued in this Court, I confess, I entertain so much doubt whether those cases were rightly decided, that I have thought it right to refer the following question to a Full Bench:—

Whether, under the circumstances stated, the non-compliance with the provisions of s. 6 of Act XI of 1859 avoided the sale, or, whether it was cured under s. 8 of Beng. Act VII of 1868 by the purchaser having obtained his certificate?

The other point arises in this way

The property in question was sold for Rs. 1,700. whereas it was proved that the real value of it was more than double that sum, but no direct evidence was given showing that the inadequacy of the price was caused by the irregularity in the proceedings.

That^{*} being so, Mr. Justice MITTER considered that in point of law he was at liberty, if he thought proper, to infer, that [207] the inadequacy of the price was attributable to the irregularity in the proceedings. On the other hand Mr. Justice TOTTENHAM considered that, as a matter of law, the Division Bench was not at liberty to draw such an inference, without some further and more direct proof, that the inadequacy of price was due to the irregularity.

Upon this point the case of *Olpherts v Mohabir Pershad Singh*, decided by the Privy Council, and reported in 11 C L R., 494, was referred to.

It seems to me that in that case their Lordships did not mean to lay down any rule of law applicable to all cases, and that their observations were merely intended to apply to the facts of the case before them

On the other hand, there is direct authority in this Court, that when an irregularity in the sale is proved, and it is also proved that the price obtained is greatly inadequate, it is open to the Court to infer, if it thinks fit, that the inadequacy of the price was due to the irregularity in the proceedings [see *Kalytara Chowdhraim v Ramcoomar Goopta* (I L R., 7 Cal. 466)].

I confess, it seems to me, that this question is rather one of fact than of law; but as the learned Judges who have differed in this case considered it to be one of law, and as, since the above decision of the Privy Council, it has been dealt with in this Court as a question of law, I think it right to refer to the Full Bench the question whether under the circumstances stated the Court is at liberty to infer that the inadequacy of the price realized by the sale was due to the irregularity of the sale proceedings ? "

Mr. Phillips and Mr. H. E. Mendies for the Appellants

Mr. Evans, Babu Mohesh Chunder Chowdhry and Moulvie Mahomed Yusuf for the Respondents.

Mr Phillips --Section 8 of Beng. Act VII of 1868 is not applicable, and the question is not one of posting the notice The sale is illegal as having been made on a day on which the Collector had no right to make it No adjournment could have the effect of legalizing the proceedings. --*Bal Mokund Lall v Jirgoddhun Roy* (11 C. L. R. , 466) [208] The case of *Goopeenath Dobey v. Roy Luchmeeput Singh Bahadur* (I L. R., 3 Cal. , 542) is authority for saying that where there has been no proper notice an absence of bidders may be presumed, from which alone substantial injury must probably have arisen to the judgment-debtor, and that case has been followed by *Kalytara Chowdhraim v. Ramcoomar Goopta* (I L R., 7 Cal. , 466) Where both material irregularity and substantial injury are proved, the presumption is that the substantial injury is due to the irregularity--*Bonomah Mozumdar v Woomesh Chunder Bundhopadhya* (I L R., 7 Cal., 730).

Mr. Evans for the respondents contended that the non-compliance with the provisions of s. 6 of Act XI of 1859 was merely an irregularity which was cured by the grant of a certificate to the purchaser--see s. 8 of Beng. Act VII of 1868--and entered into the history and scheme of the revenue law as laid down in the older rent Acts, with a view to show the modifications and alterations which, from time to time, had been made, and that the policy of the law was to the effect that certain irregularity, in proceedings under the rent law might be remedied by the Civil Courts, but that as a general rule such matters were to be left to the decision of the Revenue Courts.

The Opinions of the Full Bench were as follow. --

Garth, C.J. (PRINSEP and PIGOT, JJ., concurring).--As regards the first point, which is referred to us in this case, I am of opinion that the non-compliance with the provisions of s. 6, Act XI of 1859, was not a mere

irregularity, and was certainly not one of those errors in procedure which are intended to be cured (under s. 8 of Act VII of 1868), by the purchaser having obtained his certificate.

It seems to me that the substantial ground of complaint on the part of the judgment-debtor was, that the sale was illegal, as having been made on a day on which the Collector had not a right to make it.

Section 6 declares that "the day fixed for the sale shall be a day not less than thirty days from the time when the notice of it is affixed in the office."

[209] It matters not at what time the notice is affixed in the office, so long as the day on which the sale is notified to take place is not less than thirty days from that time.

But here the day notified for the sale was less than thirty days from the affixing of the notice, and, consequently, the day notified was one on which the Collector had no authority to hold the sale. And as the sale on that day would have been illegal, no adjournment of the sale to any subsequent day could have the effect of legalizing the proceedings.

That being so, the next question is, whether the sale in question could properly be said to have been "*a sale for arrears of revenue*" within the meaning of s. 33 of Act XI of 1859, so as to render it necessary for the plaintiff to prove any substantial injury.

About this I have had some doubt. The sale was *professedly* made under the Act, but the question is, whether it could really be said to have been a sale under the Act if the Collector had no right to make it

In the Full Bench case of *Bairnath Sahu v. Lala Sital Prasad* (2 B. L. R., F. B., 1, 10 W. R., F. B., 66), a sale was also professedly made for arrears under the Act, but as it was proved by the owner of the estate that no arrears were due, it was held that the Collector had no right to sell, and consequently that the sale was void.

Upon consideration, I am disposed to agree with the majority of the Court that the same principle applies here. If the Collector had no right to hold the sale, the error which he committed was not a mere irregularity, but one which rendered the proceedings absolutely void.

In that view of the case it is unnecessary for us to answer the second question, but as it has been referred, and as it is possible that the case may go before a higher tribunal, I think it right to say that, in my opinion, the second question is rather one of fact than of law.

I consider, moreover, that their Lordships of the Privy Council in the case of *Olpherts v. Mahabir Pershad Singh* (11 C. L. R., 494) did not intend to lay down any positive rule in all cases.

[210] Suppose that no notice, or only a day's notice, of the sale had been given, and that the property had been sold at what was admittedly about one-tenth of its value, could any reasonable man hesitate to infer, without any further evidence, that the inadequacy of the price was caused by the shortness of the notice?

Then suppose another case, in which only four days' notice of the sale had been given, and where the property was sold for one-third of its value. The Court surely, if it thought proper, would be justified in drawing the same inference. It is impossible, as it seems to me, to lay down any hard and fast rule applicable to all such cases.

The appeal must go back to the Division Bench for ultimate disposal, and we think that the plaintiff is entitled to the costs of this reference.

Mitter, J.—I am of opinion that in this case the non-compliance with the provisions of s. 6 of Act XI of 1859 under the circumstances stated in the order of reference avoided the sale, notwithstanding the provisions of s. 8 of Beng. Act VII of 1868.

It seems to me that the Legislature in enacting s. 6 of Act XI of 1859 had two objects in view, viz., (1) the fixing of the day of the sale, and (2) the publication of the notice as to the day of the sale so fixed. That this was the intention of the Legislature appears clear not only from the language of the section, but also from the provisions of ss. 3 and 5.

Section 3 provides that the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue are to be paid up in each district under their jurisdiction and shall fix notice of the aforesaid dates in a particular mode. It further directs that in default of payment on the due date so fixed, the estate in arrear shall be sold at public auction to the highest bidder. Section 5 provides that in certain specified cases a special notice is to be given.

After having laid down that on default of payment of the arrears of revenue on due date, the estate shall be sold, the Legislature would naturally next provide as to *when* the sale was to take place. And this is one of the matters provided in s. 6.

[211] The language of s. 6 is also consistent with this view of its construction. It seems to me, therefore, that s. 6 declares that the day of sale to be fixed shall be a day which shall not be less than 30 clear days from the date of affixing the notification in the office of the Collector or other officer mentioned in the section. Therefore, the day of sale fixed in this case by the Collector did not fulfil the requirements of s. 6, that being so, the Collector, in my opinion, could not, by another order purporting to have been passed under s. 20 of Act XI of 1859, adjourn the sale to another day. Upon this point I entirely agree with the observations of **NORRIS, J.**, in *Bal Mokund Lal v. Jirjoodhun Roy* [(11 C. L. R. 466 (474))]. He says "But further, when in s. 20 we find the words—'to commence the sale on the day of sale fixed,' this must refer to a day of sale which has been legally fixed. You could not adjourn a meeting which an Act of Parliament requires to be convened at 12 days notice if only an eleven days notice has been given. You cannot adjourn an illegally called meeting, and you can only adjourn a sale fixed for a certain day when it has been legally fixed for that day."

Therefore, the day on which, in this case, the sale was held was not a day on which the sale could be held in accordance with the provisions of the law on the subject, that being so, the Collector, in my opinion, had no power to hold the sale on the day on which it was held. It is therefore null and void, as it was not a sale under the provisions of Act XI of 1859.

If it was null and void, s. 8 of Beng. Act VII of 1868 would not make it valid on the ground that the purchaser has obtained his certificate. This section only cures the defects, if there be any, in the procedure to be observed regarding the service and posting of the notices required to be served and posted under the Act. The granting of the certificate cannot have the effect of rendering an illegal sale valid.

Then if the Collector had no power to hold the sale in question in this case, the right of the plaintiff is not affected by it. In order to be successful

in this case, it is not, therefore, necessary for him to obtain a decree setting aside the sale. It would be a contradiction in terms to set aside a sale which is null and void, [212] *i.e.*, which is no sale at all. It is therefore not necessary for the plaintiff to bring his case within the purview of s. 33 of Act XI of 1859, which applies where the plaintiff cannot succeed unless the sale be set aside. If the sale in this case was null and void, there is no defence to the plaintiff's claim to recover possession of his property from which he has been ejected under the colour of an illegal sale.

In *Bunwaree Lall Sahoo v. Mohabeer Proshad Singh* (L. R., 1 I. A., 89), the plaintiff sued to set aside a revenue sale on the ground that the notice prescribed in s. 5 of Act XI of 1859 was not given. That section provides that no estate which is within the purview of it shall be sold unless the notice prescribed in it is given. In that case it was found by the High Court that the required notice had not been given. But there was no finding in favour of the plaintiff that he had sustained any pecuniary loss by the sale.

The High Court, however, set aside the sale. Upon the point of substantial injury AINSLIE, J., who delivered the judgment, says "To sell a man's estate for arrears after lulling into a false sense of security by failure to give him a notice which the law prescribes as a condition precedent of a sale, is an injury of itself, wholly irrespective of the amount of purchase-money, and in my opinion a very material injury, and one amply sufficient to warrant a Court in annulling a sale under s. 33 of Act XI of 1859, that such an injury flows directly from the irregularity will hardly be denied." This judgment was upheld by the Judicial Committee. In this case also if s. 33 of Act XI of 1859 applies, it may be reasonably said that to sell a man's property when you have no power to sell it "is an injury of itself wholly irrespective of the amount of purchase-money", and if this injury be a substantial injury within the meaning of s. 33 of the Act, it is clear also in this case that it flowed from the Collector's non-compliance with the provisions of s. 6.

As regards the second question, I agree in the answer given to it by my Lord the Chief Justice.

Tottenham, J.—In the further light thrown upon the first question before us by the discussion upon this reference, [213] I have been enabled to perceive that we are not precluded from holding that the date fixed in the sale notification being less than thirty clear days from the date of its being affixed in the Collector's Office, there is a legal defect in that notification, and that we may so find notwithstanding anything in s. 8 of Beng. Act VII of 1868.

I assent, therefore, to the finding that in this respect the sale was made contrary to the provisions of the Act. But I say that the sale was not *ipso facto* null and void. It was a sale for arrears of revenue, and by s. 33 is liable to be annulled only on proof that the plaintiff has sustained substantial injury by reason of this informality in the notification.

As to the second question, I am of opinion that the existence of the particular legal defect found in the present instance is not evidence that it caused the substantial injury attributed to it, *viz.*, insufficiency in the price bid at the sale. I do not say that there might not be illegalities in sale proceedings which would by themselves warrant the Court in holding that they had caused substantial injury to the plaintiff, *e.g.*, a sale might be held when no arrears really existed, or there might be a sale without any notification at all, so that the Government might become the purchaser for a rupee.

I answer the question, therefore, only as regards the particular case referred to us, and I answer it in the negative. I consider that the Privy Council's decision in *Olpherts v. Mahabir Pershad Singh* (11 C. L. R., 494) is a sufficient authority to support this view, though I agree that their Lordships did not intend to lay down a rule of universal application.

NOTES.

[I. SERVICE OF NOTICE—

The following extract from MOOKERJEE, J.'s judgment in (1905) 2 C. L. J., 325 : 10 C. W. N. 137, gives a succinct account of the cases.

"It is argued that sec. 8 of Act VII of 1868 B. C. has no application to this case, inasmuch as it is their contention that no notice under section 7 of Act XI of 1859 was issued for service in the mehal, whereas sec. 8 assumes the issue and some service of a notice, though the service may be defective, in support of this position, reliance is placed upon the cases of 9 Cal., 271, 11 Cal., 200, 7 C. W. N., 377 (see also 14 Cal., 1). These decisions are, however, clearly distinguishable, they are authorities, no doubt, for the proposition that while sec. 8 of Act VII of 1868 B.C. raises an irrebuttable presumption that a notice required to be served has been duly served, it does not raise the further presumption that the notice itself is in accordance with law, either as to its contents or as to the time of its service, or to take a concrete illustration, that it has been affixed not less than thirty clear days before the date fixed for sale, as required by section 6 of Act XI of 1859. This doctrine has no application to a case like the present, where the substance of the complaint is that the notice required by section 7 to be served in the estate in arrears has not been served, which appears to me to belong precisely to the class of cases intended to be governed by sec. 8 of Act VII of 1868 B. C. The view I take is supported by the decisions of this Court in the cases of 21 Cal., 360; 30 Cal., 1 : 6 C. W. N., 688, 31 Cal., 256. 8 C. W. N., 649, which last was eventually taken to the Privy Council. . . . The case of 1 C. L. J., 565, only decided that where no order was passed for the issue of a notification under sec. 5 of Act XI of 1859 and none, it was admitted, was actually issued, the defect was not cured by section 8 of Act VII of 1868 B.C., which might be invoked if objections were made to the due service and posting of the notice." See also 21 Cal., 360.

II. IRREGULARITY—

There must be some definite connection between inadequacy of price and the irregularity : —(1907) 6 C. L. J., 163 (non-specification of the mouzahs) citing 21 Cal., 70 ; 21 Cal., 66 ; 32 Cal., 111 and observing that 21 Cal., 66 sweeps away the distinction made in 11 Cal., 200, between irregularities and illegalities.

In (1885) 11 Cal., 658, FIELD and O'KINEALY, JJ., explaining this case and 9 Cal., 656, observed : "The meaning of their Lordships of the Privy Council is this. that there must be some evidence, and that in the absence of evidence to show that the injury is the result of the irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter has occurred by reason of the former."

See also 20 Cal., 599 (notification of non-existent incumbrance), 13 Cal., 208 (non-mention of the owners of estates or shares), 19 All., 308 (sale *ab-initio* void).

Sale under a satisfied certificate (1889) 17 Cal., 414 (VII of 1880 B. C.) ; (1889) 17 Cal., 398 (XI of 1859, ss. 5 and 17)]

[11 Cal. 213]

ORIGINAL CIVIL.

The 10th March, 1885.

PRESENT.

MR. JUSTICE WILSON.

Geereeballa Dabee and another.....Plaintiffs

versus

Chunder Kant Mookerjee and others.....Defendants.

Civil Procedure Code --Act XIV of 1882, s. 30—Suit by legatees on behalf of themselves and other legatees—Parties—Costs against next friend.

A legatee cannot sue on behalf of himself and other legatees without an order of the Court obtained under s. 30 of the Civil Procedure Code enabling him so to sue.

[214] Where a legatee, a minor, sued in that form by her next friend without such an order, the next friend was held liable for costs on his adducing no evidence to show that the suit was for the benefit of the minor

THIS was a suit brought on the 13th August 1883 by Geereeballa Dabee, an infant, through her next friend, Nogendro Nath Bannerjee, and Khantomoney Dabee, on behalf of themselves and all other the legatees under the will of Taruck Nath Mookerjee, deceased, against Chunder Kant Mookerjee and Prankissen Mookerjee, the executors under the said will; and Thakomoney Dabee and Bhodessury Dabee, two legatees under the said will, the two latter defendants being added as defendants by an order of Court, dated also the 13th August 1883.

The object of the suit was—

- (1) To have the will of Taruck Nath Mookerjee construed ;
- (2) To have his estate administered .
- (3) To have some provision made for the payments of maintenance given under the said will ;
- (4) To protect the estate of the deceased which was then in the hands of the executors, and for discovery of what such estate consisted of ; and
- (5) For a receiver.

It appeared from the pleadings that Taruck Nath Mookerjee made and executed his last will and testament on the 17th September 1879, and appointed Chunder Kant Mookerjee and Prankissen Mookerjee executors thereof.

That under this will he directed his executors to make, amongst others, the following payments, viz. :—

- (1) A certain sum to his two sons Poresh Nath and Surrut Coomar Mookerjee.

(2) A sum of Rs. 8 per month to his infant daughter Geereeballa.

(3) A sum of Rs. 6 per month to his two widowed daughters-in-law Thakomoney and Khantomoney.

(4) A sum of Rs. 1,000 to be divided between Thakomoney and Khantomoney.

(5) The interest of a sum of Rs. 8,000 invested in Government securities to Geereeballa for her maintenance, the principal [215] thereof to be paid to her as and when she should attain her full age.

That Taruck Nath Mookerjee died on the 9th November 1879 and his will was duly proved by both executors.

That, at the date of his death, the said testator left him surviving two infant sons, Poresb Nath Mookerjee and Surrut Coomar Mookerjee, aged, respectively, twelve and nine, a daughter, Geereeballa Dabee (since married to Nogendro Nath Banerjee), a granddaughter, Bhodessury Dabee, and two widowed daughters-in-law, Thakomoney and Khantomoney Dabee.

It was also alleged that the plaintiffs, during the lifetime of the testator, and up to the 15th January 1883, had been accustomed to live in the family dwelling-house, but that subsequently to that date, on account of ill-treatment received from some of the members of the family, they had been compelled to move elsewhere, that they had not been paid the sums allowed to them as maintenance, or the sum of Rs 500 given to Khantomoney by the will, and that the defendants had refused to make these payments to them, that the testator was at his death entitled, as a member of an undivided Hindu family, to a one-fifth share in considerable moveable and immoveable property, and to certain shares in certain companies, the particulars of which were unknown to the plaintiffs, and they asked that a full discovery of the properties that had come to the hands of the executors might be given. And in connection with this part of the case, it was further alleged that in 1874 a certain suit had been instituted by one Jogendro Nath Mookerjee against the testator and the present defendants, and one Basudeb Mookerjee, for the partition of certain joint family property whereof the said testator had a one-fifth share; and that in 1875 one Komul Coomaree Dabee had instituted a suit against the said testator, the present defendant Chunder Kant Mookerjee and one Radha Nath Mookerjee, for the administration of the estate of one Ram Narain Mookerjee, a brother of the testator, and that these suits had been, by an order of Court, consolidated and were at the time of this present suit then pending.

On the 13th August 1883, the plaintiffs, as above stated, [216] amended their plaint by adding Thakomoney Dabee and Bhodessury Dabee as defendants.

The defendants put in a written statement, dated the 11th September 1883, objecting that the plaintiffs were not entitled to bring this suit, inasmuch as they had not obtained leave under s. 30 of the Code to sue on behalf of themselves and all other the legatees under the will of the testator; and that two legatees, the sons of the testator, had not been made parties to the suit; and further stated that they had never refused to pay, and had, in fact, already paid to the plaintiffs the maintenance given to them under the will, and all arrears thereof, and that they had never been asked to pay over the sum of rupees one thousand to Khantomoney and Thakomoney, but that they were ready to do so now, that they held the sum of Rs. 8,000 under the trusts of the will invested in Government securities awaiting the time when Geereeballa

Dabee should attain her full age; that the interest of part of such securities, viz., Rs. 5,000, had not been drawn owing to the testator having in his lifetime endorsed the said securities over to the infant plaintiff, and that the interest on the remaining Rs. 3,000 had been allowed to accumulate as the infant plaintiff had, up to January 1883, been maintained in the family dwelling-house. They denied the ill-treatment complained of, and stated that the plaintiffs had returned to the family dwelling-house in September 1883 and were still residing there.

Mr. Pugh and Mr. Allen for the Plaintiffs.

The Officiating Advocate-General (Mr. Phillips) and Mr. Hill for the Defendants.

The Officiating Advocate-General (Mr. Phillips) drew the attention of the Court to certain letters which disclosed the fact that the plaintiffs had returned to the family dwelling-house before the written statement of the defendants had been filed, and that they had in writing expressed their desire to withdraw from the suit, but that the attorney for the plaintiffs had written to the defendants' attorney, stating that he was unable to withdraw the suit as one of the plaintiffs was a minor, and as the next friend of the infant plaintiff had expressed his doubts [217] as to the genuineness of the authority to withdraw, and had authorized the necessary steps for the continuation of the suit.

Mr. Pugh then read the rest of the correspondence for the purpose of showing the position in which his attorney stood, and, after refusing to go into evidence and determining to rely on the statements and admissions made in the plaint and written statement, contended that he was entitled to have the estate administered, and to protect his clients' interest under the will, and as regards the objection raised in the written statement, under s 30, he submitted that the suit was properly brought, inasmuch as all the real legatees had been made either parties plaintiff or defendant, and that the only blemish in the suit was that the words in the heading of the plaint "on behalf of all other legatees" had not been erased when the plaint was amended, and this was merely a clerical error, and if the Court should determine that there were other necessary parties, they might be added.

[WILSON, J.—Unless you can show some misconduct on the part of the executors, you are not entitled to ask the Court to interfere with the executors; there is no suggestion that the property is in danger.] The position is that the executors will not pay us, but I have no wish to press for administration of the estate further than is necessary to protect the interests of my clients.

[WILSON, J.—The plaintiffs do not even say they have asked for the Rs. 1,000; they merely state they have not been paid their share of it.] There is no allegation in the written statement to the effect that a demand has not been made, and the case of the defendants is that maintenance has been paid, and that they are now ready to pay the Rs. 1,000.

[WILSON, J.—What do you say are the issues arising on the pleadings?] On the defendants' admission there are no issues for trial. But unless an administration decree is obtained, I do not see how I am to obtain maintenance, although I should be prepared to take any other relief sufficient to secure the interests of my clients.

[WILSON, J.—I think if I were to allow the suit to proceed I should first direct an enquiry, either before myself or some one [218] else, as to whether this suit is being prosecuted for the benefit of the infants, and with the authority of Khantomoney or not.]

The Officiating Advocate-General (Mr. *Phillips*) for the Defendants.—The plaintiffs are not entitled to maintain the suit in this form. Under s. 30 of the Code no order of the Court permitting them to sue on behalf of the other legatees has been obtained. Whenever a single legatee brings a suit it must be on behalf of all other legatees under the will; are the ladies entitled to bring their suit then on behalf of all the other legatees without an order of Court enabling them to do so?

There are other legatees under the will who have not been made parties, and even if they did represent all the legatees this would not get them out of the difficulty which is pointed out in the *Oriental Bank v. Gobind Lal Seal* (I. L. R., 9 Cal., 604).

But if such a suit could be maintained, we are prepared to show by evidence that the plaintiffs have nothing to complain of. The plaintiffs are entitled to Rs. 6 between them a month, and we can show that they have been paid.

[WILSON, J.—How do you, Mr. *Allen*, get over the difficulty that no leave has been obtained under s. 30?]

Mr. *Allen*.—I suppose the difficulty has arisen owing to an omission to strike out the words in the heading of the plaint, “on behalf of the other legatees” when the plaint was amended, and that the sons of the testator were treated as heirs and not added as parties, although they are in fact legatees.

Mr. Justice Wilson in delivering judgment, stated that he was of opinion that the technical objection to the suit was a valid one, the suit being one purporting to be brought under s. 30 of the Code, and, as such, only permissible when leave to sue in that way had been obtained. He therefore dismissed the suit on that ground, stating, however, that he would have been unwilling to dismiss the suit on such a ground if he had thought that there was any substance in the plaintiffs’ case, but as Mr. *Pugh* had rested his case on the pleadings and had called no evidence, there was no ground for thinking that the suit was a substantial one, and as the next friend of the plaintiff had had an opportunity [219] of calling evidence and of satisfying the Court that the suit was one really for the benefit of the infants, but had chosen to adduce no evidence, the suit must be dismissed with costs against him personally, Khantomoney bearing her own costs.

Suit dismissed.

Attorney for Plaintiffs : *Mookerjee and Deb.*

Attorney for Defendants : *Carruthers.*

NOTES.

[The provisions of O. I, r. 8, C. P. C., 1908 (=C. P. C., 1882, sec. 30) are, according to the Calcutta High Court, imperative:—9 Cal., 604; 21 Cal., 181 n. But a different view is taken by the other High Courts.—21 Bom., 784; 22 All., 269; 33 All., 660; 25 Mad., 399.]

[11 Cal. 219]

ORIGINAL CIVIL.

The 2nd March, 1885.

PRESENT

MR. JUSTICE WILSON

In the matter of Florence Emily Brownlow and Lilian Kate Brownlow Infants.

*Practice—Petition without suit— Payment out of Court of moneys
on petition without suit.*

Case in which an order was made on a petition without suit directing the payment out of certain moneys paid into Court under an order entitled, " In the matter of Florence Emily Brownlow and Lilian Kate Brownlow, infants "

THIS was an application for the payment out of Court of certain moneys which had been lodged in Court pursuant to an order of the Court, dated the 24th July 1872, which order was, however, not entitled in any suit, nor under any section of any Act.

The present petition was the petition of F E. Brownlow, and was headed, " In the matter of Florence Emily Brownlow and Lilian Kate Brownlow, infants," and set out the following facts, viz. --

That previous to 1872 the father of the petitioner had invested certain moneys in Government securities of the 4 per cent. loan of 1856-57 of the value of Rs 1,400 and Rs. 1,000 in the name of his daughters, Florence Emily Brownlow and Lilian Kate Brownlow (since deceased), respectively. That the loan of 1856-57 was called in in 1872, and certain of the notes issued thereunder were transferred to a new loan, but the authorities of the Public Debt Office had declined to transfer the two securities above mentioned to the new loan, on the ground that the petitioners for such transfer were infants, and that no one was authorized to apply for such transfer on their behalf, and for the same reasons declined to pay off the notes That [220] the father of the petitioner having been advised that he was not entitled to have the custody of the proceeds of these securities without obtaining an order of Court for that purpose, it was, therefore, arranged that the proceeds should be paid into Court to an account entitled " The account of Florence Emily Brownlow and Lilian Kate Brownlow," and that an order of Court should be applied for for the purpose. And accordingly, on the 27th April 1872, the father applied to the High Court in its Ordinary Original Civil Jurisdiction for an order, that one R. L. Upton should be appointed guardian of the estate of the infants, limited to Rs. 2,400, and that he should be at liberty to receive from the Secretary and Treasurer of the Bank of Bengal the sum of Rs. 2,400 on his undertaking to pay the same into Court, an order was made under this petition, and the said R. L. Upton obtained the proceeds of these notes, and on the 24th July 1872 paid the same to the Comptroller-General of Accounts of the Government of India, and Secretary and Treasurer of the Bank of Bengal, with the privity of the Accountant-General, by whom the said proceeds were carried to the credit of the account directed in the order, and entitled as above set out. The Accountant-General then invested the proceeds in Government securities Lilian Kate Brownlow died in the year 1876 a minor, and her father took out letters of administration to her estate, and he, on the 8th of May 1877, applied to the Court for an order, directing the Accountant-General to divide the sum invested by him, and standing

to the credit of the infants in proportion to the shares due to the infants, respectively, and for payment out of the share of the deceased, and obtained an order from Mr Justice MACPHERSON directing the payment out to him of the share belonging to the said Lilian Kate Brownlow. Florence Emily Brownlow, who was now of age, applied to have her share paid out to her. The application was not made on notice, but Mr. R. L. Upton, the guardian above mentioned, was a member of the firm of Messrs. Sanderson & Co, who were the petitioners' attorney.

Mr. *Henderson* for the Petitioners stated that a similar order had been made with regard to the share of the other sister, and that under the practice of the old Supreme Courts a guardian might be appointed on a petition without suit and that the guar-[221] dian of the present applicant having paid money into Court under an order in such a petition, the present petitioner, who was now of age, was entitled to apply in the same way for the payment out

Mr. Justice **Wilson** made the order prayed for

Order as prayed.

Attorneys for Petitioner. Messrs. *Sanderson & Co*

[11 Cal. 221]

APPELLATE CIVIL

The 2nd December, 1884.

PRESENT.

MR. JUSTICE PRINSEP AND MR. JUSTICE PIGOT

Rutnessur Biswas..... Plaintiff

versus

Hurish Chunder Bose..... Defendant.¹

Damages for breach of clause in lease—Rent suit—Assessment of damages—

Substantial damage—Nominal damage

B obtained a lease of certain lands from *A*, agreeing thereunder to pay to *A* a certain rental for the land, and also a sum of Rs. 183-6-3 yearly to *A*'s superior landlord, obtaining a receipt therefor.

A sued *B* for the rent due to himself, and for the sum due to his superior landlord. *Held*, that *A* was entitled to recover the sum due to his superior landlord as damages for

* Appeal from Appellate Decree No 1021 of 1883 against the decree of Baboo Amrita Lal Chatterji Subordinate Judge of Nuddea, dated the 31st of January 1883, modifying the decree of Baboo Sri Nath Pal, First Munsif of Bongong, dated the 9th of September 1881.

breach of the contract, and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which A might become liable to his superior landlord.

THIS was a suit described in the plaint as one for arrears of rent due for the years 1284-1285.

It appeared that up to the year 1279, one Rysona Dasi was the holder of 469 bighas of *gauti jama* lands, and in that year she granted an *iyara* lease of these lands to one Gobind Chunder Sircar for a term of nine years on the following terms, *viz*, (1), that the Government revenue and rent due to the zamindar, amounting to Rs. 183-5-11, should be annually paid to the Collector and the zamindar respectively, and *dakhillas* taken for such payments, (2), that Rs 125 should be yearly paid out of the profits of the land, (3), that eight pots of molasses made of date juice should be annually presented, or in default Rs. 3 instead thereof.

[222] On the 9th Bysack 1280, Gobind Chunder Sircar granted to one Hurish Chunder Bose a *dur-iyara* of these lands at a rental of Rs 127, subject to the other condition under which he himself held Hurish Chunder Bose obtained confirmation of this *dur-iyara* lease from Rysona Dasi, and she, after receiving a portion of the rent from Hurish Chunder Bose on the 17th Assar 1284, sold her right and interest in the lands, together with her right in the remainder of the profit and rent due to the zamindar, to one Rutnessur Biswas. The rent of 1282-83 not having been paid, Rutnessur Biswas brought a suit for rent against Hurish Chunder Bose for these years, and obtained a decree which was affirmed on appeal. Rutnessur Biswas brought this present suit against Hurish Chunder Bose to recover arrears of rent for the years 1284-85, stating that Rs. 183-6-3 was the sum due to the zamindar, Rs 127 was due as profits and Rs. 9-6-8 as road and public works cesses, and Rs 3 as the value of the molasses for the year 1284, and that the same amount was due for the year 1285, and that the *dakhillas* from the Collectorate and the zamindar had not been made over to him, and he therefore asked for a decree for that amount and for Rs. 225-10 10 as interest due on account of the default of payment of "instalments," and for delivery of the *dakhillas*.

Hurish Chunder Bose contended (1) that he was in possession of the under-tenure merely as *benamdar* of one Bani Madhub Sircar: (2) that the rent claimed was paid (3) and that the plaintiff owed him certain sums in respect of certain *jummas* held by him in the under-tenure, and he claimed to set these sums off as against the rent. He, however, set out in his written statement the terms on which Gobind Chunder Sircar held this *iyara* from Rysona Dasi, and admitted that they were correctly stated in the plaint.

The Munsif found that the defendant was not the *benamdar* of Bani Madhub Sircar; that a payment of Rs 116-5-9 had been made by the defendant towards the rent and cesses of the years 1284-85, and he therefore was entitled to a deduction to this amount, that it was not proved that the plaintiff held any under-tenure from the defendant, and that the plea of set off could not be allowed. He, therefore, gave the plaintiff a decree for [223] the amount claimed, less the sums paid, and ordered the *dakhillas* certifying the payment of that sum to be made over to the plaintiff.

The defendant appealed to the District Judge, who confirmed the decision of the Munsiff on all points, save as to the question of the sums payable to the plaintiff's superior landlord and to the Collector, and as to this point he held as follows — "There is nothing to show that the plaintiff has been obliged to pay the same, or that any obligation has been cast upon him to pay it. The obligation was upon the defendant to pay these sums; and when no claim has

been made upon the plaintiff, and when there is no allegation that the plaintiff has paid them, the presumption is that these sums have been paid by the defendant"; and as to these items he modified the judgment of the lower Court.

The plaintiff appealed to the High Court.

Baboo *Bhobani Churn Dutt* for the Appellant contended that the Subordinate Judge should have given the plaintiff a decree for the sums due to the superior landlord and to the Collector for revenue, inasmuch as the *kabuliat* provided for such payments, and that the onus of proving payment of these sums was upon the defendant.

Baboo *Srinath Doss* and Baboo *Gyanendra Nath Doss* for the Respondent contended that the suit being one for rent, the moneys due to the superior landlord and to the Collector could not be said to be rent, and therefore the plaintiff ought not to recover these sums.

Judgment of the Court (PRINSEP and PIGOT, JJ) was as follows.—

The plaintiff's case is as follows —The plaintiff is assignee of one Rysona Dasi, who held in possession certain land specified in the plaint. Of that land she granted an *ujara* to one Gobind Chunder Sircar in 1279. He, in 1280, granted a *dur-ujara* of these lands to the defendant, and in 1281 gave up the *ujara* to Rysona Dasi. The defendant after this applied for and obtained from Rysona Dasi a confirmation of his *dur-ujara*; and after this, in 1284, Rysona Dasi assigned her entire right to the plaintiff.

[224] The terms under which the defendant held are contained in a *kabuliat*, not part of the record in this case. The plaint states, as the reason for not filing it in the present case, that it is already filed in Suit 1230 of 1877, being a suit against defendant for the rent due under the *kabuliat* for the years 1282-83 in which a decree for plaintiff had been made, which decree had been appealed to the Judge's Court.

No objection was taken on the ground of the absence of the *kabuliat* containing the terms of the tenancy. It was in truth admitted in the defendant's written statement that the tenancy was held on the terms as to payment alleged by the plaintiff.

According to the terms of the *kabuliat* the tenant was bound to pay (1), Rs. 183-6-3 to the zamindar (2), road and public works cess, Rs. 4-11-4 each; (3), Rs. 127-0-0 profit rent, and Rs. 3 for value of molasses to the plaintiff. The plaint alleged that "plaintiff frequently called on defendant to pay to him the rent due to the zamindar, or to make over to him the *dakhillas* showing payment of it, and to pay him the profit rent due, but the defendant did not comply with his request."

The plaintiff claimed Rs. 875-4-8, of which Rs. 645-9-10 was in respect of the moneys payable by the defendant for the years 1284 and 1285, and Rs. 229-10-10 as interest due on the unpaid "instalments," as they are called in the translation of the plaint.

The plaint seems to have been treated by the Munsif, and apparently understood by the parties, as including a claim for the delivery by the defendant to plaintiff of such *dakhillas* as he might have in his possession.

The defendant, among other defences (some of which need not be noticed) alleged: 1st, that he was Bani Madhub's *benamdar*; 2nd, that Bani Madhub had paid the rent due to the zamindar, and 3rd, that Bani Madhub had the *dakhilla* for the rents. As to the first defence, that defendant was a *benamdar* only, the Munsif held him estopped by his admission in, and by the decree in the previous suit. As to the second, the defendant tendered evidence to prove

the payment of rent, and produced some *dakhillas*. The Munsif held that [225] payment to the amount of Rs. 116-5-9 only was established, pronounced a decree for plaintiff for Rs. 529-4-1, the residue of the Rs. 645-9-10 together with interest, Rs. 132-3-11, and ordered the defendant to hand over the *dakhillas* to the plaintiff.

The Sub-Judge affirmed this decision save as to that part of it which held the defendant liable to pay to the plaintiff an amount equal to the sums payable to the superior landlord. As to these he reversed the Munsif's decision, on the ground, as stated in the judgment, "that there is nothing to show that the plaintiff has been obliged to pay the same, or that any obligation has been cast upon him to pay it. The obligation was upon the defendant to pay these sums, and when no claim has been made upon the plaintiff, and when there is no allegation that the plaintiff has paid them, the presumption is that those sums have been paid by the defendant." Before dealing with these reasons, a defence set up before us must be noticed.

It is contended, first, that this suit is merely a suit for rent, and second, that the moneys payable to the superior landlord are not rent, and cannot be recovered as such.

We think this latter contention correct. Rent cannot be made payable as such to a third person (Woodfall, 12th ed., 355, Lit. s. 346).

But although the suit is described in the first paragraph of the plaint as a suit for rent, we think the case made by the plaint sufficiently makes out (as an alternative) a claim for damages against the defendant for breach of his contract to pay the superior landlord. It was dealt with on that footing by the Subordinate Judge, and on that footing decided against the plaintiff for the reason given in the passage above referred to. The plaintiff's claim under this head must, we think, be construed as a claim for damages.

As to the grounds assigned by the Subordinate Judge for his decision, the defendant alleged in his written statement that the payments had been made and he tendered evidence to prove it. He failed. If we thought it necessary, we should send the case back for further evidence as to the payment or non-payment of the money. But we think that, as the defendant undertook the onus of proof of payment, and having regard to [226] the respective positions of the parties, the Munsif was right in deciding the issue as to the fact of payment to the superior landlord against the defendant.

It being established that the defendant's agreement to pay the superior landlord the rents for 1284 and for 1285 was broken, the remaining question is whether plaintiff was entitled to recover from the defendant, as damages for these breaches, the amount payable as rent (for each year) for which he himself remained liable or whether, as plaintiff has not shown that he had paid the money, he is only entitled to nominal damages.

We think the plaintiff is entitled to recover as damages the full amount which the defendant agreed to pay, and has not paid.

In *Loosemore v Radford* (9 M & W, 657), plaintiff and defendant being joint makers of a promissory note, plaintiff as surety and defendant as principal, the defendant covenanted with the plaintiff to pay the money on a given day, and made default. It was contended that the plaintiff, not having actually paid any money on the note, had suffered no substantial injury, and was entitled to nominal damage only. The Court held that the defendant was liable in the full amount of the money that he ought to have paid according to the covenant. To this same effect is *Lethbridge v Mytton* (2 B. & Ad., 772).

Here, the defendant's promise was an absolute promise to pay, in discharge of plaintiff's liability to the superior landlord, the rent due for 1284 and for 1285 within each year; and the plaintiff was entitled to maintain an action in damages for the amount the moment the time expired within which the defendant was bound to pay.

The decree of the Subordinate Judge must be reversed, and that of the Munsif affirmed. If the Munsif has awarded interest on the two sums of Rs. 183-6-3 or either of them, his decree must be modified by striking out the interest so allowed, as interest cannot be allowed on these sums, which are awarded to the plaintiff as damages.

Plaintiff to have costs throughout.

Appeal allowed

NOTES.

[Such payment by the lessee to the superior landlord may be regarded as *rent* according to the circumstances, or statutory definitions, if any —(1899) 27 Cal., 67 F B . 4 C W. N., 31, (1895) 22 Cal 680 (684), (1898) 2 C. W. N , 455 (457)]

This case was, in (1904) 32 Cal., 169 (174) 9 C W N , 96 held not to have been over-ruled by the Full Bench case of 27 Cal., 67

See also (1898) 26 Cal , 241 (245) as regards the liability arising out of such a contract]

[227] APPELLATE CIVIL.

The 29th January, 1885.

PRESENT

MR. JUSTICE FIELD AND MR. JUSTICE BEVERLEY

Gunga Pershad Bhoomick.. Judgment-debtor

versus

Debi Sundari Dabea. . . . Decree-holder

Execution—Step in aid of execution—Legal representative applying for

execution without her name being on the record.

A obtained a decree against B in June 1879, and in execution thereof some time in 1879 attached certain monies in Court which belonged to his judgment-debtor, and obtained an order for payment out to him. Before receiving payment A died, and the execution proceedings were struck off on the 31st January 1880. On the 14th June 1880, and on the 22nd June 1881, the widow of A, who had taken out probate, applied to withdraw this money from Court, and on the 1st of April 1882 applied for a copy of the decree obtained by A, for the purposes of execution. At the time of these three applications the widow had not applied for substitution of her name on the record in the place of her deceased husband.

On the 5th January 1884 the widow applied to have her name substituted on the record, and for execution.

* Appeal from Order No. 303 of 1884, against the order of F. J. G Campbell, Esq., Officiating District Judge of Rajshahye, dated the 25th of August 1884, reversing the order of Baboo Promothonauth Mookerjee, Subordinate Judge of that district, dated the 8th of May 1884.

Held, that the application was barred, as the previous applications were not under the circumstances steps in aid of execution.

ONE Iswar Chundra Moitro obtained a decree against one Gunga Pershad Bhoomick in June 1879, and in 1879, in execution of this decree, attached certain monies of the judgment-debtor which were deposited in the Munsif's Court, and applied for an order directing payment of this money to him. A cheque was made out in his favour, but before realizing the money he died. Execution proceedings were struck off on the 31st January 1880, and this cheque was returned to the Court by the pleader of deceased decree-holder on the 19th February 1880.

On the 14th June 1880, Debi Sundari Dabea, the widow of Iswar Chundra Moitro, having obtained probate of her late husband's will, applied to the Court for the payment of the money deposited in Court to which her husband had been entitled. She, however, took no steps to have her name substituted on the record in the place of her deceased husband. On the [228] 22nd June 1881, Debi Sundari Dabea made another application to the Court to have the monies, deposited as aforesaid, paid out to her, and an order was passed on the 29th August 1881, directing the money to be paid over to her.

On the 1st April 1882, Debi Sundari Dabea, who had not at the time been substituted on the record in the place of her deceased husband, made an application to the Court for the purpose of obtaining a copy of the decree for the purposes of execution, and on the 5th January 1884, she applied to have her name substituted on the record in the place of her deceased husband, and asked for execution.

The Subordinate Judge refused this application for execution on the ground that, inasmuch as Debi Sundari Dabea had not had her name placed upon the record at the date of any of the former applications, none of those applications could have the effect of saving execution from being barred by limitation.

Debi Sundari Dabea appealed to the District Judge, who considered the Sub-Judge's reason for refusing execution to be purely technical, but having regard to the cases of *Hem Chunder Chowdhry v Brojo Soondury Debee* (I. L. R., 8 Cal., 89), *Fazal Imam v. Metta Singh* (I. L. R., 10 Cal., 549), he unwillingly held that the petitions for the withdrawal of the monies deposited in Court were not such as to save limitation from applying. But on the authority of the case of *Kunhi Mannan v Seshagiri Bhaktan* (I. L. R., 5 Mad., 141), he held that the petition of the 1st of April 1882 for the purpose of obtaining a copy of the decree was "a step in aid of execution," and would, therefore, save execution from becoming barred. He, therefore, allowed the appeal, and ordered execution to issue.

The judgment-debtor appealed to the High Court.

Baboo *Biprodas Mookerjee* and Baboo *Baikant Nath Dass* for the Appellant contended that execution was barred.

Baboo *Ishwar Chunder Chuckerbutty* and Baboo *Akhil Chunder Sen* for the Respondent.

The Judgment of the Court was delivered by .

[229] **Field, J.** (BEVERLEY, J., *concurring*).—The former execution case was struck off on the 31st of January 1880. We have then to consider the effect of three applications. The first of these applications was made on the 14th of June 1880, the second on the 22nd of June 1881, and the third on the 1st of April 1882.

The application of the 14th of June 1880, and that of the 22nd of June 1881, were merely to obtain payment of money in deposit in the Treasury in account with the Civil Courts, such money being payable to the person of whom the applicant was the legal representative. We think it impossible to say that either of these applications was a step in aid of the execution of the decree.

The next application was that of the 1st of April 1882. This was an application to get back the copy of the decree for purposes of execution, made by a lady who had not then been substituted for the decree-holder on the record. We think that this application also cannot be considered as a step in aid of the execution of the decree.

This being so, between the 31st of January 1880 and the 5th of January 1884, there was no step taken in aid of the execution of the decree, and we agree with the Munsif in thinking that the present application is barred by limitation.

We, therefore, set aside the order of the Judge, and restore that of the Munsif with costs.

Application refused.

NOTES.

[The Calcutta High Court has held that applications for payment out of moneys, etc. are not steps in aid of execution.—8 Cal. 89, 10 Cal. 549, 11 Cal. 227, 23 Cal. 196, though other High Courts hold different views.—2 Mad., 174, 16 Mad. 452, 17 Mad., 165; 6 All. 366 22 Bom. 340, 19 Bom. 261, 11 C P L R 161]

Even in Calcutta, where the application involves something more than paying out, as for example ascertaining the amount to which the decree-holder is entitled on rateable distribution—such application was held to be a step in aid of execution—(1904) 8 C W N., 382 See also (1905) 10 C W N., 28 3 C L J., 95 (96)

In (1898) 23 Bom. 311, it was held that an application to the Court by a *decree-holder* asking for the return of the copy of a decree filed with a former *darkhast* was not a step in aid of execution. It would thus appear that in respect of *such* an application, it is immaterial whether the applicant was (23 Bom. 311) or was not (11 Cal., 227) a party on the record.]

[11 Cal 229]

APPELLATE CIVIL.

The 7th January, 1885.

PRESENT

• MR. JUSTICE PRINSEP AND MR. JUSTICE PIGOT.

Anand Coomari.Defendant

versus

Ali Jamin.....Plaintiff.*

Adverse possession—Ejectment—Limitation—Recovery of land—Limitation Act, XV of 1877, sch. II, arts. 136, 137.

On the 25th of September 1867, A executed a conveyance of certain land to B for valuable consideration. On the same day A acknowledged the execution of the deed before the Registrar, who afterwards registered [230] the same on the 19th of October 1867; B never

* Appeal from Appellate Decree No 1164 of 1884, against the decree of Baboo Brojendra Coomar Seal, Judge of Bankurah, dated the 17th of May 1884, reversing the decree of Baboo Hara Gobind Mookerji, Munsif of Bankurah, dated the 29th of March 1880.

entered into possession of the land. On the 14th of November 1874, *C* purchased this land at a sale in execution of a decree which he had obtained against *B*; *C* did not enter into possession of the land, but, on the 26th of September 1879, brought a suit for the recovery thereof against *A*, who had all along remained in possession.

Held, that the suit was barred by limitation under arts 136, 137*, sch. II, of the Limitation Act, XV of 1877

THIS was a suit for the recovery of land. It appeared that the land in question was sold by the defendant to one Abdul Rahim on the 25th of September 1867 by a private sale. The defendant admitted the execution of the deed of sale before the Registrar on the same 25th of September 1867, but the instrument was not registered until the 19th of October 1867. The plaintiff, in execution of a decree obtained by him against Abdul Rahim, purchased the property on the 14th day of November 1874. The present suit was instituted on the 26th of September 1879.

The Court of First Instance found that neither the plaintiff nor his predecessor had had possession of the land within twelve years previous to the institution of the suit, and he dismissed it with costs. This decree was affirmed on appeal. On special appeal to the High Court the suit was remanded to be tried on the merits, the Judges being under the impression that the defendant had, on the 19th of October 1867, acknowledged the execution of the conveyance of the 25th of September 1867. On remand, the plaintiff's suit was decreed on the merits, the District Judge refusing to allow the question of limitation to be re-opened, though it turned out that the only admission by the defendant of the execution of the conveyance of the 25th of September 1867 was one made before the Registrar on the date of its execution, and not on the date of the registration. On the question of limitation the District Judge's judgment was as follows:—

"Though the execution of the *kobala* was admitted on the 25th September 1867, it was actually registered on the 19th October 1867. The date of the admission of the execution of a document is not necessarily the date of the registration. Section 60 of the Registration Act directs the registering officer to endorse on the document a certificate containing the word 'registered.' The last paragraph of that section runs as follows: 'Such [231] certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, &c' The possession of the defendant during the time that the document was under registration could not be adverse, and that is what has been held by the High Court. So far as the question of limitation is concerned, it is at an end. The defendant wanted to re-open it, but I have not allowed it to be re-opened."

The defendant appealed to the High Court.

Mr. Twisdale for the Appellant.

Baboo Rash Behari Ghose for the Respondent.*

* [Art. 137 .-

Description of suit.	Period of limitation.	Time from which period begins to run.
Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve years.	When the judgment-debtor is first entitled to possession.]

The Judgment of the Court was delivered by

Pigot, J.—The question in the case before us is, what is the nature of the possession of a vendor remaining in possession after the execution of a conveyance by him. That matter seems to have been considered by the Court of Exchequer, in the case of *Tew v. Jones* (13 M. & W., 12). That case is, in our judgment, an authority for holding that in the case of a sale out and out the vendor remaining in possession, that possession is adverse to the purchaser. That construction is in harmony with the inference to be drawn from arts. 136 and 137, Sch. II of the Limitation Act in this country; and, therefore, having regard to that principle, it must be held that the possession of the defendant was adverse from the 25th September 1867; and that, therefore, when the suit was filed on the 26th September 1879, the plaintiff's claim was barred.

We should add that the lower Court misapprehended the expression in the language of the judgment of this Court, which, having regard to the alterations in the terms of the judgment upon the true date of the execution of the deed being ascertained, could not involve the proposition that there could be no adverse possession on behalf of the defendant up to the date of registration. 'In the absence of express provisions, we think it could not be held that the commencement of the adverse possession should, by reason of the special provisions of the Registration Act, be deferred [232] until registration, according to the provisions of that Act, was completed. It must date, according to the principle already referred to, from the date of the execution of the deed. The plaintiff's suit, must, therefore, be dismissed. Having regard to the circumstances of the case, we do not make any order as to costs; each party to bear his own costs.

Appeal dismissed.

NOTES.

[An adverse possession against the vendor is also adverse to the purchaser, notwithstanding that there may have been symbolical delivery of possession to the purchaser.—(1894) 19 Bom., 620 (625), (1892) 16 Bom., 722.

Adverse possession requiring actual possession, if the vendor was at the time of sale *out of possession*, and subsequently regained possession, time runs from the latter date and not from the former, against the purchaser:—(1888) 13 Bom. 424. The adverse character of the vendor's possession may be disproved by the fact of his transfer of the patta in favour of the vendee after the purchase:—(1907) 30 Mad., 524. 17 M. L. J., 450. 30 M. L. T., 10.

It was also held in this case that this lien was of a non-possessory character.]

[11 Cal. 232]

REFERENCE FROM CALCUTTA COURT OF SMALL CAUSES.

The 12th February, 1885.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE WILSON.

Aghore Nauth Bannerjee

versus

The Calcutta Tramways Co., Ltd.*

Tramways Company—Agreement with conductor—Manager, power of—Jurisdiction of Courts of Justice—Contract Act—Act IX of 1872, s. 28, ex. 1.

The plaintiff became conductor of the Calcutta Tramways Company in accordance with an agreement which, amongst other things, provided that "the Company will retain a sum of money deposited by the conductor together with all his wages for the current month as security for the discharge of his duties, and in case of any breach by him of the rules, the Manager of the Company shall be the sole judge as to the right of the Company to retain the whole or any part of the deposit and wages, and his certificate in writing in respect of the amount to be retained and the cause of such retention shall be binding and conclusive evidence between the parties in all Courts of Justice."

On a reference from the Calcutta Court of Small Causes as to the effect of this agreement, held that it was a contract to refer to arbitration rendered valid by s. 28, example 1, of the Contract Act, and that the certificate of the Manager was conclusive.

A CONDUCTOR in the employ of the Calcutta Tramways Company brought this suit in the Calcutta Court of Small Causes against his employers, for the recovery of Rs. 18, of which Rs. 15 was a deposit, and Rs. 3 the balance of wages in the hands of the Company. The defendant company admitted the amount of deposit and the wages claimed; but put forward an [233] agreement which had been entered into by the conductor, at the time of his engagement, dated the 3rd of September 1883, and contended that the certificate of the Manager, given in accordance with article 7 thereof, was a bar to the plaintiff's claim. Article 7 provided that "the Manager of the Company, for the time being, shall be the sole judge between the Company and conductor, whether the Company is entitled to retain the whole or any part of the said Rs. 15, and also the wages due at time of discharge as liquidated damages, and his certificate in writing that the same or any given part thereof stated in such certificate are to be so retained, and of the cause of such retention shall be binding and conclusive evidence between the parties in all Courts of Justice." The Judge of the Calcutta Court of Small Causes (Baboo Kunja Lal Banerjee) was of opinion that an agreement, such as the one abovementioned, which had the effect of absolutely restraining a party from enforcing his rights in a Court of Justice, was void, and gave the plaintiff a decree. The Company applied for a new trial, and upon a difference of opinion between the Judges before whom the retrial was held, two points were referred to the High Court, the second of which was as follows.—

Whether or not the agreement of the 3rd of September 1883 absolutely restricts the plaintiff from enforcing his rights, and is, therefore, having regard to the provisions of s. 28 of the Indian Contract Act, 1872, void to that extent.

* Small Cause Court Reference No 6 of 1885, from a decision of H. Millet, Esq., and Baboo Kunja Lal Bannerjee, dated 2nd June 1884.

Mr. *Mullick* for the plaintiff.—The effect of article 7 is to make the Company, through its Manager, sole judge in its own cause. Moreover, such an agreement is void as it absolutely restrains a party from seeking his remedy in a Court of Justice, see Contract Act, s. 28.

Mr. *Gasper* for the defendant was not called upon.

The **Opinion** of the Court (GARTH, C. J., and WILSON, J.) on the point above mentioned was delivered by

Garth, C. J.—The point referred to us raises the question whether article 7 of the agreement between the parties can be enforced by the law of this country?

Under article 6 the Company are at liberty, in case of any breach of the rules by the conductor, to retain the whole of the [234] Rs. 15, which the latter deposited as security for his good behaviour, as liquidated damages for the breach; and they are also in the same way at liberty to retain any wages due to him, and then article 7 provides that the Manager of the Company for the time being shall be the sole judge between the Company and the conductor, as to whether the Company, in the event of any breach of the rules, is entitled to retain the whole or any part of the deposit of Rs. 15, and also all wages due at the time of his discharge, as liquidated damages; and the Manager's certificate in writing is to be conclusive evidence before any Court of Justice that the amount certified to be retained is correct, and that there is sufficient cause for its retention.

It is contended, that this article is in direct contravention of s. 28 of the Contract Act as ousting the jurisdiction of the Courts to adjudicate between the conductor and the Company under such circumstances.

Now s. 28, as I take it, intends to enact, as nearly as may be, what the law of England is upon the subject. It says, that "every agreement by which any party is restricted absolutely from enforcing his right under it, or in respect of any contract by usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void to that extent."

But then the first exception to the section provides, "that this is not to render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

The point which we have to determine here is, whether article 7 of the agreement now in question comes within that exception. I am of opinion that it does. The Manager of the Company is by that clause constituted by both parties the sole arbitrator between the Company and the conductor, as to whether, in the event of the conductor's misconduct, the Company is entitled to retain the whole or any part of the deposit of Rs. 15, and of any wages which may be due to him at the time of his discharge; and the certificate of the Manager [235] is to be conclusive evidence in all Courts of Justice of the amount which the Company are entitled to retain. That seems to me precisely such a case as comes within exception I of s. 28 of the Contract Act; and the dispute between the parties which has arisen in this instance has been decided by the Manager under the arbitration clause.

The point is very similar to those which so frequently occur in England, where an engineer or architect is constituted the arbitrator between a contractor and the person who employs him as to what should be allowed in case of dispute for extras or penalties.

It has been argued for the plaintiff, that the Manager in this case is virtually the Company. But this is not so. The Manager here is no more the Company than the engineer or the architect in the cases to which I have just referred is the employer. Both parties have faith in the Manager, and are content to place themselves in his hands, as an arbitrator between them in the event of dispute.

In the English case of the *London Tramways Company* against *Barley* (L.R., 3 Q. B. D., 217), to which we were referred, a precisely similar clause in the articles of agreement was held to be valid.

There the complainant was one of the conductors of the Tramways Company under an agreement very similar in its terms to that which we are now considering; and the Court held, that the certificate of the Manager was conclusive against the claim of the conductor.

If I am right in supposing that s. 28 of the Contract Act does virtually enact the law of England, that case is a direct authority in favour of the view which we take.

We therefore hold that the certificate of the Manager is conclusive evidence against the plaintiff's claim.

We make no order as to costs.

NOTES.

~ [The statutory remedies for enforcing an agreement to refer to arbitration should be noted. The Indian Contract Act 1872 originally provided for specific performance of such contract and barred other remedies. But the Specific Relief Act 1877 sec. 21 enacted that save as provided by the Code of Civil Procedure no contract to refer a controversy to arbitration shall be specifically enforced. See also the changes introduced by the Indian Arbitration Act 1899; 34 Bom., 13.]

[236] CRIMINAL REFERENCE

The 3rd March, 1885.

PRESENT.

MR. JUSTICE FIELD AND MR. JUSTICE BEVERLEY.

Ramanund Mahton.....Complainant

versus

Koylash Mahton.....Accused.

District Magistrate's Office—Deputy Magistrate placed in charge of current duties of District Magistrate's Office—Jurisdiction—Criminal Procedure Code—Act X of 1882, s. 437, Penal Code, Act XLV of 1860, ss. 379, 417—Summary trial—Splitting of charges for purpose of jurisdiction.

A Deputy Magistrate placed in charge of the current duties of the District Magistrate's Office is not thereby vested with jurisdiction under s. 437 of the Code of Criminal Procedure.

* Criminal Reference No. 29 of 1885, made under s. 438, by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 11th of February 1885.

Where an accused is charged with offences, one of which is triable summarily and the other not so triable, it is not open to a Magistrate to discard the latter charge and to proceed to try the case summarily.

ONE Ramanund Mahton preferred to the Magistrate of Sarun a complaint against one Koylash Mahton, under ss. 379 and 417 of the Penal Code. The Magistrate referred the case to a Bench of Magistrates. The Bench recorded the complainant's evidence, and referred the case to the Police for enquiry and report. On the receipt of the Police report, the President of the Bench passed the following order (presumably under s. 203 of the Criminal Procedure Code):—"There is neither theft nor cheating; I refer the plaintiff to the Civil Court for enforcing payment of the consideration-money; case struck off."

The complainant then applied for a re-hearing of his case, and the President of the Bench of Magistrates, (who was then in charge of the District Magistrate's office), in his capacity of Deputy Magistrate in charge of the District Magistrate's office, ordered the case to be restored to the file.

The Bench (the Deputy Magistrate presiding) thereupon tried the case summarily under s. 379 of the Penal Code, and convicted the accused, sentencing him to a fine of Rs. 50, or in default to one month's rigorous imprisonment.

The prisoner moved the Sessions Judge to refer the case to the High Court on the following grounds :—(1) that the Deputy [237] Magistrate had no jurisdiction to order the re-hearing of a complaint which he had already dismissed under s. 203 of the Criminal Procedure Code, the mere fact of his being in charge of the District Magistrate's office not giving him any power to pass such an order; and (2) that the District Magistrate having referred the case to the Bench for disposal under ss. 379 and 417 of the Penal Code, it was not open to the Bench, in order to give itself summary jurisdiction, to reject one part of the complaint under s. 417, which was not triable summarily, and to accept the other part of the complaint under s. 379, which was triable summarily.

The Sessions Judge, being of opinion that on the grounds above set out the proceedings of the Bench of Magistrates should be set aside, referred the case to the High Court.

No one appeared for either party on the reference.

The **Order** of the Court (FIELD and BEVERLEY, JJ.) was as follows :—

For the reasons set out by the Sessions Judge, we reverse the conviction of Koylash Mahton, and direct that the fine, if realized, be refunded.

A Deputy Magistrate placed in charge of the current duties of the District Magistrate's office is not thereby vested with jurisdiction under s. 437 of the Code of Criminal Procedure.

Conviction set aside.

NOTES.

[In (1900) 25 Bom., 90 this case was distinguished and held inapplicable to a case under sec. 396 I. P. C. when it was found that the offence committed came also within sec. 122 which for want of sanction of Government could not be proceeded with.]

[11 Cal. 237]
PRIVY COUNCIL.

The 14th November, 1884.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Deputy Commissioner of Rae Bareli.....Plaintiff
versus
Rampal Singh.....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Construction of instrument of mortgage.

An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to [238] credit the balance towards payment of the instalment, also contained the following. "Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me."

Held, that such an instrument must be taken as a whole, and that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it.

Held, accordingly (on the contention that these words negatived the mortgagee's right to take possession upon default in payment of an instalment, leaving him only a right to proceed to sale), that, as this construction would not give due effect to the first part of the instrument, it must yield to a construction which, not only would give such effect, but would also be the more reasonable one, *viz.*, that the mortgagee should take possession upon such a default, and also might sell if the mortgagee objected to his applying the rents in reduction of the principal and interest due.

APPEAL from a decree (31st October 1881), of the Judicial Commissioner of Oudh, reversing a decree (20th December 1880) of the District Judge of Rai Bareli.

This suit was instituted by the appellant as the manager, on behalf of the Court of Wards, in charge of the Pindri Ganeshpur estate, of which Shahdeo Singh was the proprietor, to obtain possession by enforcing a mortgage of thirty-one villages, executed by the respondent's wife, the Rani Subhao Koer, on the 10th March 1874. Possession was claimed on the ground that the mortgagor had failed to pay the stipulated yearly instalment.

This claim was resisted by Raja Rampal Singh, on the ground that the right to possession, on such default, depended, by the terms of the mortgage, on the mortgagor's consent; and that in the absence, or on the refusal, of such consent, the mortgagee must exercise his ordinary right of realizing his security by obtaining an order for sale, and selling his security.

The material parts of the mortgage-deed of 10th March 1874 are set forth in their Lordships' judgment, as well as the circumstances under which another defendant became, and ceased to be a party to this suit.

The District Judge of Rai Bareli, after concluding on that part of his judgment which is quoted by their Lordships, that the [239] power of obtaining possession by the mortgagee, on default being made in payment of the instalment, was given absolutely, added the following :—

“ Had such power been intended to be subject to the wish of the mortgagor, the natural way of expressing the idea would be *kabza de denge* (I will give possession), and there would have been an express mention that such delivery of possession would be contingent upon the will of the mortgagor. Such is not the case here. The form of mortgage in which property is mortgaged, and delivery of possession is made contingent upon failure of instalments, is very common, and in interpreting deeds of this kind, and in the absence of clear and explicit condition to the contrary, the Courts will not accept a construction which would materially vary the rights of the parties and create rights and obligations different to what they are understood to be under such mortgages. That, in executing the mortgage in question, the parties intended to create a mortgage different in its nature to the ordinary kind of mortgages does not appear from the deed, and I cannot hold that the words *agar mujh ko yeh manzur na ho* (if this be not agreeable to me) were intended to mean that the preceding terms of the mortgage would become null and void at the will of the mortgagor. Again, the expression used with reference to the mortgagee's power of recovering the instalment money is expressed in the words *wusul karlen* (may realise), an expression which by no means can be understood to confine and limit the mortgagee's remedy to that relief only ; but indicates option in the matter, as the grammatical sense of the words clearly shows. The clause appears to have been introduced to benefit the mortgagee by giving him immediate power of recovery of the mortgage money, and not to divest him of the power, which he would independently have, of obtaining possession on failure of due payment of instalments. So that, if the mortgagee chooses to waive his right of immediate recovery of the mortgage money, there is nothing to preclude him from falling back upon the power vested in him by the preceding conditions of the mortgage, and to seek recovery of possession. This construction receives further support from the circumstance that, even after the clause just referred to, the deed goes on to lay down certain [240] other conditions which relate to the mortgagee's rights whilst in possession.”

The Judicial Commissioner, holding that “ the mortgagee must realize his security,” reversed the decree of the District Judge.

On this appeal—

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe*, for the Appellant, argued that the decision of the Judicial Commissioner was wrong. The first Court had rightly held that the instrument gave the mortgagee the right to convert the mortgage, upon a default occurring in payment of the instalments, from one without possession into a mortgage with possession. This power had not been put, by the effect of subsequent words, under the control of the mortgagor to compel the mortgagee to sell.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the Respondent, contended that there was an actual expression of the intention of the parties, to the effect that possession could not be taken on the part of the mortgagee, without the consent of the mortgagor.

Counsel for the Respondent were not called upon to reply.

Their Lordships' Judgment was delivered by

Sir R. Couch.—The suit in this case was brought by the present appellant. The plaint prayed that under the terms of an instrument of mortgage, dated the 10th March 1874, possession as mortgagee of 31 villages specified in that

instrument of mortgage should be awarded to the plaintiff. At the time of filing the plaint the respondent Raja Rampal Singh, was not in possession of the villages. The person in possession was Dirgaj Kunwar, his mother. Rampal Singh was made a defendant on the ground that, under the circumstances which were stated in the plaint, he was liable to pay the original debt, and was the real owner of the mortgaged villages. Dirgaj Kunwar was made a defendant as being the party in possession. The plaint was filed on the 31st March 1880. On the 11th June 1880 there were proceedings for mutation of names. It is not necessary to go into the particulars of those proceedings, the result of which was that Rampal Singh came into possession, and on the 14th June, in his written statement in the suit, he defended [241] it as being in possession, and Dirgaj Kunwar in fact became no longer a real party to it. The contest is between the present appellant and Rampal Singh. The only question which is now raised is upon the construction of the mortgage of the 10th March 1874.

The terms of that mortgage, after reciting particulars showing how it came to be entered into, are these. After stating that there was to be a mortgage for Rs. 50,000, with a promise to pay it up in five years, from 1875 to 1879, it proceeds,—“Therefore, I, while enjoying sound health and proper senses, do hereby mortgage without possession to the Shahzada, in lieu of Rs. 50,000, being the balance of the consideration of the above mentioned decree, the following villages, as per boundaries given below, situate in the above-named pargana and district, together with all vested and contingent rights, the gross rental of which is Rs. 18,253-12-3, and the Government revenue, Rs. 7,986, my husband having gifted them to me by a deed of gift dated 2nd June 1873, with power to sell, or mortgage, or transfer in every way the proprietary right, and I holding possession thereof. Raja Hanwant Singh, my father-in-law, has also recognised the fact by the decree dated 7th September 1871, and in case of change of heirs from time to time this property cannot be taken out of my possession; and I covenant as follows. (1) I will pay Rs. 10,000 per annum at both crops to the Shahzada Sahib, and of that amount his servants will first deduct the interest, whatever it may come to by calculation, and then credit the balance towards the principal and in case of any disorder which may cause default in payment of the instalment, the servants of the Shahzada Sahib Bahadur, taking complete possession of the mortgaged estate, will hold themselves liable for the payment of the Government revenue, including land revenue and cesses of all sorts, and having first deducted from the savings the cost of making collections at the rate of 10 per cent, on the gross rental on account of the pay of servants, will credit the balance towards the instalment money, at the end of each year, in the months of May, June, November and December, having made up accounts, they will note the date of realisation. Till the time the accounts are not made up [242] there will be no claim or objection on my part to set off the interest against the amount collected; on the other hand the amount collected will be considered as amount in deposit.” To stop here for the present, there is here a distinct provision that upon default in payment of an instalment the mortgagee by his servants was to take possession of the mortgaged property, and to collect the revenue, and apply it towards the payment of the instalment. The words are. “The servants taking complete possession.” That evidently shows that possession was to be taken, the mortgagee was to have power to take possession on the non-payment of an instalment. What is said by the District Judge in his judgment is very pertinent to this part of the instrument. He says “The question involved in the fifth issue now remains to be determined, viz., whether under “the terms of the deed of mortgage the plaintiff is entitled to sue for possession. The words of the deed, so far as they bear upon this point, have been

“carefully read and considered by me in the original Hindustani, and a literal translation has been given above in this judgment. There is no doubt that there is some ambiguity in the language of the deed. That a breach of the condition as to regular payment of instalments has taken place is not denied on behalf of the defence, but it is contended that such breach having taken place the plaintiff's only remedy is to sue for the recovery of the mortgage debt, and that the plaintiff's right to enter into possession was intended to be contingent upon the wish of the mortgagor. For this contention the defence relies upon these words of the deed ‘And if this be not agreeable to me, then immediately on the happening of the breach of promise, after the end of the year, they may realize the entire instalment money, etc.’ It is contended by the defence that the word ‘this’ (*yeh*), used in the above sentence, applies to all the preceding conditions in the deed, and that it makes the condition of taking possession entirely dependent upon the mortgagor's wish. But I am of opinion that this is not a fair construction of the Hindustani words as they are used in the deed. The language of the deed shows that the power of obtaining possession on failure of regular and full payment of instalments was given absolutely, the words used being *kabza karke* (having taken possession), [243] “and emphasised by the words *usī wakt*, at once, which, read together, indicate absolute power to take possession.” Therefore we have in the first part of this instrument an absolute power on the part of the mortgagee to take possession on non-payment of an instalment. That this was contemplated is shown also by the provision at the end of the instrument, which says. “Should, on the expiry of the term of this instrument, any money remain due, then, till the payment thereof, possession will continue according to the terms herein set out.” Then, after the passage which has been read, comes the part upon which the respondent relies. “If I do not accept this, then as soon as the breach of promise occurs they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me. Should in any way any objection be raised by me, or by my husband, as between us or in Court, it will be void.” The contention on the part of the respondent is, that these words apply to all the previous parts of the deed, and that the mortgagee could not take possession, except at the option of the mortgagor, and if the mortgagor thought fit to say that the mortgagee should not take possession but should realize the amount of the instalment by sale of the villages, that course must be adopted, and a suit for possession could not be maintained. Now the consequence of putting such a construction as that on this part of the instrument would be to make it not consistent with the former part, which gives a power to take absolute possession. The instrument must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it. A construction which will give effect to all is that the words, “if I do not accept this,” may be referred to the part which immediately precedes that passage, namely, that which provides for the setting off the interest against the amount collected by the mortgagee when in possession. The other construction would not only not give the proper effect to the first part of the instrument, but it would also involve what could scarcely have been contemplated by the parties, viz., that the only security, the only remedy which the mortgagee would have if the mortgagor thought fit to insist [244] upon it, would be that upon default in payment of an instalment he would be obliged to sell a portion of the property so as to realize the amount of that instalment. That can scarcely have been in the contemplation of the parties. The instrument must be looked at as a whole, and in their Lordships' opinion the reasonable construction is that there was an

absolute power to the mortgagee to take possession on default in payment of an instalment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and other property which was brought into the security, in order to satisfy the debt. This seems to their Lordships to be the reasonable construction of the instrument. It is the construction which the District Judge put upon it, but which the Judicial Commissioner thought was wrong, and therefore reversed his judgment.

Their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, leaving the judgment of the District Judge to stand, and the respondent will pay the costs of this appeal, and the costs of the appeal in the Court of the Judicial Commissioner.

Solicitor for the Appellant. *Mr H Treasure.*

Solicitors for the Respondent. *Messrs. Deane, Chubb & Co.*

NOTES

[The instrument should be construed as a whole —(1911) 14 O C, 189 11 I.C, 685
See also 11 Cal, 121 *supra*]

[11 Cal. 244]

PRIVY COUNCIL

The 18th November, 1884.

PRESENT

LORD FITZGERALD, SIR B PEACOCK, SIR R P COLLIER,
SIR R COUCH AND SIR A. HOBHOUSE.

Bishenmun Singh and others. . . . Objectors

versus

The Land Mortgage Bank of India Petitioners.

[On appeal from the High Court at Fort William in Bengal]

Jurisdiction as between District Judge and Subordinate Judge of a Court making a decree to execute it, notwithstanding certain special matters

The sale of mortgaged property was decreed by a Subordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees in both suits in the District Court, it was objected that execution could [245] not proceed therein, on the ground that the decree for sale was that of the Subordinate Court.

Held, that the decree (which affected the whole property mortgaged) was that of the District Court, which accordingly had jurisdiction to execute it. To have enabled the Subordinate Court so to do, an order by the District Court would have been necessary.

Matter which had no bearing on the question raised on this appeal having been introduced into the record, it was ordered that all such costs as might have been so occasioned should be disallowed by the Registrar, on the taxation of costs.

*APPEAL from a decree (8th April 1881) of the High Court, dismissing an appeal of the present appellant from a decree (6th November 1880) of the District Judge of Bhagalpore.

The above concurrent decrees were made in execution proceedings taken by the present respondents against the appellants. The question now raised was as to the jurisdiction of the District Court to execute the decree of which execution was sought, as that of the District Judge, the appellants contending that it could be executed only by the Court of the Subordinate Judge of that district.

A mortgage by the appellant to the respondent bank not having been satisfied, a suit was instituted thereupon by the latter. A decree was made on the 8th January 1877, for Rs. 1,69,515, to be executed against the property mortgaged.

On application for execution by attachment and sale, certain intervenors objected that the judgment-debtors had, before the mortgage, parted with their interest in part of the mortgaged property. The Subordinate Judge allowed this objection as to part of the property, upholding the right of the decree-holder to execute against the remainder.

The bank then sued the present appellants in the Court of the Subordinate Judge, asking for a declaration that the properties which had been acquired in lieu of those which the mortgagors professed to mortgage should be held subject to the mortgage.

This suit having been transferred for trial to the Court of the District Judge, the defendants agreed to the substitution, filing an answer to the effect that the property substituted should be liable to be sold in execution of the decree obtained by the bank in the Court of the Subordinate Judge on the 8th January 1877, [246] and that, for the purpose of that auction sale, this suit ought to be taken as "supplemental" to the former one, and that the decree of the above date should be "amended" accordingly. It was further agreed that the appellants should have six months' time for payment. The Judge, on the 6th August 1879, made a decree in terms of this agreement.

For execution of this decree by attachment and sale of all the properties, the bank applied to the District Judge. The present appellants objected that execution in the District Court was unauthorized by the terms of the decree.

This objection was disallowed by the District Court, and a Divisional Bench of the High Court (CUNNINGHAM and PRINSEP, JJ.), dismissed an appeal from this order.

On this appeal—

Mr *J. F. Leith*, Q.C., and Mr. *C. W. Arathoon*, for the Appellants, argued that the sale having been ordered by the Subordinate Court on 13th August 1877, and that order remaining, should have been carried out in that Court.

The District Court did not itself decree the sale, but made a decree "supplemental" in its own terms to that of the Subordinate Court. Thus the order for sale could not be said to be that of the District Court. Reference was made to ss 223 and 224 of the Code of Civil Procedure, Act X of 1877.

Mr. *R. V. Doyne* (with whom was Mr. *Horace Davey*) for the Respondent was not called upon.

Their Lordships' Judgment was delivered by

Sir A. Hobhouse.—The question raised in this appeal relates to the propriety of a sale effected on the 6th November 1880, under the order of the District Judge of Bhagulpore. The appellants are the judgment-debtors of the respondents, and the debt was secured by a mortgage. A suit was instituted by the respondents before the Subordinate Judge of Bhagulpore, for the purpose of realising that mortgage, and on the 8th January 1877 a decree was made, under which the property comprised in the mortgage was to be sold. Before the sale was

effected certain objectors appeared, and then it turned out that the appellants had assumed to [247] include in this mortgage certain property which, by a previous family arrangement, had passed to other members of the family. But, at the same time, and by the same arrangement, the appellants had received other properties which were not included in the mortgage. The respondents then instituted another suit, also in the Court of the Subordinate Judge of Bhagulpore, for the purpose of bringing within the influence of the mortgage the property which by the family arrangement had been substituted for the property that was professedly mortgaged, but did not belong to the mortgagors. That suit was called up by the District Judge into his Court, and in that suit a decree was made on the 6th August 1879 by the District Judge, which has now to be construed.

The decree was made by the consent of the debtors, and the effect of it was this: The Court declared that the substituted properties were fit to be sold by auction in execution of the decree of the creditors (that is, the decree of the 8th January 1877), and that for the purpose of that auction sale this suit ought to be taken as supplemental to the former suit. Then it directed that the mortgage given by the debtors to the creditors, and the aforesaid decree of the 8th January 1877, should be amended according to the previous declaration. Another term of the consent decree was that the debtors should have six months' time, from the date of decree in the new suit, for making arrangements for payment of the amount due.

Those were the main terms agreed upon, and embodied in the decree. The six months elapsed, and some time after they had elapsed the creditors, the respondents, presented a petition for execution of the decree in the second suit. It has been disputed whether it was a petition for the execution of the decrees in both suits. Part of the petition looks one way and part the other, but it may be taken to be, as the appellants contend, that it was a petition for the execution of the decrees in both suits. Now it is a very odd thing that there is not in this record any copy of the order made upon that petition. All their Lordships find is that an order was made fixing the sale for the 5th November 1880, and that an application was made by the appellants for a postponement of that sale. The [248] application seems to have been made on the very day for which the sale was fixed. The Judge refused that application. The sale took place. The appellants say they are aggrieved by that sale, and they seek by this appeal in some way to disturb the sale. It is difficult to say what they seek, because they now rest their case upon the allegation that the execution proceedings should have been carried into effect by the Subordinate Judge, and that the District Judge had no such power. If so, the order by which the appellants are aggrieved is the order which was made in answer to the petition for execution, and which ordered the sale, and that order is not appealed from. The order that is appealed from is the order made by the District Judge refusing the application to postpone the sale, which was a totally different question. It would be exceedingly difficult for the appellants to succeed, even if there were no jurisdiction, because they have never taken the proper course to complain on the ground of want of jurisdiction. They complain only of that which is discretionary in the Judge, of ordering the sale to take place at the time fixed or to postpone it. That is the ground of appeal to the High Court, and the ground of their appeal here.

But their Lordships do not desire to rest their decision upon that point. They think on the point which has been argued at the bar here, though it is not properly raised by the petition of appeal, that the appellants have shown no case for disturbing the order made by the District Judge. It is quite clear that in applying to the District Court for execution of the decree in the new

suit the parties must have considered that the decree was one of the District Judge, and to be carried out by the District Judge, and though unfortunately we have not got the order made on the petition for execution, the District Judge himself must have so considered, because he made the order for the sale, and the sole question is whether the decree of the 6th August 1879 was the decree of the District Judge.

Now, like other decrees of Indian Courts, this is not drawn in the most artistic form, and it might be open to argument whether in saying the decree of the Subordinate Judge should be amended that decree still remained the decree of the Subordinate [249] Judge, but their Lordships think that, even construing the language of the decree strictly, the better construction is that it was intended the decree should be that of the District Judge, and they think that in point of procedure it was more proper to make it the decree of the District Judge than the decree of the Subordinate Judge. If then it was desired that the Subordinate Judge should execute the decree, there should have been an order made by the District Judge ordering the subordinate Court to carry the decree into execution. The District Judge did not take that view. He carried his own decree into execution, and their Lordships consider that the decree which he carried into execution drew up into itself the decree of the Court below, and that it was in effect a decree for a sale of the whole of the property which the new suit approved to be the property affected by the mortgage. It may be observed in construing that decree that there is certainly one term in it which applies to the whole property, that which was originally well mortgaged, and that which was substituted into the mortgage, namely, that six months' time should be allowed to the appellants to make arrangements. Their Lordships think that on the broad construction of this decree the sensible view of it is to hold that it was the decree of the District Judge, that it affected the whole property mortgaged, and that his jurisdiction to order execution was clear.

The result is that the appeal ought to be dismissed, and their Lordships will therefore humbly advise Her Majesty to that effect.

The appellants must pay the costs of the appeal, but their Lordships observe that in this record, as in many others that come before them, there is matter introduced which could not possibly have any bearing upon the question raised by the appeal. There is a map of the district of Bhagulpore, which is nothing but a copy of a public map. It is not an estate map, and even if it were, it would be difficult to see how it could bear on the question involved in this appeal. There are also nearly 30 pages of *jummabandi* accounts, and it is impossible to understand how those could have had any bearing upon the appeal. Therefore, in the taxation of the costs, their Lordships [250] desire that the Registrar shall disallow all such as have been occasioned by the introduction of irrelevant matter.

Solicitor for the Appellants *Mr. T. L. Wilson.*

Solicitors for the Respondents *Messrs Freshfields and Williams.*

NOTES.

[On the question of priority this case was distinguished in (1894) 18 Mad., 61 (63) as, there, the purchaser had for years allowed the vendor to remain in possession and thereby put him in a position to hold out to others that it was his.

As regards the costs entailed by the introduction of unnecessary records, the Privy Council animadverted upon the practice in (1884) 8 Mad., 219 and directed the Registrar to treat them as not forming part of the record, in taxing the costs.

Their Lordships expressed themselves even more strongly in (1902) 25 Mad., 678 P.C. = 29 I. A., 156, and suggested to the High Court the desirability of framing regulations, if none existed, to check this abuse.]

[11 Cal. 250]
APPELLATE CIVIL.

The 26th January, 1885.

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE O'KINEALY.

Hara Sundari DebiOne of the Defendants
versus
Kumar Dukhinessur Malia (Plaintiff) and others Defendants.*

*Agreement of parties—Compromise— Decree on Compromise—Appeal—
Code of Civil Procedure, Act XIV of 1882, s. 375.*

After suit filed by the plaintiff against several defendants, one of whom was an infant, a petition of compromise entered into between the adult parties was filed in Court. The petition stated the terms of arrangement, and also that an application would be made by the guardian of the minor praying the Court to allow the compromise to be carried out on his behalf. Ten days after the petition of compromise was filed, the first defendant and the plaintiff presented petitions to the Court withdrawing from the compromise, and praying that the suit should proceed. The second defendant presented a petition praying that the compromise should be recorded, and a decree passed according to its terms. The Court made a decree in accordance with the prayer of the second defendant's petition. The first defendant appealed.

Held, that an appeal lay, and that the lower Court was wrong in enforcing the compromise at the instance of the second defendant.

Seemle, that s. 375 of the Code of Civil Procedure merely covers cases in which all parties consent to have the terms entered into, carried out and judgment entered up.

Ruttonsey Lalji v. Poorban (I. L. R. 7 Bom. 304) questioned.

GOBIND PROSAD PUNDIT died on the 30th of December 1861, leaving him surviving his widow Darimba Debi, who died in 1872, and three daughters—Shama Sundari, who died in 1870, Hara Sundari, the defendant No. 1, and Uttum Coomaree, the defendant No. 3, who was a childless widow at the death of her mother. [251] Hara Sundari had five sons—Biresur Malia (who died in 1879, leaving him surviving one son, Promothonath Malia, defendant No. 4), Ramessur Malia, the defendant No. 2, Surbeshur Malia, who died in 1865, Dukhinessur Malia, the plaintiff, and Songeshwar Malia, who died in 1865.

On the 17th of June 1858, Gobind Prosad made and published his last will and testament, whereby he, after declaring he had endowed a certain idol with his entire estate, made certain charitable bequests, gave certain legacies, and laid down rules as to the maintenance of his family. On his death in 1861, the executors appointed by the will refused to act, and his widow Darimba Debi took out a certificate under Act XXVII of 1860, and administered the estate, describing herself as *shebait*, of the idol. From the death of Darimba in 1872, the defendant Hara Sundari managed the estate. On the 19th of October 1881, Uttum Coomaree, who claimed to be entitled to an eight-anna share of the property of Gobind Prosad, on the ground that the family was governed by Mitakshara law, assigned all right, title, and interest in the same to the plaintiff. On the 9th of February 1882, the plaintiff filed

* Appeal from Original Decree No. 39 of 1884, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Burdwan, dated the 29th of November 1883.

the present suit, claiming to be entitled to, and to possession of an eight-anna share of the property left by Gobind Prosad, asking to have the will construed, and alleging that the majority of its provisions were bad in law as tending to create a perpetuity and secure perpetual accumulation of the bulk of the income. The defendant Hara Sundari contended that the will was valid; that under it she was solely entitled to the management of the estate, and that the plaintiff had no cause of action. Ramessur Malia's defence was to the same effect, save that he charged Hara Sundari with having committed breaches of trust in order to assist the plaintiff in his present claim. Uttum Coomaree supported the plaintiff. Promothonath Malia, an infant of the age of twelve years, adopted the written statement of Ramessur Malia.

On the 10th of August 1883, a petition of compromise, signed by the adult parties, was filed in the Court of the Subordinate Judge, stating the terms upon which the parties had agreed to settle all their disputes, stating also that a deed embodying the terms and executed by all the parties [232] should be filed in Court, and that the guardian of the minor would make a formal application to the Court for an order allowing him to enter into the compromise. On the 22nd of August 1883, Hara Sundari filed a petition withdrawing her assent to the compromise, on the grounds that, when the terms of the compromise were read over to her, she was weak and ill, that she had no advice as to what she ought to do, and that she had not been able to understand the meaning of the compromise. On the same day, the plaintiff also presented a petition to the Court withdrawing his assent to the compromise, and praying that the suit should proceed, while Ramessur Malia, the defendant No. 2, presented a counter-petition praying that a decree might be passed in terms of the compromise of the 10th of August. On the 28th of August 1883, the Subordinate Judge, following the case of *Syud Mehndi Ali Khan v. Konwar Ramchunder Bahadoor* (S. D. A., 1851, p. 381) passed an order directing the suit to proceed for trial on the merits. Thereupon Ramessur Malia obtained a rule from the High Court calling upon the other parties to show cause why that order should not be set aside, and why a decree should not be entered up in terms of the compromise. On argument, this rule was discharged with costs on the 12th of September 1883, but the Subordinate Judge was recommended to investigate the circumstances under which the compromise was entered into (during the trial of the other parts of the case), so as to enable the Court to deal fully with the whole case on appeal.

On the 2nd of November 1883, the Subordinate Judge fixed the following additional issue. "Whether the Maharani, defendant No. 1, did agree to the petition of the 10th of August 1883, and whether it is binding on the parties to the suit." And on the same day the guardian of the minor presented a petition to the Court praying that the compromise would be carried out. On the hearing the Judge found that the Maharani did agree to its terms, and he held that it was binding on the parties to the suit on the authority of *Ruttonsey Lalji v. Pooribai* (I. L. R., 7 Bom., 304). The defendant Hara Sundari appealed to the High Court. On the hearing a preliminary objection was taken [253] by Mr. Bonnerjee for Ramessur Malia that no appeal lay under s. 375 of the Code of Civil Procedure, the judgment of the lower Court having been passed in terms of the compromise, but the Court held that the appeal was not barred in a case like the present, where the question was whether the circumstances warranted the application of s. 375—*Sashti Charan Chatterjee v. Tarak Ohandra Chatterjee* (8 B. L. R., 315); *Boonjad Mathoor v. Nathoo Shahoo* (I. L. R., 3 Cal., 375).

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Chunder Madhub Ghose*, Baboo *Taraprosono Sen*, for appellants, contended that s. 375 was never intended to refer to any case except where the consent was given and existed up to recording the compromise in Court. This was really a suit for specific performance of a compromise, that compromise being a breach of trust on the part of the defendant Hara Sundari, that the plaintiff with whom it was made did not seek to enforce it, and it could not be enforced at the instance of the second defendant. *Ruttonsey Lalji v. Pooribai* (I. L. R., 7 Bom., 304) is not in point.

Mr. *Bonnerjee*, Baboo *Gurudas Bannerjee*, Baboo *Jugut Chunder Bannerjee*, Baboo *Pran Nath Pundit*, and Baboo *Ratnessur Sen* for the respondents contended that s. 375 did apply, that the compromise was a proper one to be carried out as a fair family arrangement come to after long discussion—2 White and Tudor's Leading Cases in Equity, 5th ed., p. 860, *Stewart v. Stewart* (6 Cl. & Fin., 911).

The Judgment of the Court was delivered by

Pigot, J.—This is a suit by one Kumar Dukhinessur Malia against Maharani Hara Sundari Debi for possession of certain property.

The circumstances out of which this suit has arisen are as follows:—The property in dispute admittedly belonged to Baboo Gobind Prosad Pundit, and was disposed of by his will, dated the 4th Asar 1265, in which he purported to dedicate it to an idol, Sri Damudor Chunder Jew. On the death of Baboo Gobind Prosad Pundit, his widow entered into possession of [254] this property as *shebani*; and after her, her second daughter Maharani Hara Sundari Debi, defendant No. 1 in the cause. Plaintiff asserts that neither the deceased Baboo Gobind Prosad Pundit, nor his widow, dealt with the property as the property dedicated to the idol, but as family property. Further, he submits that the will is void and inoperative, except so far as the religious and charitable and other gifts contained therein are concerned, and he claims in his own right, and as assignee of one of the heirs under Mitakshara law, to have the will construed, his rights declared, and possession given to him of the property in dispute.

In answer, the defendant Hara Sundari Debi asserts that the whole property has been validly endowed by Gobind Prosad Pundit, and that she holds as *shebani*; and she denies that the family is governed by the Mitakshara law.

The written statement of the defendant No. 2, Kumar Ramessur Malia, supports her answer. In paragraph No. 4 of his written statement he asserts that the will created a valid dedication of all the property to the idol. In paragraph 7 he denies the allegation in the plaint that there never was any actual dedication of the estate to the idol Damudor Chunder Jew. And in paragraph 11, after asserting that the Maharani is acting as *shebani* under the will, he goes on to say that she "has at various times committed breaches of trust in order to assist the plaintiff in his present claim."

On these pleadings, ten issues were raised by the lower Court.

While the case was under trial, the parties came to a compromise which is to be found at page 112 of the paper book.

In this compromise it is recited as follows :—

“There are serious doubts as to whether the will of the late Baboo Gobind Prosad Pundit, dated the 4th Asar 1265 B. S., will be valid and binding in its entirety, and the opinion of most of the vakeels and counsel is, that provisions contained in the said will as to the *sheba* and worship of Iswar Damudor Chunder Jew and public charity, &c., &c, and the expenses required for the purposes thereof, are proper charges on the estate of the said pundit; and that the residue of the properties and the surplus income thereof have not been appropriated to *Deb-sheba* [255] (service of the Deity) or public charities or any other purposes according to the will aforesaid, and that they are inheritable by his legal heirs. However, it being highly necessary to save trouble and expense of all parties amongst ourselves, and to settle the rights of one another, and to remove all uncertainty regarding them, we all thus decide the abovementioned suit, and settle and define our several rights to the estate left by the late Gobind Prosad Pundit in the manner following.”

Under the settlement, Rs. 20,000 was set apart to defray the expenses of the worship of the idol. Promothonath Malia, not a party to the suit, was given 2½ annas of the residue, and the remaining 13½ annas were divided between Kumar Ramessui Malia, defendant No 2, and Kumar Dukhinessur Malia, plaintiff.

The Maharani retained the management of the property during her lifetime.

This petition of compromise is dated the 10th August 1863. On the 22nd August, that is to say, twelve days later, the Maharani presented a petition in the Court of the Subordinate Judge, saying that she had entered into the compromise under pressure, did not understand its contents, and asked to be relieved. This petition was subsequently verified.

On the 28th August 1863, the case coming on for hearing before the Subordinate Judge, he held, on the strength of a ruling of the Sudder Dewani Adawlut in the year 1851, that the defendant was entitled to recede from the compromise before it had been completely carried out by the sanction of the Court and judgment recorded.

The case then came before this Court on motion, asking that the Subordinate Judge be directed to exercise jurisdiction, and give judgment according to the terms of the compromise.

The rule which was issued on that motion was discharged. But the Judges pointed out that the Court below, when dealing with the whole cause, would exercise a wise discretion in determining whether the document was binding upon the lady or not, in order that when the case came before this Court, the whole might be tried out once for all.

After the rule was discharged, the Subordinate Judge, instead of doing what he ought to have done, namely, deciding all the [256] issues in the cause, restricted his inquiry to the fact whether the Rani was bound by the terms of compromise or not, and decreed the suit accordingly. We think it is to be regretted that he should have done so.

The Maharani now appeals, urging that under the circumstances the compromise should not be the basis of a decree under s. 375 of the Code of Civil Procedure. The plaintiff supports the allegation, and as a fact receded from

the compromise before the judgment had been entered up in the lower Court. The person who insists on the compromise being carried out is Kumar Rames-sur Malia, defendant No. 2, and his contention is, that the compromise having been effected under s. 375 of the Code, no appeal lies. In support of that he has cited the case of *Ruttonsey Lalji v. Pooribai* (I. L. R. 7 Bom., 304), in which an agreement out of Court from which one of the parties wished to recede was enforced on motion under s. 375 of the Code. That section runs as follows.—“If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith, so far as it relates to the suit, and such decree shall be final, so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction”

This section is not new, but an amendment and modification of a corresponding section in Act VIII of 1859, and, as at present advised, it appears to us clear, with great deference to the opinion expressed in the Bombay case, that it merely covers cases in which all parties consent to have the terms entered into, carried out, and judgment entered up, and does not cover a case like the present in which the parties or some of them have declined to carry out the agreement before the judgment has been recorded. In the first place the section states that the decree shall be final, so that if it be applied to cases where the agreement is sought to be enforced against an unwilling party, the Court would have no power to refuse specific performance, although if it had been [257] sought to be enforced in a regular suit, specific performance might never be obtained. Again, in the one case, the decree is final in the other case, it is subject to appeal. These considerations lead us to the conclusion that s. 375 of the Code was never intended to cover cases in which one of the parties is unwilling to have the judgment entered up. In such a case the decree must be considered as a decree for specific performance and not under s. 375 of the Code.

We think, therefore, that the preliminary contention of the respondent that no appeal lies cannot be sustained

Even assuming that s. 375 of the Code is applicable to a case in which an adjustment has been repudiated by either plaintiff or defendant before the decree has been recorded, still we find reasons for concluding that that decree should not be allowed to stand. The Maharani is in possession of the property. It is against her that the plaintiff claims relief. He has receded from the compromise, and so did she, the party seeking to enforce it is the second defendant. So that we have this peculiar circumstance that, in a suit between the plaintiff and the defendant, the second defendant is endeavouring to enforce by motion the agreement against his co-defendant. In other words, he is seeking to do what was decided in the case of *Piercy v. Young* (L. R., 15 Ch. D., 475) he cannot do, namely, to take the conduct of the case out of the plaintiff's hands.

Again, the statement of the lady and the second defendant as to the position which this lady holds towards the property, raises a question of importance. As we understand, the first duty of a trustee is to carry out the directions of the settlement, except such as are illegal, and if he has once acknowledged himself to be a trustee he cannot set up a title adverse to that of

the beneficial owner. Here the party who seeks to enforce the compromise, and the party who objects, both admit that the lady has no beneficial interest in the land, and that she holds solely on behalf of an idol. The only ground in the recital of the compromise for partitioning the property among the family is that the trustee and others have some doubts whether the trust is valid.

[258] Then, again, the lady asserts that the compromise was obtained from her by pressure and by misstatement of facts.

Looking then at the whole case, we think that, even if it were one in which specific performance should be given, which we are far from saying, the defendant Ramessur Malia must seek such performance in a regular suit.

We are, therefore, of opinion that the decree of the lower Court must be set aside, and the case must be remanded for retrial upon the original issues.

Decree set aside and case remanded.

NOTES.

[This view as regards the effect of objection to compromise by some of the parties has not been adopted by the Calcutta High Court —(1897) 24 Cal , 908.=1 C. W. N., 597, nor by other High Courts —(1885) 8 Mad., 482; 9 Mad., 103; (1883) 7 Bom , 304 , (1891) 16 Bom., 202; 12 C. P. L. R , 56 , 5 O C , 49.

The compromise may be oral or written .—(1909) 13 C W. N , 1023

The Court has power to enter into the fact of a valid compromise —C P. C , 1908, O 23, r. 3; (1912) 15 Bom., L. R., 340 , (1899) 23 Mad 101 , (1895) 20 Bom , 304 , 2 O C , 67]

[11 Cal 258]

APPELLATE CIVIL.

The 3rd February, 1885.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE TREVELYAN.

Lala Dilawar Sahai and others..... Defendants

versus

Dewan Bolakiram and another.Plaintiffs.

*Mortgagor and mortgagees— Priority—Marshalling of securities—
Purchaser for value.*

Where the owner of certain property mortgages it to A, and afterwards sells a portion of the mortgaged property to B, it is not incumbent on A in suing to enforce his mortgage

* Appeal from Appellate Decree No. 2837 of 1883. against the decree of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 27th of August 1883, affirming the decree of E. G. Lillingston, Esq., Deputy Commissioner and Sub-Judge of Hazaribagh, dated 23rd of November 1882.

to proceed first against that portion of the property which has not been sold by the mortgagor.

IN this case the plaint stated that the defendants No. 1, Lala Dilawar Sahai and others, by two deeds, bearing date the 18th of April 1876 and the 5th of January 1877 respectively mortgaged to the plaintiffs a two annas share in eighteen villages; that, on the 19th of July 1878, the plaintiffs obtained a mortgage decree on their mortgage, and in execution of this decree they attached the mortgaged properties. The defendants filed various objections, but the only one material for the purposes of this report were those filed by the defendants No. 2, the Panray defendants, who claimed as purchasers of two of the 18 villages under a deed of sale, dated the 30th of April 1878, and they claimed to have priority over the plaintiffs on the ground that their purchase-money was applied in payment of a prior mortgage on those villages which had been executed in the year 1871. The plaintiffs' claim was disallowed, and they [259] then brought the present suit for a declaration that the two annas share of the defendants No. 1 in the 18 villages were liable to be sold under the decree of the 19th of July 1878, for an order for attachment and sale of the said two annas, and for general relief. The defendants raised the same defences as in the previous claim, but the Court of First Instance found that the Panrays' purchase was unconnected with any previous mortgage, and gave the plaintiffs a decree. It was contended by the Panrays, on the authority of *Bishonath Mookerjee v Kisto Mohun Mookerjee* (7 W R, 483), that the plaintiffs were bound to proceed first against the villages, other than the two which they had purchased on the 30th of April 1878, but the Judge held that that case did not apply. The defendants appealed to the Judicial Commissioner, who affirmed the decree of the Court of First Instance. The defendants appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Koruna Sindhu Mookerjee* for the Appellants.

Baboo *Kali Mohun Doss* and Baboo *Bussunt Koomar Bose* for the Respondents.

The Judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

This is a suit in which the plaintiffs as mortgagees sue to have it declared that certain properties in possession of the defendants are liable to attachment and sale as the property of their judgment-debtors. The defendants have raised several issues: *first*, they contend that they are in a position to claim the benefit of a prior mortgage, *secondly*, they say that, even if that be not the case, still they are entitled to throw the mortgagees on other properties to save the property in their own possession.

Now, in regard to the first point, we think that the defendants are not entitled to the benefit of the first security, for there is nothing on the record to show the relative dates of the conveyance and the payment of the money; nor

is there any finding by the lower Court that they paid the money to the original mortgagee.* We do not think, therefore, that they have shown they are entitled to take the benefit of the first mortgage.

[260] Then, as to the second point, the defendants contend that the plaintiff is not entitled to a declaration that the property is liable to attachment and sale, unless he has shown that he has exhausted the other property.

Reliance has been placed on two cases referred to in Story's Equity and Jurisprudence. One is the case of *Hartly v. O'Flaherty* (L. & G. temp. Plunkett, p. 208, 1 Beat, 61). This was a suit to determine whether a mortgagee of a portion of an estate, having paid a Crown debt overriding the entire estate, the mortgagee was entitled to contribution from the purchasers of the other portions. It was not a case of the present kind. In one portion of the judgment, page 216, it is said. "If a mortgagor sells a portion of his equity of redemption for valuable or good consideration, the entire residue, if undisposed of by him, is applicable in the first instance to the discharge of the mortgage, and in ease of a *bond fide* purchaser." This case came under the consideration of the Lord Chancellor in the case of *Averall v. Wade* (L. & G. temp. Sugden, p. 252), and there the Lord Chancellor said "The general doctrine is this, where one creditor has a demand against two estates, and another demand against one only, the latter is entitled to throw the former on the fund that is not common to them both. This is a narrow doctrine, and cannot generally be enforced against an incumbrancer, who is a mortgagee. Whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the debtor to redeem, or he may foreclose. In Ireland, indeed, there would be a decree for sale, and the mortgagee would be entitled to no more than his money, and the Court would deal with the surplus in such manner as it might think fit, so that the equity might be worked out, but not so in England." So far, therefore, as we can see, there is no support for the contention now put forward that in this suit by a mortgagee we should declare that the mortgagees must proceed against the property not in the hands

* [The following criticism of Dr Rash Behari Ghosh (who was the appellant's vakil) in his *Mortgages* (1911), Vol I, pp 498, 499, while of help to understand the judgment, throws additional light on the facts of the case, the report here not being full on this point.—

"It will be noticed that the Transfer of Property Act does not expressly provide for cases where the payment of the charge is contemporaneous with the purchase of the equity of redemption. * * * It has, however, been held in a Calcutta case (11 Cal., 258) that the purchaser would not be entitled to the benefit of the prior mortgage in the absence of anything to show that the money was paid by the purchaser himself and not by the vendor out of the purchase-money. I, however, venture to think that this case, in the words of their Lordships of the Privy Council, is likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense and to litigation. If an incumbrance is paid out of the purchase money, can it make any difference whose hand actually pays the money? In such cases it is the vendee, I repeat, who redeems and not the vendor, as no sane mortgagor would allow any part of the purchase money to be applied in redeeming an incumbrance, if such money only represents the value of the equity of redemption as that would simply amount to making a present of the mortgage-money to the vendee (see sec. 55 sub-section 1, cl (g), Transfer of Property Act). I am not aware of any later case in which the question has been raised though the point apparently, arose in a subsequent case in Calcutta (1 C W. N., 691) but the report is so obscure that the judgment is of very little use."

of the defendants who hold the equity of redemption of a portion only.*

We therefore think that the plaintiff is entitled to a decree, and dismiss the appeal with costs.

Appeal dismissed.

NOTES

[I. MARSHALLING OF SECURITIES—

The criticism of Dr. *Rash Behari Ghosh* has been quoted as footnotes to the above judgment. With reference to this, the Madras High Court in (1905) 29 Mad , 217, at 222, observed “ We should be disposed not to rely on the authority of the said decisions, 11 Cal , 258, etc , when the mortgagee refrains from proceeding against the portion of the mortgaged property which the mortgagor had not parted with, and when he seeks to realise the entire debt from those portions only of the mortgaged property which have been conveyed by the mortgagor subsequent to the mortgage to a purchaser without any contract affecting the purchaser's right to have the charge satisfied out of the portion retained by the mortgagor,—in other words, where the mortgagor conveys not morely the equity of redemption but the property itself free from any liability to contribute to the mortgage debt. That, in such a case, the purchaser may insist upon the mortgagee proceeding in the first instance against the mortgaged property, which is in the mortgagor's hands, would seem to be consonant with sound principle and the weight of authority. The present, of course, is altogether a different case,” in that the interests of other members were sought to be bound under Hindu Law.

But this case was explained in (1908) 31 Mad , 419 18 M. L. J , 229, **F.B.**, and it was held that the first mortgagee was not bound to proceed first against only such property as not included in the subsequent sale by the mortgagor , but the Court under sec 88 of the Transfer of Property Act exercises its discretion as to which of the properties mortgaged should be first sold

See also *Manks v. Whiteley* (1911) 2 Ch. 448, at 466, where PARKER, J , said, “ The equitable right of marshalling has never been held to prevent a prior mortgagee from realising his securities in such manner and order as he thinks fit ”

If the prior mortgagee satisfied himself out of the *puisne* encumbered fund, the person so disappointed is subrogated to the first mortgagee's rights for the amount taken out of the subsequent creditor's security—see *Fisher on Mortgages*, (1910) p 698, para 1365

In (1895) 17 All , 434, EDGE, C J and BANERJI, J , without adverting to the criticism of Dr. Ghosh, held on the authority of 11 Cal , 258, 5 Mad , 387, 9 All , 690, that the right of a mortgagee to bring any portion of the mortgaged property to sale was not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person

As regards the exclusion of *purchasers*, from the benefit of marshalling, see (1903) 31 Cal , 95, at 102, 8 C. W. N. 30, (1897) 24 Cal 746 at 749, 750

II. SUBROGATION—

The criticism of Dr. *Rash Behari Ghosh* has been given as a footnote to the above Judgment. The point was not decided in (1905) 2 C. L. J , 288. See, generally, the notes to 10 Cal 1035 *supra*.]

*[In view of the fact that Dr. *Rash Behari Ghosh* was the vakil for the unsuccessful appellant in this case, the following criticism of this case, in his book of *Mortgages* (1911) Vol. I, may be read with interest —“ The judgment, as reported, which, it may be noted in passing, would go to show that even a *puisne* mortgagee cannot claim the privilege of marshalling, is founded upon a palpable misapprehension of Lord St. LEONARDS' dictum in *Averall v. Wade*. (After citing the extract quoted in this judgment, he proceeds), in other words, you cannot marshal so as to compel the double creditor to divide his claim when he seeks to foreclose the security. If, therefore, two estates are mortgaged to a first mortgagee and one only to the second, and the first mortgagee has the right to foreclose, all that the second mortgagee can do is to redeem him. He cannot compel the first mortgagee to divide his claim. But where the action is for sale and not foreclosure, there can be no question of the mortgagee's dividing his claim, and in countries where the usual decree on a mortgage is sale and not foreclosure, no difficulty has ever been felt in applying the doctrine of marshalling. Indeed Lord St. LEONARDS is careful to point out that in Ireland, where the mortgagee is not entitled to anything more than his money, the equity of the creditor with only one security may be easily worked out, but, adds his Lordship, not so in England.” p. 362.]

[261] ORIGINAL CIVIL.

The 2nd March, 1885.

PRESENT :

MR. JUSTICE WILSON.

In the matter of Peary Mohun Ghosaul.....Plaintiff

versus

Harran Chunder Gangooly.....Defendant.

*Jurisdiction—Act XV of 1882, ss. 18, 19, 38, 45—Trespass to immoveable property, jurisdiction of Small Cause Court as to—**Revision—Act XIV of 1882, s. 622.*

The plaintiff brought a suit in the Calcutta Court of Small Causes to recover damages for trespass to certain immoveable property of which he proved he was in possession ; the defendant contended that such a suit was one for the determination of a right to, or interest in, immoveable property, and was, therefore, not maintainable in the Small Cause Court.

Held, the Court had jurisdiction to entertain such a suit

ON the 27th February 1884, one Peary Mohun Ghosaul instituted a suit in the Calcutta Court of Small Causes against one Harran Chunder Gangooly for Rs. 36 as damages on account of a trespass committed by the defendant in pulling down a *pucca* privy situate in 13 Furriah Pooker Street in Calcutta. In this suit the defendant pleaded (1) that he denied that the *pucca* building was ever in the possession of the plaintiff, (2) denied the building was on land No. 3 Furriah Pooker Street, (3) denied plaintiff's right in the building, (4) denied the Court's jurisdiction, and (5) denied that the plaint contained any cause of action. The suit came on to be heard, after several adjournments for the purpose of inspecting the premises and otherwise, on the 16th August 1884, when the Second Judge of the Small Cause Court gave the following judgment : " I need not decide the title to the premises, this is an action for trespass. From the documents produced by the defendant it appears that the building stands within the boundaries of the land which he has purchased. But it is in evidence that the plaintiff was all along in possession, and his witnesses have proved it. I think, therefore, the plaintiff is entitled to damages. I allow Rs. 25."

The defendant applied for a new trial, but his application was refused.

The defendant then applied to the High Court under s. 622 of Act XIV of 1882, and s. 13 of the Letters Patent, and asked [262] that the record might be called for, in order that the judgment of the Small Cause Court might be set aside. The following were the grounds on which the rule was applied for: (1) that though the judgment of the Small Cause Court professed to leave the question of title undetermined, the question had been in reality decided, inasmuch as it was held that the plaintiff was all along in possession, the Court having no jurisdiction to decide that point, (2), that the suit was for the determination of a right to, or interest in, immoveable property within the meaning of s. 19 of the Presidency Small Cause Court Act of 1882, and as such could not be tried by that Court; (3) that if the Court had jurisdiction the Second Judge had acted with material irregularity in proceeding to inspect the premises.

A rule was granted calling upon the plaintiff to show cause why the judgment and decree of the Small Cause Court should not be reversed.

Mr. *Phillips* appeared to show cause against the rule, and put in an affidavit proving that the plaintiff had been in possession of the premises No. 13

Furriah Pooker Lane, for the last 25 years, and contended that the defendant had made out no case for interference, the suit being an ordinary suit for trespass, and dealt with as such, that it was doubtful if the procedure under s. 622 would apply, as the new Small Cause Court Act by s. 38 gave a *quasi* appeal to the High Court, by a re-hearing in cases over Rs. 1,000, and, although we have not in our affidavit stated the value of the property, yet neither has the defendant shown that it was under that sum. That it has not been made out that the Court had tried a question of title to immoveable property.

Mr. *Bonnerjee* in support of the rule. - It has been said that we have a remedy under s. 38, and assuming that to be so, s. 38 contemplates cases which can be properly tried by the Small Cause Court, and this does not fall under that category; the damages claimed were Rs. 36, so the value of the building could not have been over Rs. 1,000. I say a suit for trespass to immoveable property does not lie in the Small Cause Court. Under s. 25 of Act IX of 1850, the Court had formerly jurisdiction in respect of all suits for debt or damages, the present Act, however, has no such section, see ss 18 and 19 of the Act of 1882. Clause [263] (g) of s. 19 forbids such a suit. If a person obtains damages with regard to immoveable property, he must be interested in the property to get them. Suits of the character of cls. (o) and (q) were cognizable by the Small Cause Court under the old Act, but the new Act has taken away that power. Section 32 of the old Act says "The jurisdiction of the Court shall extend to the recovery of any demand not exceeding the sum of Rs. 500, which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will."

As regard these matters the new Act has made changes, and has modified the former powers of the Court. Chapter VII shows what suits for immoveable property are allowable, and this is not one of those. Section 45 shows that there is also a class of cases cognizable by the Court in which compensation may be granted, but the present suit is not one of that class.

Wilson, J.—This was a rule granted under s. 622 of the Code of Civil Procedure to show cause why a decision of the Calcutta Court of Small Causes should not be set aside. The only ground on which it is contended that it should be set aside is the ground of want of jurisdiction. The proceedings show that the suit was a mere suit for trespass, based on the plaintiff's possession. The defence was a denial of possession, no question of title was raised, and I am asked to hold that the Small Cause Court has no jurisdiction. No doubt before the present Act the Court had this jurisdiction, but I cannot think that jurisdiction is taken away by the new Act, all that is taken away is by s. 19, but this is not a suit for recovery of immoveable property, nor a suit for determination of any other right to, or interest in, immoveable property. No question of title is raised or determined.

I think the rule must be discharged with costs."

Rule discharged.

Attorney for Plaintiff · Baboo N. G. Newgic.

Attorney for Defendant Baboo N. C. Bose.

NOTES.

[Where tiled huts, which being attached to immoveable property partook of the same character, were the subject-matter in dispute (even as between an attaching creditor and a third party), it was held that the Small Cause Court had no jurisdiction. —(1904) 31 Cal.] 340=8 C.W.N., 246.

The High Court can exercise its powers of revision under sec. 622, C.P.C., 1882, in respect of Presidency Small Cause Courts.—(1908) 31 Mad., 490; 18 M.L.J., 480; 11 Cal., 261; 24 Cal., 455, 19 Mad., 196; 20 Mad., 358; 21 Mad., 232, 26 Mad., 163, cited in 31 Mad., 490.

In (1902) 29 Cal., 498, this case was cited and relied on as an authority (with 24 Cal., 455) for the position that rules affecting the Calcutta Presidency Small Cause Court decrees are issued from the Original Side, and that, therefore, the Presidency Group Division Bench had no jurisdiction over them.]

[264] REFERENCE FROM CALCUTTA COURT OF SMALL CAUSES.

The 24th February, 1885.

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR JUSTICE WILSON.

Nobin Chunder Kurr....Plaintiff

versus

Rojomoye Dossee.....Defendant.¹

Limitation Act XV of 1877, s. 14—Exclusion of time of proceeding bonâ fide in Court for a cause of like nature to want of jurisdiction.

The plaintiff on the 31st March 1884 brought a suit in the Small Cause Court on a promissory note, dated the 24th April 1879. In his plaint he omitted to set out certain payments of interest by the defendant, which payments (if so set out) would have had the effect of saving the suit from being barred by limitation. The Judge of the Small Cause Court held that on the face of the plaint the suit was barred, and rejected the plaint on the 24th April 1884, under cl (c) of s. 54 of the Civil Procedure Code.

On the 25th April 1884 the plaintiff brought a fresh suit on the same promissory note, and in his plaint set out how it was that he claimed exemption from limitation. Held, that in computing the period of limitation, the plaintiff was not entitled under s. 14 of Act XV of 1877 to exclude the time during which he was prosecuting the previous suit.

THE plaintiff brought a suit on the 31st March 1884, in the Calcutta Court of Small Causes, to recover from the defendant a sum of Rs. 1,458-9-9, being the balance of principal and interest due on a promissory note made by the defendant in favour of Bonomally Chuckerbutty, or order, dated the 24th April 1879. This promissory note was endorsed over to the plaintiff.

The defendant made certain payments on account of interest on the 3rd June 1880, 17th January 1881, and the 1st April 1881, amounting in all to Rs. 210, which payments were endorsed on the said promissory note by the defendant's agent. There was, however, no clause in the plaint setting out these payments of interest for the purpose of showing that the suit was not barred by limitation. The learned First Judge of the Small Cause Court, on the 24th April 1884, rejected the plaintiff's plaint under s. 54 [263], cl. (c) of the Code of Civil Procedure, it being manifest on the face of the plaint that the suit was barred by limitation.

The plaintiff thereupon, on the 25th April 1884, filed a fresh suit on the same promissory note, inserting in his plaint a clause showing the payments of interest above stated, and the fact of the institution of the first suit. The

¹ Small Cause Court Reference No. 9 of 1884, from a decision of H. Millet, Esq., First Judge of the Calcutta Court of Small Causes, dated the 10th December 1884.

defendant at the hearing contended that the time during which the previous suit was pending could not be excluded in determining whether the suit was barred by limitation.

The learned First Judge of the Small Cause Court was of opinion that the plaintiff under the circumstances was not entitled under s. 14 of the Limitation Act to exclude the time during which he was prosecuting his previous suit, and, contingent on the opinion of the High Court on the case next stated, dismissed the plaintiff's suit.

"This suit is brought to recover Rs. 1,458-9-9 principal and interest due on a promissory note payable on demand, and dated the 24th April 1879. This note was originally made in favour of Bonomally Chuckerbutty, and endorsed over by him to the plaintiff. The plaintiff states. The plaintiff claims exemption from limitation because of payments of interest amounting to Rs. 210 endorsed by defendant's agent, Kannai Lal Mullick, who made such payments as payments of interest, and endorsed the same on the 3rd June 1880, the 17th January 1881, and the 1st April 1881, and because of a suit instituted by the plaintiff on the 31st March 1884, within three years from the last payment of interest, viz., the 1st April 1881, in which suit the plaintiff was rejected by the Court on the 24th April 1884."

"The present suit was instituted on the 25th April 1884, if therefore the time during which the other suit was pending in this Court cannot be excluded in accordance with s. 14 of the Indian Limitation Act, the plaintiff must either be rejected or the present suit dismissed."

"It may be stated here that suits in this Court can, be rejected at any time, they being filed in Court *as of course* and not presented for admission. This is in consequence of the modified form of the Code of Civil Procedure as applicable to this Court."

"The defendant has taken the objection alluded to before, viz., that the time during which the previous suit was pending cannot be excluded."

"The previous suit, as stated in the present plaintiff, was instituted on the 31st March, and the plaintiff was on the 24th April rejected under s. 54 of the Code of Civil Procedure, as it was manifest on the face of the plaintiff that it was barred by limitation. That plaintiff was an ordinary plaintiff on a promissory note, no clause claiming exemption from limitation having been inserted. This being so, can it be said the plaintiff was prosecuting the [266] previous proceeding with due diligence, the reason for the failure of the plaintiff (judging by his present statement) being that he had not complied with the terms of the last paragraph of s. 50 of the Code of Civil Procedure. Had he complied with that section, and set out the fact of payment of interest as set out in the present plaintiff, the previous plaintiff would not have been rejected. I am of opinion that this failure on the part of the plaintiff is want of due diligence on his part. In fact, a similar question has already been decided by a Full Bench of the High Court at Calcutta, *Jhunder Madhub Chuckerbutty v. Bissessuree Debea* (6 W. R., 184, B. L. R., Sup. Vol., 553). There the case had in the first instance been brought under some old procedure not specially mentioned. By that procedure it was necessary for the plaintiff to set out certain boundaries in his plaintiff. He failed to do so and was non-suited. The question there was whether the time occupied by that proceeding could be deducted from the period of limitation when the plaintiff filed a fresh plaintiff in respect of the same subject-matter. The majority of the Full Bench held it could not be deducted. The question then had to be decided on s. 14 of Act XIV of 1859 (the old Limitation Act), but there is practically no difference as

regards diligence between s 14 of that Act and s. 14 of the present Limitation Act. By this decision I am bound, and I may state my own opinion coincides with that of the majority of the Full Bench. Either party is desirous, in the event of the suit being decided against him, that the matter should be referred to the High Court, and I think it advisable that it should be so.

Should the Hon'ble Judges of the High Court be of opinion that the plaintiff was prosecuting the previous suit with due diligence, it will still be open to them to say whether limitation is a "cause of a like nature" to jurisdiction. The question referred will be whether in computing the period of limitation, the plaintiff under the circumstances above set out is under s. 14 of the Indian Limitation Act, 1877, entitled to exclude the time during which he was prosecuting his previous suit in this Court? Contingent on the opinion of the High Court my judgment is that the suit be dismissed as barred by limitation."

Mr Pugh appeared on the reference on behalf of the defendant and cited *Rajendro Kishore Singh v. Bulaky Mahton* (I. L. R., 7 Cal., 367), and *Chunder Madhub Chuckerbutty v. Bissessuree Debea* (6 W. R., 184, B. L. R., Sup. Vol., 553).

No one appeared on behalf of the plaintiff.

The **Opinion** of the Court (GARH, C.J., and WILSON, J.) was that the question should be answered in the negative.

NOTES

[For similar cases, see 23 Mad , 621 , 23 Mad , 583 , 28 Mad , 338 , 12 Cal , 291 This case was distinguished in (1892) 16 Mad , 274]

[267] CRIMINAL REFERENCE.

The 24th February, 1885.

PRESENT

MR. JUSTICE TOTTENHAM* AND MR. JUSTICE GHOSE.

Queen-Empress

versus

Juggernath Accused

Stamp Act (I of 1879), s. 3, cl. 17, and art 52, sch. I—

Receipt—Acknowledgment.

An entry* made by a creditor in the *khatta* book of the debtor, and signed by him for the payment of a sum of money in discharge of a debt is a "receipt" within the meaning of s. 3, cl. 17, of the Stamp Act, and as such must be stamped under art 52, sch. I, of that Act.

THIS was a reference from the Presidency Magistrate of Calcutta under s. 432 of the Criminal Procedure Code, and the question referred was as to whether

* Criminal Reference No. 1 of 1885, by B L Gupta, Esq., Presidency Magistrate, Calcutta, dated the 8th of January 1885

an entry in a *khatta* book proved to have been signed by the accused was a receipt within the meaning of cl. 17, s. 3, of the Stamp Act (Act I of 1879), and as such required a one-anna stamp under art. 52,* sch. I, of that Act.

The Magistrate in his letter, referring the case, stated as follows.—

"Independent evidence has been given to show that the amount paid was in satisfaction of a debt, and the entry also refers expressly to the transaction out of which the debt arose. The amount in figures and the name of the accused are shown to have been written by the accused at the time he received the payment, and it is admitted that no separate receipt of any sort was taken from the accused or from the firm on whose behalf he received the money.

I have seen the rulings in the cases of *Brojen Lal Coomar v. Bromomoye Chowdhuran* (I. L. R., 4 Cal., 885), and *Binja Ram v. Rajmohan Roy* (I. L. R., 8 Cal., 282), but no general principle is deducible therefrom, and the decision in each case must depend on the nature of the particular entry and of the evidence adduced."

The prosecution was one of several of a like nature instituted by the Collector of Calcutta to test the question as to whether such entries did not require to be stamped.

[268] The entry was contained in the debtor's books, and was as follows.—

No. 99					
Year 1291.					
Date 7th Assai.					
Debit side					
Debited to Sebaram Megraj	...	..	Rs.	A.	P
			..	405	4 0
Through Juggernath on account of 13th Bysack					
Government note P 23466 1 piece			...	500	0 0
	45				
Deduct returned	..	...	...	94	12 0
				405	4 0

And it was proved by the evidence that it referred to a previous entry detailing the transaction which was the purchase of a bale of cloth, and that the sum of Rs. 500 was paid to Juggernath, the gomasta of the firm, who retained the sum of Rs. 405-4, the amount due, and returned the balance, Rs. 94-12, and that Juggernath made the entry and signed it

It was also proved by the evidence that it was not the practice to take separate receipts, but that the person who received the money made an entry of the above nature in the books and signed it

The Advocate-General (Mr *Phillips*) appeared for the Crown.

Mr. *Sale* and Mr. *Chick* for Juggernath, the accused.

Mr. *Phillips*.—The document amounts to an acknowledgment of the payment of money, and therefore is *prima facie* a receipt, and the only

* [Art. 52 —

Description of Instrument.	Proper stamp duty
Receipt for any money or other property the amount or value of which exceeds twenty rupees See exemptions, schedule II (No. 15)	One anna]

receipts exempted from duty are those covered by sch. II, cl. 15. Sub-clause (b) of that clause exempts receipts for any payment of money without consideration, but that is not the case here, for there can be no question that there was consideration for the payment of this sum. The entry is also signed, and such signature shows the actual receipt by the person so signing the amount.

[269] Mr. Sale.—The form and nature of the document sought to be chargeable with stamp duty must be looked at as well as the intention of the parties executing it. For example, entries in an ordinary cash book of receipt of money could surely never be intended to be regarded as receipts. [See *In the matter of Act XVIII of 1869, and the Uncovenanted Service Bank* (I. L. R., 4 Cal., 829); *Brojender Coomar v. Bromomoye Chowdhram* (I. L. R., 4 Cal., 885); *Benja Ram v. Raj Mohun Roy* (I. L. R., 8 Cal., 282); *Brojo Gobind Shaha v. Goluck Chunder Shaha* (I. L. R., 9 Cal., 127)].

Such entries as this on either side of the account are not intended to operate as acknowledgments of money received or as acknowledgments of debts. They are made solely for the information of the owner of the book in which they appear and for the purposes of his business. The fact that the entry is made by the person receiving the money, and not by the owner of the book, is immaterial, because otherwise it might equally be said that the entry, if made in the presence of the creditor and acquiesced in by him, would be sufficient to make it chargeable with stamp duty under the section. If the entry in question is liable to be stamped, then the corresponding entry on the other side of the account would also have to be stamped as an acknowledgment of debt. Thus each entry in the book would require to be stamped, as well as the corresponding entries of payment in the creditor's books. If this view of the law be the correct one, it would be impossible to keep *khattas* or native books of account, and the system of account-keeping in the bazar would be completely upset, and serious inconvenience would be occasioned.

Mr. Phillips (in reply).—Mr. Sale's contention amounts to this, that the question to be considered is not whether the document falls within the section, but whether it was the intention of the parties that it should fall within it. This can scarcely be the correct way of looking at it. Again, he says, that to be liable to stamp duty the document must have been executed with the same intention as is ordinarily understood by the act of "granting a receipt," and that great inconvenience would be caused by holding that [270] this entry requires to be stamped. But the Legislature have defined the term "receipt" (see s. 3, cl. 17), and the word used is "acknowledged" and not "admitted." An admission may be to any one, and thus an entry by a man in his own book would not come within this section. Giving a receipt is merely giving an acknowledgment of payment made under cl. 1, sch. I, acknowledgment in books must be stamped. The cases of *In the matter of Act XVIII of 1869 and the Uncovenanted Service Bank* (I. L. R., 4 Cal., 829), and *Brojender Coomar v. Bromomoye Chowdhram* (I. L. R., 4 Cal., 885), were under the old Stamp Act, and the words in that Act were different.

The **Opinion** of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

Tottenham, J.—It appears to me that Exhibit B, which was submitted to us by the Presidency Magistrate with his letter of the 8th January last, does come within the meaning of cl. 17, s. 3 of the Stamp Act (I of 1879). The signature of Juggernath and the amount, Rs. 405-4, in his handwriting, form, in my opinion, a writing, whereby the debt was acknowledged to have been paid off. I think so because of the place in which this writing appears, namely, against the entry in the debtor's book where the debtor recorded

payment of his debt. It is true that we must look to the intention of the parties as to what this writing by Juggernath was intended to import ; and upon the evidence I have no doubt that the intention was that what Juggernath wrote should operate as a receipt. I think, therefore, that this writing falls within this definition of a receipt in cl. 17, s. 3 of the Stamp Act.

Ghose, J.—I am of the same opinion. It seems to me that the entry in Exhibit B, coupled with the writing and signature of Juggernath, the *gomastah* of the firm of Megraj, amounts to a receipt within the meaning of cl. 17, s. 3 of the Stamp Act.

Mr. *Sale* on behalf of Juggernath contended that in this case the question was one of intention, namely, whether the parties intended that the entry and signature in question should operate as a receipt. I accept this contention as perfectly sound, and [271] it seems to me that in every case of the kind it should always be a question of intention. On turning to the evidence of Grish Chunder Ghose, the owner of the shop from which the debt in question was due, and reading Exhibit B by the light of that evidence, it appears to me to be clear that the intention of the parties was that the entry and the signature to it of Juggernath should have the same effect as a receipt.

Mr. *Sale* also called our attention to several rulings of this Court. Those decisions, I observe, were passed under the Stamp Act of 1869. The present Stamp Act of 1879 is more comprehensive, so far as the definition of a receipt is concerned, and it appears that in the cases in which those decisions were passed, the true question was whether the particular document which was tendered in evidence was admissible in law by reason of no stamp having been used. The question here is a different one, and on examining the observations made by the learned Judges in those cases, it would appear that if any principle of law is deducible from them as applicable to this case, it is a principle rather in favour of the view taken by the Crown than opposed to it

[11 Cal 271]
CRIMINAL REFERENCE.

The 19th February 1885.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Makhan Lal Saha.....Petitioner

versus

Makhan Chora Saha.....Opposite Party *

Public nuisance—Obstruction—Enquiry under s. 133, Criminal Procedure Code (Act X of 1882)—Previous orders when no bar to such enquiry—Criminal Procedure Code (Act X of 1882), s. 133.

An application was made under s. 133 of the Criminal Procedure Code (Act X of 1882) for the removal of an obstruction in a public thoroughfare, but after a personal local inspection by the Magistrate, and without any evidence being taken, the parties were referred to a civil suit, and the order was refused, the Magistrate holding that the way was not a public way.

A civil suit was then filed, and during its pendency a second application was made under s. 133 of Act X of 1882, with a like object, which was [272] refused on the ground that the civil suit was pending, and that there was no likelihood of a breach of the peace.

The civil suit resulted in the way being held to be a public thoroughfare.

A third application was then made under s. 133 to have the obstruction removed, but the Magistrate held that, in face of the two previous orders, he could not interfere.

Held, that the order of the Magistrate was wrong, upon the ground that he was bound to make such enquiry, and as there never had been any enquiry into the matter, the first decision being no decision at all, but a mere dictum of the Magistrate upon a personal local investigation without hearing evidence, and thus not on judicial enquiry, and the second decision being based merely upon the pendency of the civil suit and the previous improper order, and that neither of these orders operated therefore as a bar to the Magistrate enquiring into the matter of the present complaint.

THIS case arose out of an application made under s. 133 of the Criminal Procedure Code (Act X of 1882) for the removal of an obstruction in the shape of a *pucca* building in a public road. It was the third application that had been made with the same object.

The first application was made at a time when the building was in course of erection in 1881, but the Sub-divisional Magistrate, before whom it was made, after holding a local examination, but without taking any evidence, on the 17th July 1881, refused to interfere and referred the parties to the Civil Court. Thereupon a civil suit was instituted for the removal of the obstruction upon the footing of the pathway being a private one, but that suit, which was ultimately taken up on second appeal to the High Court, was unsuccessful, and the defendant's plea that the pathway in question was a public one was substantiated.

Pending the hearing of the second appeal a second application was made under s. 133 for the removal of the obstruction, but the Deputy Magistrate, by an order on the 8th September 1883, refused to interfere, upon the ground that there was no likelihood of a breach of the peace, and that the question as to

* Criminal Revision No. 13 of 1885 against the order of Baboo Radha Madhab Bose, Deputy Magistrate of Cutwa, dated the 18th of November 1884.

whether the path was a public or private one was still pending before the High Court. Against this order the applicant moved the High Court, but without success, as the Court refused to interfere till the appeal then pending was decided.

[273] The appeal was heard on the 6th June 1884 and resulted in a decision that the pathway was a public one.

The present application was then made, and an order was issued calling upon the opposite party to show cause why the obstruction should not be removed. The opposite party appeared and filed a written statement, questioning the right of the Magistrate to entertain the matter in the face of the two previous orders passed by officers holding concurrent jurisdiction with himself, and also on the ground that there was no likelihood of a breach of the peace, and that the proceeding was therefore not justified in law. The Magistrate overruled the said objection, holding that a likelihood of a breach of the peace was not a necessary condition precedent to action being taken under s. 133, but upheld the other objection and refused to pass any order in the matter.

Against that decision the petitioner now applied to the High Court under its revisional powers.

Baboo *Ashutosh Dhur* and Baboo *Ambica Churn Bannerjee* for the Petitioner.

Baboo *Ambica Charan Bose* for the Opposite Party.

The **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

Tottenham, J.—It appears to me that the Deputy Magistrate was mistaken in supposing that he was precluded from taking up this case by reason of the decisions of his predecessors. The question was whether the obstruction complained of had been erected in a public way. On the first occasion, when an application was made to the Magistrate, it seems that no enquiry was instituted, that is, no judicial enquiry, but the Magistrate simply inspected the place, and upon that inspection determined that the way was not a public way, and therefore refused to interfere. Thereupon the complainant went to the Civil Court, and attempted to show that the way was a private one, and that he was specially hindered by the obstruction. In the Civil Court he failed upon the ground that it was a public way, and that he had not made out a case sufficient to entitle him to relief in the Civil Court.

[274] In the meantime, while the decision of the Civil Court was under appeal the complainant applied again to the Magistrate upon the strength of the finding of the Civil Court that the way was a public one. The Magistrate then declined to interfere, not absolutely, but upon the ground that the civil suit was still pending, as well as upon the ground that his predecessor had already held that the way was not a public one. Upon the civil proceedings being terminated by the decision of a second appeal to this Court, the petitioner again applied to the present Magistrate. The Magistrate now thinks that, notwithstanding the decision of the Civil Court, he is precluded from interfering, because his predecessor thought that the way was not a public one. Thus it appears that the petitioner is defeated in the Criminal Court, because the way is not a public one, and in the Civil Court because it is a public way. We think that the Magistrate is bound to make an enquiry notwithstanding the decisions of his predecessors. The last of these two decisions was upon the ground, partly that there were civil proceedings still pending, and partly that there had already been a decision by the Magistrate. The first decision of the

Magistrate strictly speaking was not a decision at all, but simply a dictum on inspection of the place. It is impossible for any Magistrate, without taking evidence, to say whether a road is a public thoroughfare or not.

Under the circumstances we think that the rule must be made absolute, and the Magistrate directed to come to a decision whether or not the way is a public one; and, if so, whether the obstruction raised should be removed. The matter of the removal of the obstruction is one entirely in his own discretion.

Ghose, J.—I am of the same opinion. It appears to me that neither on the first, nor on the second, occasion did the two previous Deputy Magistrates hold any judicial enquiry in the matter of the complaint made before them in accordance with the provisions of s. 133 of the Criminal Procedure Code. That being the case, neither the first nor the second order operates as a bar to the Deputy Magistrate enquiring into the complaint upon the present occasion.

Order set aside.

NOTES

[Where there are sufficient materials, prior disposal is no bar :—5 C. W.N., 173.
The Magistrate ought not to base his order on his own opinion :—11 Bom., 375.]

[273] APPEAL FROM ORIGINAL CIVIL.

The 19th February, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Nundo Lal Bose and another.....Plaintiffs

versus

The Corporation for the Town of Calcutta.....Defendants.*

Certiorari—Bengal Act IV of 1876, ss. 88, 104 and 117—Municipal Commissioners, their jurisdiction—Assessment—House rate—Annual value—Power of the High Court.

The power of the High Court to quash proceedings on *certiorari* is not affected by the provision of s. 117 of the Municipal Act, and if it should appear either on the face of the proceedings or upon affidavits that the Commissioners have acted without or in excess of jurisdiction, the Court will interfere.

Per WILSON, J.—The words “annual value” in s. 88 of the Municipal Act must be taken to mean “annual letting value.”

Quære.—Whether s. 104 of the Act is in the nature of an interpretation clause, or merely directory as containing instruction to the Commissioners how to proceed when exercising the jurisdiction conferred by s. 88?

THIS was an appeal from a decision of Mr. Justice PIGOT, dated 31st March 1884.

* Original Appeal No. 5 of 1884, against the decree of Mr. Justice PIGOT, dated the 31st March 1884.

The appeal arose out of an assessment made on a certain house and premises at Bagbazar by the Corporation of the Town of Calcutta. The Municipal assessor, upon finding that the said house was a family dwelling-house, and not likely to be let on rent, assessed the house-rate upon a supposed annual rent calculated on the basis of the costs of the buildings and premises, and in conformity with the provisions of Bengal Act IV of 1876, the Municipal Act, gave notice to the owners that the premises had been valued at an annual assessment of Rs. 4,800, and that the Commissioners would, on a specified day, proceed to hear any appeal that might be preferred against the said assessment. In pursuance of the notice, the owners preferred an appeal to the Commissioners, in which they questioned the principle upon which the assessor had fixed the rate. The Commissioners, however, saw no reason to disapprove of the principle on which the assess- [276] ment had been made; but, as a matter of personal favour, it would seem, to the vakeel who appeared on behalf of the owners, reduced the assessment from Rs. 4,800 to Rs. 4,500. Dissatisfied with this decision, the owners, on the ground of want of jurisdiction, made an application to the High Court on the Original Side for a writ of *certiorari* to bring up the proceedings of the Commissioners, together with all matters connected therewith, and submitted affidavits in support of their application. A rule was granted on the 3rd March 1884. The learned Judge, before whom the rule came up for discussion, although of opinion that it was a case in which, if the Court had the power to interfere, it should certainly exercise its powers, held that, "whether the Commissioners in the present case were right or wrong in the conclusion they arrived at, or in their mode of arriving at it, the Court could not interfere, as the judicial act done by them was done in exercise of the power conferred upon them by the Legislature." He was, moreover, of opinion that, when an assessment made under the Act was under the Act confirmed on appeal, it was by s. 117 made final and conclusive. The rule was, therefore, discharged, but under the circumstances without costs. From that order the plaintiffs appealed.

Mr. Pugh (with him Mr. Evans and Mr. Bonnerjee) for the Appellants. — This is a case for *certiorari*, the rule should have been made absolute. Annual value means annual letting value. All houses must be rated on the same principle. Under Bengal Act IV of 1876, the Municipal Commissioners had no power but to rate all houses in a particular way. The Act lays down one rule for houses that are let, but the Municipality have set up another rule for this house. They have no power to assess upon the basis they have done. They have acted entirely out of their jurisdiction, and this Court, like the Court of Queen's Bench, can interfere in such a case by *certiorari*. The following cases were cited: *The King v. The Trustees of the Duke of Bridgewater* (9 B. & C., 68), *The King v. Thomas Andrews Adame* (4 B. & Ad., 61), *Rex v. Berney Brograve* (4 Burr., 2491), *The King v. The Inhabitants* [277] *of Washbrook* (4 B. & C., 732); *The King v. The Chapel Wardens and Overseers of the Township of Bilston* (5 B. & C., 851), *The King v. Tomlinson* (9 B. & C., 163).

The Officiating Advocate-General, Mr. Phillips (with him Mr. O'Kinealy) for the Respondents. The Court cannot interfere by *certiorari*. There is no authority to show that Courts have interfered in such a case. *The King v. The Trustees of the Duke of Bridgewater* (9 B. & C., 68) has no bearing on the matter, as that was a case of appeal and not of *certiorari*. The Commissioners in this case do not repudiate the law, but profess to act under it. There was no wilful or perverse departure on their part from the law. There is nothing to show that the house has been over-assessed. The Court cannot hear affidavits. The fixing of assessments is not a judicial act. Every house has

to be assessed. The house in question is totally untenantable, but the Commissioners had to fix some assessment. *Queen v. Chantrell* (L. R., 10 Q. B., 587); *The Queen on the prosecution of the London and North-Western Railway Company v. The Overseer of the Poor of the Township of the Foreign of Walsall* (L. R., 3 Q. B. D., 457); *The Overseer of the Poor of Walsall v. The Directors, etc., of the London and North-Western Railway* (L. R., 4 App. Cas., 30); *The King v. The Rector, Vestrymen and Parishioners of St. James, Westminster* (2 A. & E., 241); *The Queen v. The Justices of Cheshire* (8 A. & E., 398); *The Queen v. James Bolton* [1 A. & E. (N. S.), 66], *Ex parte the Overseers of Tollerton* [3 A. & E. (N. S.), 792], *The King v. The Justices of Monmouthshire* (8 B. & C., 137) were referred to.

Mr. Pugh in reply, further cited the following cases :—*Hudson v. Tooth* (L. R., 3 Q. B. D., 46); *Twinkler v. The Board of Works for the Wandsworth District* (2 D. G. & J., 261), *Rex v. Hardy* (2 Cowp., 579); *The Queen v. Myer Albert* (5 Q. B., 37).

[278] The Court (GARTH, C. J., and WILSON, J.) delivered the following **Judgments** :—

Garth, C. J.—This is an appeal against an order made by the Court below, discharging a rule nisi which had been obtained for a writ of *certiorari*, to bring up an assessment made by the Commissioners of the Town of Calcutta for the purpose of quashing it.

The rule was applied for by Nundo Lal Bose and Pasupati Nath Bose, who are the owners of a family dwelling-house in Bagbazar Street, upon which the assessment was made; and the ground of the application was, that the assessment was illegal, the Commissioners having made it upon a principle which the law did not allow.

The learned Judge of the Court below was of opinion that the assessment was made upon a wrong principle, but he considered that in making it the Commissioners were acting within their powers, and consequently he had no authority to interfere.

The matter has now come before us on appeal, and, as to the facts of the case, or the general law applicable to the issuing of the *certiorari*, there seems little or no question.

The authority of this Court to remove the proceedings of inferior Courts in the exercise of their judicial functions, is undoubted. It is an authority derived from the old Supreme Court, and is similar to that which was exercised by the Court of Queen's Bench in England, and, if the Commissioners in this case were exceeding their jurisdiction in making the assessment, it seems clear that we have the power to quash it upon *certiorari* notwithstanding the provision in s. 17 in the Calcutta Municipal Consolidation Act, 1876.

That section merely means that the assessment shall be final and conclusive when the Commissioners have made it in the exercise of their powers [see *Rex v. Moreley* (2 Burr., 1041), *Rex v. Plowright* (3 Mod. Rep., 95)]; but if they have acted without jurisdiction the *certiorari* is not taken away by a clause of that kind; and the want or excess of jurisdiction may either be shown upon the proceedings themselves, or may be brought before this Court **[279]** upon affidavits. See *Rex v. Long* (1 Man. & R., 139), *Rex v. Sheffield and Manchester Railway Company* (11 Ad. & E., 194).

I, therefore, entirely agree with the learned Judge in the Court below that the only real question in the case is, whether the Commissioners in making this assessment were acting within their powers.

Let us see, therefore, what their powers are :—

By s. 64 of the Act, the Commissioners at the Quarterly Meeting to be held in October of each year, are to fix the rates, at which the rates and taxes levied under the Act are to be imposed for the succeeding year. Then by s. 88 they are to impose upon all houses and land within the town of Calcutta certain annual rates, and, amongst others, a house-rate, which is to be calculated on the annual value of such house and land, and, lastly, by s. 104, the estimated gross annual rent at which any such house or land might reasonably be expected to let from year to year, shall (for the purpose of any rate to be imposed under the Act) be held and deemed to be the annual value of such house or land.

Now, for the purpose of determining what the powers of the Commissioners are in imposing these rates, I think that ss. 88 and 104 must be read together, the one being explanatory of the other. The rates which the Commissioners impose are to be calculated on the annual value of the property rated (s. 88), and what is meant by the annual value of the property rated is the gross annual rent at which such property might be expected to let from year to year (s. 114). These being the powers of the Commissioners, let us now see what they did in this particular case.

The family dwelling-house of the applicants was rated in October 1883 at Rs. 4,500 a year, and Mahatab Chunder Mullick, the assessor to the Corporation, describes in paragraph 10 of his affidavit the principle upon which it was rated.

After stating that the house and premises in question form the joint family dwelling-house of the applicants, and that it is difficult to determine what is a reasonable rental for such houses [280] which are built, not with a view to letting, but for the residence and convenience of the owners, he goes on to say : " In assessing the said premises No. 65, Bagbazar Street, I estimated the total expenditure on the building and land at Rs. 1,80,000, and I assessed the gross annual rent at which the said house and premises might reasonably be expected to let from year to year at Rs. 4,800, being at the rate of 2½ per cent. on the said sum of Rs. 1,80,000.

From this assessment the applicants appealed to the Commissioners under s. 114 of the Act, and their appeal was heard on the 15th of January 1884.

On this occasion Baboo *Shanoda Charn Mitter*, a vakeel of this Court, appeared on behalf of the applicants. He says, in his affidavit, that he pointed out to the Commissioners that the former assessment of the house in question was made by Mr. Williamson (of the firm of *Mackintosh, Burn & Co.*) at a rental of Rs. 115, and he produced certificates both from Mr. Williamson and from Baboo Nilmoney Mitter (who is a Civil Engineer and Surveyor well acquainted with the neighbourhood in which the house is situate) to the effect, that the house would not let from year to year for more than Rs. 250 a month.

He then says in paragraph 9 of his affidavit. " The said Commissioners, however, would not listen to my contention, and said that they could not place any reliance on those two certificates as against the assessment made by their own assessor, and although they were perfectly aware that the house and premises in question would not, if let, produce Rs. 250 a month, and probably not Rs. 200 a month, being a native family dwelling-house, and situate in an out-of-the-way place, consequently the probable rent the premises might yield could not be the criterion of assessment, and considering the size of the buildings they did not think that an assessment of Rs. 4,800 per annum was a high assessment; but, inasmuch as I had argued the appeal, and had formerly

been one of the Commissioners of the Town of Calcutta, they would, for my sake, reduce the annual value to Rs. 4,500, and adjudicated accordingly that the said house and premises should be assessed for house rate at the annual value of Rs. 4,500."

[281] It seems to me that this statement of Baboo Saroda Charn Mitter is virtually uncontradicted. I am satisfied from the affidavits that the Commissioners adopted the assessment of their own surveyor, based, as they knew it was, upon a percentage of the estimated cost of the buildings in entire disregard of the principle, which they were bound by law to adopt as the basis of their assessment, namely, *the gross annual rent at which the house might be expected to let from year to year.*

It may be that the Commissioners on the hearing of the appeal might have reasonably required the attendance of Mr. *Williamson*; and that his evidence and that of Baboo *Nitmoney Charn Mitter* should have been brought before them in the regular way, and not by the mere production of a certificate. But their decision did not rest upon any point of this kind. They adhered to their own surveyor's assessment upon the ground that it was properly made, and they refused to be guided by the principle laid down in s. 104 of the Act.

In this it seems to me they acted beyond their powers. They had no right whatever to make the assessment upon any other basis than that which the Act prescribes. The principle upon which they ascertained the annual value of the premises appears to me to have been obviously fallacious; but whether it was so or not, it was an arbitrary test, and one which the law does not sanction.

The assessor might just as well have estimated the rental upon the amount of the applicant's private income as upon the original cost of the building.

It may be, no doubt, that in assessing joint family property of this nature, some difficulty may often arise. The principle of rating upon which the Commissioners are directed to proceed is the same which is adopted in England, and similar difficulties arise there in the case of gentlemen's parks and mansions which are laid out for residential purposes, and not for sale or letting. But such properties are, nevertheless, constantly rated upon the basis of their annual letting value.

It is, of course, no part of our duty to say how such valuations should be made. We have only to see that, in making them, the Commissioners act within their powers. As they have failed to [282] do so in this instance, I think that the order of the Court below should be reversed, and that the rule *nisi* for the *certiorari* against the Corporation should be made absolute.

The applicants will be entitled to the costs of the rule against the Corporation in both Courts upon scale No. 2.

Wilson, J.—I am of the same opinion. I take the same view of the facts as the Chief Justice has taken, and on the facts it is abundantly clear that the assessment upon the applicants was improperly made. The question is, whether the error was an excess of jurisdiction, or amounted only to a miscarriage on the part of the Commissioners while acting within their jurisdiction. If the error goes to jurisdiction, we can, and ought to, interfere by *certiorari*; if not, we have no power to do so.

This question is not free from difficulty, but I have come to the conclusion that the error committed does go to jurisdiction. Three sections of the Calcutta Municipal Consolidation Act, 1876, are material. Section 64 requires the Commissioners at their Quarterly Meeting in October of each year to "fix

the rates at which the rates and taxes hereinafter mentioned shall be imposed for the year commencing on the first day of January then next ensuing." That section only gives power to fix the general standard of rating, and has nothing to do with the assessment of the individual properties upon which the rates are to be charged. This is dealt with in s. 88, which says: "The Commissioners shall, as provided in s. 64, impose upon all houses and land within the town the following annual rates, which shall be calculated on the annual value of the said houses and lands." Under this section the Commissioners have power to impose on any house or land a rate calculated on its annual value not on anything else. Now, if we had nothing but these words to guide us, I should say that in such an act value must mean money value, and that the "annual value" of a house must mean the annual money benefit derivable from it, and could not mean any percentage on its cost.

But the whole system of taxation and assessment under the Act in question is obviously borrowed in its general outlines from English Rating Acts. In such Acts in England the words "annual value" are in familiar use, and have long received a settled construction. "Annual value" has always been held to mean annual letting value, and I think we ought to give the words the same meaning here. If this be so, the Commissioners are shown to have exceeded their jurisdiction upon the language of s. 88 alone, without the aid of s. 104.

Section 104 makes the intention of the Legislature quite clear. It says: "The estimated gross annual rent at which any house or land liable to rate under this Act might reasonably be expected to let from year to year shall, for the purposes of any rate to be imposed under this Act, be held and deemed to be the annual value of such house or land. The value of land so estimated shall not include the value of any machinery thereupon."

This section first removes any doubt that might without it have arisen as to annual value meaning annual letting value. Secondly, it provides in favour of the public and against the person assessed that annual value is to mean gross rent, whereas it would otherwise have meant net rent, that is the gross rent, less the necessary outgoings, as was held by the House of Lords in *Dobbs v. Grand Junction Waterworks Company* (L. R., 9 App. Cas., 49). Thirdly it gets rid of a possible ambiguity as to machinery.

This section, or so much of it as I have cited, may be regarded as in the nature of an interpretation clause explaining the meaning of the words in the earlier section. If so the two must be read together. And then it is, I think, quite clear that the Commissioners have exceeded their jurisdiction.

On the other hand this section may be read as only directory, as containing instructions to the Commissioners how to proceed when exercising the jurisdiction conferred by s. 88. In that case a breach of the provisions of s. 104 would not go to jurisdiction. But if so, as I have already pointed, the excess of jurisdiction in this case is, in my opinion, apparent from s. 88 alone without the aid of s. 104.

Appeal allowed.

NOTES

[The Courts have power to deal with the question whether a certain assessment is *ultra vires* or not :—(1908) 35 Cal., 859. 12 C. W. N., 709. 7 C. L. J., 631.]

There have been several statutory definitions of the words 'annual value' in various Indian Enactments, a list of which is given in Mr. Kalnādi Prasad's '*Judicial Interpretation of Indian Statutes.*']

[284] APPELLATE CIVIL.

The 5th February 1885.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE TREVELYAN.

Durga Pershad and another.....Defendants

versus

Ghosita Gorla..... Plaintiff.*

*Limitation—Suit for abatement of rent—Suit for apportionment of rent—
Bengal Act VIII of 1869, s. 19.*

In 1877 certain *butwara* proceedings were terminated, and the amount of land held by the plaintiff in the portion of the estate allotted to the defendant was ascertained. The rent payable was admitted to be at the rate of Rs. 4 per biggah. In 1881 the defendants sued the plaintiff for rent of a larger amount than the plaintiff admitted to be due, and obtained a decree on the 31st May 1881. On the 20th September 1881, the plaintiff instituted a suit nominally under the provisions of s. 19 of Bengal Act VIII of 1869 for abatement of rent upon the ground that the defendants were seeking to charge him rent upon a larger amount of land than he actually held. The defendants pleaded that the suit was barred by limitation as being brought more than one year after the cause of action accrued. The Court found that the amount of land held by the plaintiff was the amount stated by him in his plaint, and not that alleged by the defendants.

Held that the suit was rather one for the apportionment of rent after the *butwara* proceedings, and not one for abatement of rent, and that it was not barred by limitation, inasmuch as the period allowed for such suit must be taken to be six years and not one year.

IN this case the plaintiff held a *jote* under the defendants and their co-sharers, who were jointly in possession of an estate paying revenue to Government. In the year 1877 the estate was partitioned, and out of the lands held by the plaintiff a plot, measuring about fifteen cottahs as ascertained by a measurement by an Ameen, was allotted to the defendants as their share. It was not disputed that the rent payable in respect of the land was at the rate of Rs. 4 per biggah. After the partition the defendants enforced a payment from the plaintiff of Rs. 5 odd on account of the land held by him which formed the shares allotted to them on the partition. On the 31st May 1881 a decree was passed [285] against the plaintiff by the District Judge in a suit brought by the defendants for rent for a larger amount than the plaintiff contended was payable by him. The plaintiff, therefore, on the 20th September 1881, instituted the suit nominally under the provisions of s. 19 of Bengal Act VIII of 1869 for abatement of rent, and for a declaration that he was only bound to pay rent at the rate of Rs. 4 per biggah for the amount of land held by him.

The defendants contended that the suit being one for abatement of rent was barred by limitation, in that it was brought more than one year from the date in which the cause of action arose, namely, the date of the conclusion of the partition proceedings, and that as the local biggah was smaller than the ordinary biggah, of which fact the plaintiff was aware, he was not entitled to the relief he sought. The Munsiff found that the amount of land held by the

* Appeal from Appellate Decree, No. 1905 of 1883, against the decree of J. Pasford, Esq., Officiating Judge of Patna, dated the 11th April 1883, affirming the decree of Baboo Kedar Nath Roy, Third Munsiff of Patna, dated the 31st of May 1882.

plaintiff was what he stated it to be, and that the defendants had failed to prove their contention as to the size of the local biggah, and also that the suit was barred by limitation, and gave the plaintiffs a decree.

The lower Appellate Court dismissed the defendants' appeal, agreeing with the Munsif as to the finding of fact as regards the size of the local biggah, and the quantity of land held by the plaintiff, and holding that, as the plaintiff's cause of action accrued from the date of the decree passed against him on the 31st May 1881, the suit was not barred by limitation.

Against this decree the defendants now specially appealed to the High Court, on amongst other grounds, that the suit was barred by limitation and should have been dismissed.

Baboo *Sirish Chunder Chowdhry* for the Appellants

Mr. *H. F. Mendies* for the Respondents

The **Judgment** of the High Court (MITTER and TREVELYAN, JJ.) was as follows :—

The ground of appeal that has been mainly argued before us is that the plaintiff's suit being for abatement of rent, it is barred by limitation, inasmuch as it was not brought within one year from the date of the cause of action

[286] It is true that the Courts below have tried this suit as one for abatement of rent under s. 19 of Bengal Act VIII of 1869, but looking to the plaint and the facts admitted by both parties, it appears to us that it is not a suit for abatement under s. 19 of Bengal Act VIII of 1869. The admitted facts are these. The plaintiff held a *jote* under the defendants and his co-sharers who were jointly in possession of an estate paying revenue to Government. A *butwara* was effected of this estate in 1877, and, out of the plaintiff's *jote* lands, a plot of land, measured by the Ameen, fifteen cottahs, fell to the *putti* or divided share of the defendants. The plaintiff further alleges that the rate of rent at which he held the *jote* while the estate was joint was Rs. 4 per biggah. On partition the defendants demanded and enforced payment of Rs. 5 on account of the fifteen cottahs' plot that fell to the defendants' *putti*.

The plaintiff brought this suit, according to the plaint, under s. 19 of Bengal Act VIII of 1869 for abatement of rent, but from the facts stated, and which are not disputed, it is quite clear that this is not a suit for abatement under s. 19. The plaintiff does not say that there has been any diminution in his holding; but what he says is, that by its division into several *puttis* or shares it has become necessary to apportion the rent payable to the different landlords who obtained distinct *puttis* under the partition, and that on a proper adjustment of the rent, he would not be liable to pay the rent which the defendants have realized from him. This is not, therefore, a suit for abatement of rent, but a suit for apportionment of rent and for a declaration that after *butwara*, the share of the rent which the plaintiff is liable to pay to the defendants is as it is stated in the plaint.

The cause of action of this suit arose in the year 1877, and the suit was brought in September 1881, that is, within six years. There is no special provision in the Limitation Act regarding a suit of this description, and therefore six years is the period of limitation within which the plaintiff would be entitled to bring a suit of this description. That being so, we are of opinion that the present suit is not barred by limitation.

[287] Two other points have been raised and argued before us which mainly depend upon this, viz., whether the local biggah was smaller than the ordinary biggah. Upon this point the lower Courts have come

to the conclusion that the defendants have not made out their contention. In second appeal we cannot interfere with this finding of fact.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[In 15 Mad, 492 it was held that a suit for *apportionment of assessment* between *co-sharers* under a single *patta* did not fall under Art.120 but that such a suit may be brought so long as their joint liability lasts]

[11 Cal. 287]

APPELLATE CIVIL.

The 26th January 1885.

PRESENT.

MR. JUSTICE MITTER, AND MR. JUSTICE PIGOT.

Mahomed Hossein.One of the defendants

versus

Purundur Mahto, on his death his son, Hem Lal Mahto.Plaintiff.*

Limitation—Suit to set aside sale held in execution of a decree—Execution Act XV of 1877 (Limitation Act), ss. 4 and 14 and sch. II, art. 12—Civil Procedure Code (Act XIV of 1882), ss. 311 312.

If in an application for execution the Court erroneously holds that the application is not barred and orders a sale, the order, though erroneous and liable to be set aside in the way presented by the procedure law, is not a nullity, but remains in full force until set aside, and a sale held in pursuance of such order is, until set aside, a valid sale, a suit to set aside such a sale is governed by art. 12 cl (a) † of sch II of Act XV of 1877.

The word "disallowed" in s 312 of the Civil Procedure Code has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under s 311 are taken

On the 15th June 1878, a judgment-debtor filed a petition objecting to execution of a decree against him proceeding on the ground that the decree was barred. On the 18th

* Appeal from Appellate Decree No 985 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 26th of March 1883, reversing the decree of Baboo Jogesh Chunder Mitter, Rev Bahadoor, Subordinate Judge of that district, dated the 25th of March 1882.

† [Art 12 —

Description of suit	Period of limitation.	Time from which period begins to run.
To set aside any of the following sales —	One year ..	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.]
(a) sale in execution of a decree of a Civil Court,		
(b) sale in pursuance of a decree or order of a Collector or other officer of revenue,		
(c) sale for arrears of Government revenue, or for any demand recoverable as such arrears.		
(d) sale of a patni taluq sold for current arrears of rent.		

Explanation.—In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent.

November 1878, that objection was overruled and certain of his property sold. Against the order overruling his objection the judgment-debtor appealed, and ultimately on the 13th January 1880 the order was set aside by the High Court, and the decree was held to have been barred. Pending these proceedings the judgment-debtor also, on the 17th December 1878, applied, under the provision of s. 311 of the Civil Procedure Code (Act XIV of 1882), to set aside the sale on the ground of material irregularity, but that application was ultimately rejected on the 17th May 1879, and the sale was confirmed on the 21st May 1879.

On the 2nd April 1880, the judgment-debtor applied to set aside the sale, on the ground that the decree, in execution of which it had taken place, [288] had been held to be barred and though an order setting aside the sale was made by the Original Court, it was subsequently set aside by the High Court on the 13th April 1881, as having been made without jurisdiction. The judgment-debtor now brought a suit on the 4th January 1882, upon the same grounds to set aside the sale and recover possession.

Held, that the suit was barred.

THE facts of this case, so far as they are material, were as follows:—On the 18th November 1878, certain property belonging to Purundur Mahto, the father of the respondent, who was the plaintiff, but who died pending the appeal, was put up for sale in execution of a decree obtained by one of the defendants against him, and purchased by the present appellant, Mahomed Hossein. On the day on which the sale took place, and immediately prior thereto, an objection raised by Purundur Mahto by a petition filed on the 15th June 1878, objecting to the sale proceeding on the ground that the execution of the decree was barred by limitation, was overruled. After the sale Purundur filed an appeal against the order, finding that the execution of the decree was not barred, and also applied to have the sale set aside on the ground of material irregularity in publishing it, etc. The latter application was filed on the 17th December 1878, was rejected on the 17th May 1879, and, though an appeal was preferred against such rejection, the order of rejection was confirmed on the 24th March 1880, and the sale was ultimately confirmed on the 21st May 1880, and a certificate granted to the purchaser, the present appellant.

On the 5th July 1879 the Judge decreed the appeal preferred against the order of the 18th November 1878 finding that the decree was not barred, and held that the decree was barred, and though an appeal was preferred to the High Court, the decision of the Judge upon this point was upheld, and that appeal dismissed on the 13th January 1880.

The judgment-debtor, Purundur, thereupon, on the 2nd April 1880, applied to the Subordinate Judge to have the sale set aside upon the ground that the decree, in execution of which the sale had taken place, had been found to be barred, and that application was granted on the 13th September 1880; but an appeal being preferred, the order then passed was set aside by [289] the High Court on the 13th April 1881, upon the ground that it was made without jurisdiction.

Purundur, thereupon, on the 4th January 1882, instituted the present suit for the purpose of setting aside the sale, and having possession of the lands which had meanwhile been taken possession of by the auction-purchaser. The first Court dismissed the suit, holding that it was barred by limitation, but on appeal that decision was reversed, and the plaintiff obtained a decree.

The lower Appellate Court was of opinion that Art. 12 of Sch. II of the Limitation Act did not apply on the ground that the execution sale was in reality a nullity, as the decree being barred by limitation the Court had no

jurisdiction to direct any sale in execution thereof; and that, even if Art. 12 did apply, the provision of s. 14 entitled the plaintiff to deduct the period from the 2nd April 1880, to the 13th April 1881, when he was endeavouring by litigation to set aside the sale. That Court also held that the sale could not be said to have been confirmed on the 21st May 1879, as that order was appealed against, and the appeal was not disposed of up till the 24th March 1880, and that the action of the Court in confirming the sale could not affect the right of the parties.

The defendant, Mahomed Hossein, now specially appealed to the High Court.

Mr. C. Gregory and Baboo Jogendro Chunder Ghose for the Appellant.

Baboo Taruck Nath Palit for the Respondent.

The **Judgment** of the High Court (MITTER and PIGOT, JJ.) was as follows:—

The facts of this case are briefly as follows:—In 1878, execution of a money decree against the plaintiff was taken out, and the property in dispute was attached. On the 15th June 1878, a petition was filed by the plaintiff, objecting to the proceedings in execution on the ground that the decree was barred by limitation. On the 18th November 1878, the Court executing the decree overruled this objection, and the property in dispute was sold at auction for Rs. 90. Against this order the plaintiff preferred an appeal.

[290] On the 17th December 1878, before the appeal was heard, the plaintiff made an application under s. 311 of the Code of Civil Procedure to set aside the sale on the ground of material irregularity in conducting it. This application was rejected on the 17th May 1879, and the sale was confirmed on the 21st May following.

The appeal against the order of the Original Court overruling the plea of limitation was heard on the 5th of July 1879, and the Appellate Court decreed the appeal, holding that the decree was incapable of execution as barred by limitation. This decision was confirmed by the High Court on second appeal on the 13th January 1880. On the 24th March following, the District Judge on appeal confirmed the order of the lower Court rejecting the plaintiff's petition under s. 311 of the Civil Procedure Code.

On the 2nd April 1880, the plaintiff made an application to the Original Court to set aside the sale, on the ground that the decree at the time it was held was barred by limitation. The Court, apparently acting under s. 316 of the Civil Procedure Code, set aside the sale on the 13th September 1880. On the 13th April 1881 this Court, on the motion of the defendant, set aside the order of the 13th September 1880 as passed without jurisdiction.

The present suit was brought on the 4th January 1882 for possession of the property in dispute, which was sold on the 18th November 1878 by setting aside the said sale.

The Court of First Instance dismissed the suit, but the District Judge on appeal has, reversing the decree of the lower Court, awarded a decree in favour of the plaintiff. Against the decision of the District Judge, the present appeal has been preferred by the auction-purchaser.

The parties joined issue upon the question whether the defendant auction-purchaser was or was not a mere benamidar for the defendant decree-holder. Both Courts have concurrently found that it had not been established that he was benamidar of the decree-holder. That question being one of fact, is therefore no longer open in this second appeal.

One of the grounds upon which the suit was dismissed by the Subordinate Judge was that it was barred by limitation under [291] clause (a) of Article 12 of the second schedule of the Limitation Act, which says that in a suit to set aside a sale in execution of a decree, the period of limitation is one year from the date when the sale is confirmed.

The lower Appellate Court is of opinion that this article is not applicable because the execution sale in this case was a nullity. The District Judge holds that the decree being barred by limitation the Court had no *jurisdiction* to direct any sale in execution thereof. One of the contentions of the defendant auction-purchaser, before the District Judge, was that the decree was not barred by limitation, and that as he was not a party to the proceeding in which it was held that it was so barred, he was not bound by the decision arrived at in it. But the District Judge overruled this contention on the ground that he purchased the property when that proceeding was pending, and that therefore on the doctrine of *lis pendens* he was bound by the final decision in that proceeding.

The District Judge was further of opinion that, even if the article in question be held to be applicable, the present suit would not be barred by limitation. He arrives at this conclusion in the following way. -- In the first place he thinks that the date of the confirmation of the sale is not the 21st of May 1879, when the Court in which the sale was held, held a proceeding confirming the sale. He is of opinion, therefore, that upon the proper construction of s. 312 of the Civil Procedure Code, the Court had no power to confirm the sale then. But the date when the sale should be held to have been confirmed, according to the provisions of the Civil Procedure Code, was the 24th of March 1880, when the District Judge dismissed the appeal in the proceeding under s. 311.

In the second place the District Judge holds that the plaintiff is entitled under s. 14 of the Limitation Act to the deduction of the time which elapsed between the 2nd of April 1880, (when the plaintiff applied to the Subordinate Judge to have the sale set aside on the ground that the decree had been declared by the highest Court to be barred), and the 13th of April 1881, when the High Court reversed the order made by the lower Court in that proceeding in favour of the plaintiff. There is no [292] doubt that if this period be deducted, and if the correct starting date be the 24th of March 1880, the suit would be within time.

It seems to me that the District Judge is in error in holding that this suit is not barred under clause (a) of Art. 12 of the second schedule of the Limitation Act.

The District Judge is in error in holding that, inasmuch as the Court had no jurisdiction to entertain the application of the decree-holder for the sale of the disputed property in consequence of the decree being barred by limitation, the sale itself was a nullity. Section 4 of the Limitation Act directs that an application made after the period prescribed in the Act shall be dismissed. This direction in the section in question does not take away the jurisdiction of the Court in respect of the application in any way. If the Court erroneously holds that the application is not barred, the order of the Court, though erroneous and liable to be set aside in the way prescribed in the procedure law, is not a nullity, but remains in full force until set aside. Therefore, the sale held in this case was a valid sale until it was set aside.

That being so, clause (a), Art. 12 of the second schedule of the Limitation Act clearly applies to this suit. According to the article in question the period

of limitation begins to run from the time when the sale is confirmed. In this case the sale was confirmed on the 21st of May 1879. The District Judge is of opinion that the word "disallowed" in s 312 of the Civil Procedure Code means "disallowed" by the Appellate Court. It seems to me that the section does not admit of this construction. The words of the section leave no discretion to the Court in the matter of the confirmation of the sale after the objection is disallowed. It says that the objection, being disallowed, "the Court shall pass an order confirming the sale." The objection to the sale was disallowed on the 17th May 1879, and the sale was confirmed on the 21st May following. The date of the confirmation of the sale was therefore the 21st May 1879, and not the 24th March 1880 as held by the District Judge. Taking the 21st May 1879 as the starting point, the present suit was not brought within one year, even if the time [293] deducted by the District Judge be held to have been rightly deducted. The suit is, therefore, barred by limitation.

The decision of the lower Appellate Court will, therefore, be set aside, and the plaintiff's suit dismissed with costs in all the courts.

Appeal allowed.

NOTES.

[A question of limitation is not one affecting jurisdiction —(1898) 25 Cal , 789

The manner in which Art 12 is affected by sec 7 was considered in (1894) 17 Mad , 316.

Where the sale in execution was not authorised by the decree, Art 12 was held not to apply —(1897) 19 All , 308]

[11 Cal. 293]

APPELLATE CIVIL

The 4th February 1885.

PRESENT ·

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

Abilak Roy and othersDefendants

versus

Rubb Roy.... Plaintiff.*

*Hindu law—Mortgage for legal necessity by managing brother of joint family
—Sale in execution of decree obtained against mortgagor alone—Rights of
purchaser and other members of joint family.*

A, the managing member of a joint Hindu family governed by the Mitakshara law, for joint family purposes and legal necessity, mortgaged the joint family property. The mortgagee subsequently sued A alone upon the mortgage, obtained a decree, and had the property comprised in the mortgage put up for sale. B, a brother of A's, who was no party to the mortgage or to the suit thereon, resisted the purchaser at the auction sale in his endeavour to get possession. In a suit by the purchaser against B and A, held, that B's interest in the joint family property was unaffected by the decree passed in the mortgage suit, and that the purchaser was not entitled to the relief he sought as regards his share

Subramanyayyan v Subramanyayyan (I. L. R , 5 Mad. 125) followed.

* Appeal from Appellate Decree No 1808 of 1883, against the decree of Baboo Dinesh Chunder Roy, Additional Subordinate Judge of Tirhoot, dated the 13th of April 1883, reversing the decree of Mahomed Nurul Hosain, Khan Bahadur, Munsiff of Tajpore, dated the 28th of June 1882.

THE facts of this case were as follows.—Hurihur Dut Roy and Jori Roy, members of a joint Hindu family governed by the Mitakshara law, borrowed a sum of Rs. 700 from one Sheo Proshad Singh upon a mortgage of a share in the joint family property, the loan being raised for legal necessity. This mortgage was dated the 13th July 1875, and covered an eight gunda, one couri, one krant share in mouzah Dihali. Afterwards Hurihur Dut Roy separated from Jori Roy. The sons of Sheo Proshad Singh, who had meanwhile died, instituted a suit on the 8th January 1879 upon the mortgage against Hurihur Dut Roy and Jori Roy, and obtained an [294] *ex parte* decree against them. Hurihur Dut Roy, thereupon, paid up one-half of the amount due under the decree, and got his share of the property released, and the judgment-creditors took out execution for the remaining portion of the decree, and attached a moiety of the property mortgaged. Abilak Roy, a brother of Jori Roy, and the sons and daughters of Jori Roy, then preferred claims to the property attached, and notice thereof was duly given at the time the execution sale was held. At the sale the plaintiff became the purchaser, and being resisted by Abilak Roy and the other claimants, in his attempt to take possession of the property he had so purchased, he instituted the suit to obtain possession. Abilak Roy appeared and claimed to be entitled to a half of the four gundas two krants share which was sold in execution of the mortgage decree, upon the ground that he was no party to the suit in which the decree was passed. He further contended that he was not joint with Jori Roy, and that he was not benefited by the money advanced on the mortgage, and that, therefore, his share was unaffected by the mortgage on the subsequent proceedings taken thereon.

Both the lower Courts came to the same conclusion upon the question of fact, holding that the family was joint, and that the mortgage debt was contracted for necessary joint family expenses and for legal necessity. The first Court, however, upon the legal question held that Abilak's share was not affected by the decree and execution proceedings in the mortgage suit, and dismissed the plaintiff's suit so far as that share was concerned. The lower Appellate Court, however, came to a different conclusion, and gave the plaintiff a decree for the whole of his claim, holding that Abilak Roy was bound by the mortgage decree.

Abilak and the other defendants now specially appealed to the High Court.

Baboo *Mohesh Chunder Chowdhury* and Baboo *Saligram Singh* for the Appellants.

Baboo *Umakali Mookerjee* for the Respondents

The following case was cited and relied on for the Appellants—*Suraj Bansi Koer v. Sheo Proshad Singh* (L. R., 6 I. A. 89)

[295] The Judgment of the High Court (MITTER and FIELD, JJ.) was as follows :—

In this case we are of opinion that the decree, which was passed, and the execution which followed upon it, did not affect the interest of Abilak Roy. It is true that his elder brother, Jori Roy, as managing member of the family, raised a loan in order to meet certain legal necessities of the family, and the lower Appellate Court has found upon the evidence that the mortgage was binding upon Abilak Roy, who was a minor at that time. But the suit which was brought upon the mortgage bond was not brought against Jori and Abilak, but only against Jori. That being so, the question arises whether the decree, and the sale which followed, would at all affect the interest of Abilak. We think it is quite clear that it does not. The case of a decree being passed

against the father acting as the representative of the family consisting of himself and his sons, is quite distinct from the case of a manager acting on behalf of his minor brothers. It was held in a Full Bench decision, in the case of *Subramanyayyan v. Subramanyayyan* (I. L. R., 5 Mad., 125), that in a case where the elder brother, acting as a manager, executes a mortgage bond, if a decree be obtained against the executant of the bond and not against his other brothers as well, the interest of the brothers who are not parties to the suit would not be affected by the decree, and the execution sale, although the mortgage itself might be binding upon them. Upon this point, namely, whether the decree and sale would, under the circumstances stated above, affect the interest of the minor brothers, who were not parties to the suit, all the learned Judges of the Madras High Court who sat in that Full Bench were unanimous, although there was a difference of opinion as regards the question, how far the mortgage itself was binding upon the younger brothers. But we are not called upon to decide this latter question in this case. The plaintiff, who is the auction-purchaser of the share of Jori Roy, seeks to obtain possession of the entire family property on the ground that in execution of the decree which was obtained against Jori Roy the whole of it [296] has passed. We think that the interest of Abilak was not affected by the sale.

We, therefore, modify the decree of the lower Appellate Court, and allow the plaintiff a decree for two gundas and one krant with costs in proportion in all the Courts, and dismiss the claim in respect of Abilak's share.

Appeal allowed and decree modified.

NOTES

[This decision, in so far as it rests on general principles, must be deemed to have been **overruled** by the decision of the Privy Council in *Daulat Ram v. Mehn Chand* (1897) 15 Cal., 70, where it was held that all were bound by the mortgage of the managing members, and that though all were not made parties to the suit, the sale in execution operated to affect the entire interest of the family.

As regards the conflict of this rule of Hindu Law with the statutory rule in The Transfer of Property Act, 1882, that all persons having an interest in the mortgage security should be made parties, (now, see C. P. C., 1908, O. 34, r. 1) there has been difference of opinion in the several High Courts, see 28 Cal., 517 reversing 27 Cal., 724, 33 All., 7, 21 Mad., 222; 22 Mad., 207, 34 Bom., 354, 12 Bom., L. R., 811, 940.,

See also 15 I. C., 89]

[11 Cal. 296]
APPELLATE CIVIL.

The 11th February, 1885.

PRESENT :

MR. JUSTICE MITTER, AND MR. JUSTICE TREVELYAN.

Than Singh..... ..Plaintiff

versus

Chundun Singh and others.Defendants

*Review of judgment—Special appeal from order passed by Appellate Court
on appeal from order granting a review of judgment—Civil Procedure
Code (Act XIV of 1882), ss. 624, 626, 629.*

No second appeal lies against an order passed under s. 629 of the Civil Procedure Code

An application was made by a plaintiff for review of judgment, dismissing his suit as against all the defendants, which application was granted. Against that order the defendant appealed, and the lower Appellate Court confirmed the lower Court's order, granting the review as against one of the defendants, but set it aside as against the other defendants.

Held, that no second appeal lay against such order

THESE appeals arose out of a suit upon a bond to recover the sum of Rs. 428-2-8, principal and interest. The Munsiff before whom the suit was heard dismissed it, holding that the evidence adduced on behalf of the plaintiff was unworthy of credence, inasmuch as enmity was shown to exist between the plaintiff's witnesses and the defendant's. After that decision the plaintiff applied for a review on two grounds. *First*, that he had in his possession a paper, showing that the disputes upon which the Munsiff had relied as ground for disbelieving his evidence had all been amicably settled, and that the document was not within the knowledge of his agent who conducted the suit on his behalf, and, *secondly*, that, after the decision, one of the defendants, Girdhari, [297] had made statements admitting his liability under the bond, and boasting that he had succeeded in evading payment thereunder and avenged himself on the plaintiff. The Munsiff, upon the facts, allowed the review, and ordered the case to be set down for re-trial.

Against that order all the defendants appealed, on the ground that it was made in contravention of the provisions of ss. 624 and 626 of the Civil Procedure Code.

The District Judge held that the Munsiff was wrong in granting the review as regards the first contention, and that having done so he had infringed the provision of s. 624. And holding that the possession of the paper in question, which the plaintiff admitted he knew of, although it was unknown to his agent, was no ground for granting a review, he decreed the appeal upon that point, and set aside the Munsiff's order, granting a review so far as the defendant, other than Girdhari, was concerned.

Upon the other question the District Judge held that the Munsiff was right in admitting the review as against Girdhari upon the allegation of the statements made by him after the original decision of the case, and he therefore affirmed that portion of the Munsiff's order.

* Appeals from Appellate Decree No. 2925 of 1883 and order No. 396 of 1883, against the decree and order of C. B. Garret, Esq., Judge of Patna dated the 15th of August 1883, modifying and reversing the decree and order of Baboo Sharada Prosad Ghose, Munsiff of Behar, dated 4th of July 1883.

The plaintiff now specially appealed to the High Court upon the following grounds :—That the lower Appellate Court was in error in supposing there had been any infraction of s. 624, and that, having admitted the review as against one of the defendants, it should have granted the review as against all the defendants. Girdhari also appealed against the order allowing the review as against him.

The only question considered in the case was whether the appeal lay at all to the High Court.

Munshi *Mahomed Yusoof* and Mr. *Mendies* for the Appellant.

Baboo *Umerandra Nath Chatterjee* for the Respondent.

The **Judgment** of the High Court (MITTER and TREVELYAN, JJ.) was as follows :—

We are of opinion that in both these cases no second appeal lies. The suit of the plaintiff against the defendants was dismissed [298] by the Munsiff. The plaintiff then filed an application for review, and that application was granted by the Munsiff. An appeal was preferred by the defendants against the order, granting a review under s. 629 of the Code of Civil Procedure. The District Judge set aside the order granting the review so far as the respondents in second appeal No. 2925 were concerned, but affirmed the order so far as the appellant in appeal No. 296 was concerned. Against the order of the District Judge, passed under s. 629, these two appeals have been preferred. There is no provision in the Code which allows a second appeal against the order passed on appeal under s. 629. Both these appeals are, therefore, dismissed without costs.

Appeals dismissed.

NOTES.

[See also (1888) 12 Mad., 125 ; (1889) 11 All., 383 ; (1906) 6 C. L. J., 225. An appeal however lies from the decree as amended —(1889) 13 Bom., 496.

It has been held in (1912) 17 C. W. N., 403 that an appeal under the C. P. C. (1908) O. 47, r. 7 is not controlled by sub-section 2 of section 104 of the Code, and that an appeal against an order granting a review would lie under sub-rule (1) of rule 7 of this order, even where no appeal would lie against the final decree disposing of the case]

[11 Cal. 298]

REFERENCE FROM CALCUTTA COURT OF SMALL CAUSES.

The 23rd February, 1885.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE WILSON

NusserwanjeePlaintiff

versus

Pursutum Doss and others.....Defendants.'

*Act XV of 1882, s. 69—New trial, application for—
Difference of opinion between Judges—Order rejecting
application—Contingent judgment.*

An order rejecting an application for a new trial, subject to the decision of the High Court on certain point or points referred, is not a "contingent judgment" within the meaning of s. 69 of Act XV 1882, nor can points of difference between the Judges at that stage form matter for reference.

A SUIT was brought in the Calcutta Court of Small Causes for the recovery of Rs. 2,000 as damages, owing to the failure of the defendants to perform an alleged contract. During the course of the trial, the plaintiff's pleader offered to abandon the claim if the defendants would go into the witness box and swear on Ganges water and the leaves of the *toolsi* plant that they had never confirmed the contract. This was met by a counter-offer on the part of the defendants that they would abide by any statement the [299] plaintiff, who was by faith a Zoroastrian, would make in the presence of fire. The challenge was at once accepted, but the defendants wanted to withdraw their offer, and submit to the original offer, of the plaintiff. The Court, however, decided that the parties were bound by the counter-offer, and the plaintiff having solemnly made a statement before a lighted match, his claim was decreed. A new trial was applied for; but the Chief Judge refused the application, subject to the decision of the High Court upon a point in which there seemed to be a difference of opinion between him and his colleague Mr. Millet, however, referred to the case of *Hall v. Joachim* (12 B. L. R., 34), and expressed doubts as to whether at that stage of the proceedings the Small Cause Court had the power of referring any question to the High Court.

The question referred was as follows:—Whether, under the circumstances, the parties could be considered as of one mind, or whether the defendants were entitled to withdraw from the counter-offer made by them after it had been accepted.

Mr. T. Apar for the plaintiff contended that the reference could not be heard, and relied on *Hall v. Joachim* (12 B. L. R., 34).

Mr. Allen for the defendant:—*Hall v. Joachim* (12 B. L. R., 34) is not an authority in this case. That was a case where the reference was made at the instance of parties. This is a case where two Judges have differed on a point of law. Section 69 of Act XV of 1882 leaves the Small Cause Court no option but to refer the matter according to the provisions thereof. *Hall v. Joachim*

* Small Cause Court Reference No. 8 of 1884, made by H. Millet, Esq., Chief Judge of the Court of Small Causes of Calcutta, dated the 16th of August 1884.

(12 B. L. R., 34) decided no more than that this Court would not decide or the Court of Small Causes what they ought to decide for themselves. Moreover, when the Small Cause Court Judges, two in number, were hearing an application for a new trial in the suit, they were sitting together in the suit within the meaning of s. 69. The course pursued in the present case was correct, and the matter was properly before the Court. This is a reference by the Judges of the Small Cause Court differing in a point of law, not a reference at the instance of parties.

The **Opinion** of the Court was delivered by

Garth, C. J. (WILSON, J., *concurring*).—I think that the pre-[300]liminary objection, which has been taken to our hearing this reference must prevail. The case is precisely similar to that of *Hall v. Joachim* (12 B. L. R., 34), to which we have been referred.

That case was decided under s. 7 of Act XXVI of 1864. which is similar in its terms to s. 69 of Act XV of 1882. In that case, as in this, an application was made for a new trial to two Judges of the Small Cause Court; and on the hearing of that application, the Judges differed in opinion upon a point of law, which was consequently referred for the opinion of this Court.

The reference came on before the late Chief Justice and Mr. Justice PONTIFEX, who decided that, if the Judges of the Small Cause Court thought fit to take the opinion of the High Court upon the point referred, their proper course was to grant a new trial, so that the point might be properly raised. But they held that upon the application for a new trial no judgment could be given, which would be a "*contingent judgment*" within the meaning of s. 7 of the Act of 1864.

The reason upon which that case was decided directly applies here, and this is more evident, because, having heard from Mr. *Allen* what the nature of the point is, it is obvious that, if we were to decide that point now, we should not determine the case finally. We should not in fact enable the Court below to give any judgment, properly so called, upon the present proceeding. The only effect of our decision might be, that a new trial would be had, in which the very point upon which we had given our opinion might not arise.

We think that we are bound by the decision in *Hall v. Joachim* (12 B. L. R., 34), and my own opinion is, that the principle upon which that case proceeded is correct.

If the Judges of the Small Cause Court consider that the point is a proper one for discussion, the course which they should take is pointed out by Sir R. COUCH in the above case, *viz.*, that they should grant a new trial, at which the point can be raised in the regular way. We make no order as to costs.

Attorneys for Plaintiff : Messrs. *Barrow & Orr*.

Attorney for Defendants : Baboo *A. T. Dhur*.

NOTES

[In (1896) 20 Mad., 358. 7 M. L. J., 140 it was pointed out that in 15 Mad., 179, 11 Cal., 298, 12 B. L. R., 34 the question was simply whether a new trial should or should not be granted; and it was held that there need be no formal order granting a new trial when this may be inferred from the fact of the merits being discussed.

To a similar effect is (1908) 31 Mad., 490 at 492 : 18 M. L. J., 480.]

[301] PRIVY COUNCIL.

The 25th, 27th, 28th, and 29th November, and 13th December, 1884.

PRESENT :

LORD FITZGERALD, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Run Bahadur Singh.....Plaintiff

versus

Lucho Koer.Defendant.

[On appeal from the High Court at Fort William in Bengal]

Res judicata—Act VIII of 1859, s. 2—Act X of 1877, s. 13—Cross
Appeal—Practice.

The decision in a suit in order to be final and conclusive, as *res judicata*, upon an issue raised in another suit, must be the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit, in which the prior decision is given in evidence as conclusive.

This proposition stated in the judgment in *Mussumat Edun v Mussumat Bechun* [8 W. R., (F. B.) 175; 2 Ind. Jur., N. S., 265], and affirmed by the Judicial Committee in *Misir Raghobardas v. Sheo Baksh Singh* (1 L. R. 9 Cal., 439, L. R., 9 I. A., 197), is applicable equally to cases under Act VIII of 1859, s. 2 (as supplemented by the general law), and to cases under the more complete enactment in Act X of 1877, s. 13, which is not to be construed as having altered the former law.

A suit was brought in the Court of a Subordinate Judge by a Hindu against the widow of his deceased brother, claiming his property by right of survivorship, the issue being whether, at the death of the latter, the ownership of the brothers was joint or separate. An order under Act XXVII of 1860, granting a certificate to the widow did not, on the above issue, operate as *res judicata* in the widow's favour, being a proceeding of representation, and not otherwise of title.

Held, also, that a decision of the same issue in a Munsiff's Court in a rent suit brought by the widow, the surviving brother, on his application, having been made a party defendant under s. 73 of Act VIII of 1859, did not constitute *res judicata* in her favour.

Krishna Behari Roy v. Gajeswar Choudhram (1 L. R., 2 I. A. 283, 1 L. R. 1 Cal., 144) referred to and followed.

Held, also, that the brother having appealed against a decree dismissing the suit as *res judicata* (the judgment which that decree followed having, nevertheless, found that the widow was disentitled by reason of the brothers having been, in fact joint in estate) the widow could have supported the decree, without filing a cross appeal as to that finding, on the ground that the decree had been rightly made (though not for the reason given) in her favour.

[302] APPEAL, and cross appeal, from a decree (August 30th, 1880) of the High Court—*Run Bahadur Singh v. Lucho Koer* (I.L.R., 6 Cal., 406)—affirming a decree (January 21st, 1878) of the Subordinate Judge of Gaya.

In the suit out of which this appeal arose, the survivor, of two brothers, Raja Run Bahadur Singh and Murlidhar, sons of Bishen Singh, of whom Murlidhar died in 1872, claimed by right of survivorship the share in the family property which had been Murlidhar's. The defendant, the widow of Murlidhar, alleged that the brothers were separate in estate, having been divided in the Fasli year 1270 (1862-1863), nine years before the death of her husband.

At a later stage the defence of *res judicata*, as to this separation not having taken place, was set up by the widow. The family property which had been acquired by Bishen Singh, who died in 1869, consisted of mouzahs in the districts of Gya and Patna, in some of which the *malikat* had been acquired by him, while others were held under *mokurrari* grants from the Tikari Raj. From Bishen Singh they descended to his sons, and the property in suit was valued in the plaint at more than Rs. 1,70,691.

At the hearing before the Subordinate Judge, the defendant, setting up the defence of *res judicata*, gave in evidence an order of the District Judge, maintained on appeal by the High Court in July 1875, granting to her a certificate to collect debts, as widow and representative of Murlidhar. To establish the same defence, she also relied on the decree of a Munsiff's Court (6th January 1875), maintained on appeal (28th August 1875), against a tenant occupying land in one of the mouzahs, the subject of one of the *mokurrari* grants. That suit was for rent, and whilst it was pending, on the 13th August 1874, Run Bahadur filed an objection, stating that Murlidhar had till his death been joint with him, that the widow was not entitled, and asking to be made a defendant. This was granted, and Run Bahadur was made a party defendant under s. 73 of Act VIII of 1859.

The Munsiff having fixed an issue raising the question whether the plaintiff's husband had received, till his death, the rent jointly with [303] Run Bahadur, or separately, adjudicated on the title as between the widow and Run Bahadur, to the entire *mokurrari*, under which was held the mouzah in respect whereof the rent suit was brought. His judgment (6th January 1875) was that the brothers were separately in possession of their shares, and that Murlidhar had been in separate possession of this mouzah—a decision which was upheld on appeal by the Subordinate Judge (28th August 1875). Upon this and other evidence given in the present suit, the Court of First Instance, the Subordinate Judge of Gya, concluded that the separation between the brothers was neither *res-judicata*, nor had it been established as a fact.

Against this decision the plaintiff, Run Bahadur, appealed to the High Court, and the defendant filed her cross appeal, maintaining that the separation of the brothers, her late husband and the plaintiff was *res judicata*, under Act VIII of 1859, s. 2. The High Court (PONTIFEX and McDONELL, JJ.) was of opinion that this issue of separation had been directly and substantially raised in the rent suit decided in 1875; and that, although the Munsif would not have been competent to try the present suit, he was competent to try, and did try, at the instance of the present plaintiff, when he tried the rent suit, the issue on which the present suit depended. The High Court held that the rule of *res judicata* must be held to apply as between rent suits and other suits, as the intervention of claimants of title was permitted; and it concluded that the judgment in the rent suit of 1875, on the substantial issue of separation between the brothers, must be regarded as *res judicata* governing the present suit. The appeal of the plaintiff was, therefore, necessarily dismissed, although the High Court on the evidence came to a conclusion opposite to that of the Subordinate Judge, and was of opinion that the brothers held the family property jointly down to the death of Murlidhar.

The judgment of the High Court is reported at length in I. L. R., 6 Cal., 412.

The plaintiff having appealed to Her Majesty in Council against the decree of the High Court based on the above view of the question of *res judicata*, the defendant filed a cross appeal, [304] as to that part of the judgment which related to the brothers having been joint.

Mr. T. H. Cowie and Mr. C. W. Arathoon, for the Appellant, contended that the judgment of the High Court was erroneous in treating the issue as to separation as *res judicata*, under s. 2 of Act VIII of 1859. In the rent suit the tenancy of the tenant was tried rather than the title of his lessor, while the claim of the intervenor was only incidentally tried. Nor was the Court of the Munsiff a Court of competent jurisdiction within the meaning of s. 2 of Act VIII of 1859, of which the words meant a Court which would have had jurisdiction over the matter in issue in the subsequent suit in which the defence of *res judicata* might be set up. This jurisdiction the Munsiff's Court, which tried the rent suit had not. The Court, giving the judgment which had been set up, afterwards as conclusive, in another Court, should also have had concurrent jurisdiction with that other Court, both as regards pecuniary limit and authority to deal with the subject-matter of the suit—*Mussumat Edun v. Mussumat Bechun* [8 W. R., (F. B.) 175; 2 Ind. Jur. N. S., 265]. Neither of these conditions existed in regard to the judgment in the rent suit of 1875. Reference was made to *Misir Raghobardial v. Raja Sheo Baksh Singh* (I. L. R. 9 Cal., 439; L. R. 9 I. A., 197) *Flitters v. Allfrey* (L. R. 10 C. P. 29).

Mr. Graham, Q. C., and Mr. R. V. Doyne, for the Respondents argued that, not only was the case of *Misir Raghobardial v. Raja Sheo Baksh Singh* (I. L. R., 9 Cal., 439; L. R., 9 I. A., 197) distinguishable, inasmuch as it related to Act X of 1877, s. 13, but also on the ground that the principle on which it was decided had reference to the pecuniary limit of the jurisdiction exercised by a Subordinate Court—a limit which in that case would have excluded from the cognizance of the first Court the question that was tried in the second. But here the rent case was one in which the Munsiff had jurisdiction to try the very question upon the decision of which the adjudication in the present suit must depend. It mattered not that the Court, into which this question had come for investigation a second time, had a jurisdiction more extended [305] than that of the Court which had already tried the question. It had been raised as a question of title in the rent suit; and the Munsiff not only had jurisdiction, but was bound to try the issue as to the separation of the brothers. Suits for rent had been heard between 1859 and 1869 by Deputy Collectors under Act X of 1859, with the right of intervention secured to adverse claimants of rent, and a proviso that the decision should not affect title. When these suits were transferred back to the Civil Courts, by Beng. Act VIII of 1869, this proviso was not re-enacted. The decision of the Civil Courts, receiving its due effect, was, therefore, *res judicata* as to the title.

That the effect of such a decision was to constitute *res judicata* did not depend only on the construction of the Acts above referred to. That the judgment of a Court not competent to try the subsequent suit, on which the judgment might be pleaded as *res judicata* must nevertheless be held to be the judgment of a Court of competent jurisdiction, appeared from the decision in *Flitters v. Allfrey* (L. R. 10 C. P., 29).

Upon the question of *res judicata*, counsel for the appellant were not called upon to reply. But their Lordships directed that the question on the merits (also raised by the cross-appeal), as to the finding of the High Court, that the brothers were joint in estate, should be argued.

On this Mr. J. Graham, Q. C., and Mr. R. V. Doyne were heard for the Cross-Appellant.

Mr. T. H. Cowie, Q. C., and Mr. C. W. Arathoon were heard for the Cross-Respondent.

On a subsequent day, December 13th, their Lordships' Judgment was delivered by

Sir R. P. Collier.—In this case Run Bahadur Singh sued Mussumat Lucho Koer, the widow of his deceased brother, Murlidhar Singh, to recover possession of the property held by Murlidhar, on the ground that the brothers were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a Hindu widow's estate in the property. She further maintained that this [306] question had been conclusively determined in her favour in a former suit between her and the plaintiff.

The Subordinate Judge decided the plea of *res judicata* against her, but held in her favour that the brothers were separate in estate, and gave her a decree.

The High Court determined the plea of *res judicata* in her favour, and, as it applied to the whole action, affirmed the decree. Nevertheless, they inquired into the question of fact, and held that the brothers were joint in estate.

From this decree Run Bahadur has appealed.

The widow has not appealed against the decree, nor could she, because it is in her favour, but she has appealed against the finding that the brothers were joint in estate.

It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it. If she had not appealed, she could have supported the decree, on the ground that the Court ought to have decided the question of separation in her favour. But inasmuch as no objection has been taken at the bar to her cross-appeal, and as (the appeals being consolidated) practically the inquiry would have taken the same course, and the costs would have been nearly the same, whether she had appealed or not, their Lordships are not disposed, under the peculiar circumstances of the case, themselves to take the objection.

The question of *res judicata* arose in this way —

After the death of her husband she applied for a certificate, under Act XXVII of 1860, enabling her to collect the debts of her husband. This application was opposed by the plaintiff, who set up the case of joint ownership, on which he now relies. A certificate was granted to her, and the grant was confirmed on appeal.

Though this proceeding has been relied upon by her as constituting *res judicata*, counsel at their Lordships' Bar have not argued that it has this effect, inasmuch as the only question to be determined in this proceeding is one of representation, not otherwise of title.

Subsequently she brought (in 1874) a suit in the Court of the Munsiff against a tenant for the recovery of rent, to the amount of Rs. 53. [307] Run Bahadur intervened, asserting precisely the same title to the property of his brother as he sets up in the present suit, *viz.*, joint interest and ownership. An issue was framed in these terms:—

“Did the plaintiff or her deceased husband realize the rent of the 8 annas separately and in a state of separation before this, or did the plaintiff's husband during his lifetime realize the rent with Run Bahadur jointly, and after him did Run Bahadur alone receive rent of the entire 16 annas?”

Witnesses were called on both sides, and the Munsiff decided in favour of the present defendant.

On appeal to the Subordinate Judge the decision was affirmed.

The jurisdiction of the Court of the Munsiff is limited to Rs. 1,000. The only appeal from it is to the District Court, from which there is only a special appeal, on points of law, to the High Court.

By Act X of 1859, exclusive jurisdiction was conferred on Collectors to determine rent suits, with an express limitation of their power in cases of intervention (s. 77) to determine the "actual receipt and enjoyment of the rent," with a provision that their decisions should not affect title.

By Act VIII of 1869, s. 33 (of the Lieutenant-Governor of Bengal in Council), rent suits were re-transferred to the ordinary tribunals, to be regulated like other actions, by the Code of Civil Procedure (Act VIII of 1859) without any re-enactment of the limitation which had been imposed on the jurisdiction of the Collector.

It has been contended on behalf of the defendant that this being so the Munsiff had jurisdiction to try the question of title if it were necessary for the purpose of determining to whom rent was due, and that the plaintiff, having intervened and raised an issue directly involving the question of title, is bound by the judgment.

This is the opinion of the High Court.

Their Lordships regard it as having been decided that such a judgment as that of the Munsiff is not conclusive.

The Indian Act in force relative to estoppel by *res judicata* [308] was at the time of the institution of this suit Act VIII of 1859, s. 2, which is in these terms :—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim "

With reference to this enactment it has been observed by the Board [*Soorjomonee Dayee v. Saddanand Mohapatter*, 12 B. L. R., 304]:—

"Their Lordships are of opinion that the term cause of action is to be construed rather with reference to the substance than to the form of action, . . . and that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata* founded on the principle *nemo debet bis vexari pro eadem causa*."

The same view has since been expressed by this Board, *Krishna Behari Roy v. Brojeswari Chowdranee* (L. R., 2 I. A., 283, I. L. R., 1 Cal., 144).

A similar view had been expressed by Sir BARNES PEACOCK, then Chief Justice of Bengal, in the well-known case of *Mussumat Edun v. Mussumat Bechun* (8 W. R., F. B., 175).

He there adopted the definition of judgments conclusive by way of estoppel given by DE GREY, C J., in the *Duchess of Kingston's case*, in answer to questions put by the House of Lords. "The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another Court," and Sir BARNES PEACOCK proceeded thus to define "concurrent jurisdiction":—

"In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

This doctrine has been expressly affirmed in a recent case before this Board [*Misir Raghobardal v. Rajah Sheo Baksh Singh* (L. R., 9 I. A., 197; I. L. R., 9 Cal., 439)] decided since the judgment appealed against.

It is true that when the suit in this last-mentioned case was [309] brought the governing statute as to *res judicata* was Act X of 1877, s. 13, which is in these terms :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction in a former suit between the same parties, or the parties under whom they or any of them claim, litigating under the same title."

But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law.

A suit for interest amounting to Rs. 1,600, on a bond for Rs. 12,000, was brought in the Court of an Assistant Commissioner, whose jurisdiction was limited to Rs. 5,000, the Assistant Commissioner held that the real amount for which the bond was given was Rs. 4,790, and not Rs. 12,000, and, interest on the smaller sum having been overpaid, dismissed the suit.

It was held that his judgment was not *res judicata* as to the amount for which the bond was given, inasmuch as this amount was beyond the limits of his jurisdiction.

Their Lordships approve of the statement of the law by Sir BARNES PEACOCK above quoted, and proceed to observe "In their Lordships' opinion "it would not be proper that the decision of a Munsiff upon (for instance) the "validity of a will or of an adoption, in a suit for a small portion of the "property affected by it, should be conclusive in a suit before a District Judge "or in the High Court, for property of a large amount, the title to which "might depend upon the will or adoption by taking concurrent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided."

If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire

Assuming, therefore, that the question of title was directly raised in the rent suit, their Lordships are of opinion that the judgment in that suit is not conclusive in this.

[310] Having regard, however, to the subject-matter of the suit, to the form of the issue (which has been above set out), and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, viz., whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive.

It now becomes necessary to consider the question of fact whether at the death of Murlidhar the brothers were joint or separate in estate. Their Lordships agree with the observation of the High Court that the tendency of the Courts in this country, to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse.

Although the judgment in the rent suit is not conclusive, still their Lordships cannot help attaching some weight to the decisions of the Munsiff and the Subordinate Judge, both Natives, who heard the same case as that now before us and a good deal of the same evidence. It may be added that the judgment in the certificate suit, in which the plaintiff set up the same case was the same ;

it was the same, also, and the case and evidence much the same, in a proceeding before a Magistrate requiring the plaintiff to enter into recognizances to keep the peace. All the Native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it.

The following facts require to be stated in order to the understanding of the merits of the case. Bishen Singh was the father of the plaintiff and of Murlidhar ; the three together with a grandson formed a joint Hindu family. Bishen was the reversionary heir to the Raj of Tikari, the estates appertaining to which had descended to two brothers, Hetnarain and Modenarain, the former of whom owned 9 annas, the latter 7 annas. Both brothers had died ; Hetnarain leaving a widow, Rani Inderjit, who adopted a son Ramakishen, Modenarain leaving two childless widows. Inderjit (called in the case “ the Maharani ”) had granted to Bishen a *mokurrari* lease of a considerable quantity of land, which formed the greater part of the joint property of the father and his two sons. Some time in 1860 or [311] 1861, Bishen left his home on a religious pilgrimage, his whereabouts were long unknown, he was vainly sought by his sons, and did not return until about 1868

During his absence the following occurrences took place His two sons brought a suit in his name under the alleged authority of an *am-muktarnama* from him against the Maharani, her adopted son, and the widows of Modenarain, disputing the adoption and claiming possession of 9 annas of the property, and a declaration of right to 7 annas. That suit had been dismissed in the District Court, and again on appeal in the High Court, on the ground that the *am-muktarnama* was not genuine.

The Maharani had, on the *mokurrari* rent not being paid, seized the property, put it up for sale, and bought it herself

It is further alleged by the defendant, and denied by the plaintiff, that the brothers separated in estate in 1862 or 1863 (Fash 1260)

It may be as well to say at once that their Lordships agree with both Courts that separation at this time (as alleged on the written statement of defendant) is not satisfactorily proved, indeed, whatever might have been the desire of the brothers to live and act separately, they could not effect a partition of the family property without the consent of their father, but if the father on his return was informed of their desire to separate, this may have influenced his action in the transaction which has now to be referred to.

The suit of the sons having been dismissed upon the ground that it was brought without their father's authority, he was in no way bound by the result, and might have instituted a similar suit himself. Under these circumstances, he came to an arrangement with the Maharani and Ramkishen, which is stated by the defendant to be as follows —

Bishen was to admit the adoption and relinquish all claim to the 9 annas, insisting only on his claim in reversion to the 7 annas. And in consideration of this the Maharani and Ramkishen were to re-grant the land (in Patna district), the subject of the former *mokurrari*, together with other lands in Gaya by another *mokurrari*. Bishen, however, having devoted himself to a religious life, desired to relinquish [312] his property to his sons, whom he described as “ men of this world,” in equal and separate shares, but, according to the inveterate practice of Hindus, desired this to be done in the form of grants to *fursidars*, one *fursidar* in each grant to be the servant of and to represent one of his sons, the other *fursidar* the other son. His reason for this is said to have been to defeat any claim against them by one Munshi Amir Ali, who had advanced the money to conduct the suit which has been mentioned.

In pursuance of this arrangement Bishen executed two *ladavi ikramamas*, in very nearly the same terms, on 2nd August 1868.

He therein states that he undertook a long pilgrimage after the death of Hetnarain, and proceeds: "Having gone to different *tirths* I was so deeply engaged in the worship of God that there remained no knowledge of the circumstances of my native place." He alleges that on his return he found that improper use had been made of his name by his sons in their suit, repudiates that suit, and renounces all claim to the 9 annas share held by Ramkishen, whose adoption he admits, retaining only his claim in reversion to the 7 annas; this instrument was executed also by his sons.

Whereupon the Maharani and Ramkishen execute on the same day another *ladavi ikramama*, admitting his reversionary claim to 7 annas.

The *mokurrari pottahs* follow on the 4th of August 1868.

That relating to Gaya confers on Bunwari Rawat and Kewal Rawat certain property of large extent, "from generation after generation, at the definite and consolidated annual uniform *jama* of Rs. 1,709 in equal shares." That relating to Patna is to the same effect, the grant being to Mitan Rawat and Ducki Rawat. These grants are made by the Maharani and confirmed by Ramkishen. The grantees are household slaves, and it is admitted on both sides that they were *fursidars*. It therefore becomes necessary to go behind the deeds and ascertain the true nature of the transaction.

The view of the defendant has been stated, viz., that the two brothers were the real *mokurraridars*, and were to hold separately.

That of the plaintiff is that they were the real *mokurraridars* and were to hold jointly.

[313] The High Court are of opinion that Bishen was the real *mokurraridar*, a case set up by neither party.

The defendant called the Maharani, the only surviving principal of the transaction except the plaintiff, Ramkishen having died before the evidence was taken in this suit. But the Maharani and Ramkishen had both given evidence for the defendant in the certificate and rent suits, and their depositions are on the record. They are witnesses of high station, having no interest in the cause, speaking of transactions in which they were principal parties, their evidence is clear, throughout consistent, and appears to their Lordships conclusive, unless it be wilfully false.

The Maharani deposes.—

"Both Babu Run Bahadur Singh and Babu Murlidhar Singh were *mokurraridars* in equal shares, i.e., at the time of taking the *mokurrari* Babu Bishen Singh had divided the property to both the above Babus in equal shares, that the brothers might not fall out with each other, and with this view the name of a man of each of them was entered fictitiously in the *mokurrari*. . . . Babu Run Bahadur Singh and Babu Murlidhar Singh were separate, and therefore the name of a man of each of them was mentioned fictitiously."

It is true that the *fursidars* gave evidence on behalf of Run Bahadur, the more powerful party (as he has acquired by purchase from the widows of Modenarain a present interest to the amount of 7 annas in the Raj), that they were slaves of Bishen, but, in their Lordships' opinion, this evidence cannot countervail the much stronger evidence that each was the slave of one of the brothers.

The Maharani further states that Bishen had told her that the "two brothers were fighting with each other; he had made a partition between them."

Ramkishen states :—

“ At the time of taking the *mokurrari*, Babu Bishen Singh took it in the name of Kewal Rawat, servant of Run Bahadur Singh, and in the name of Bunwari Rawat, servant of Murlidhar Singh. The Rawats are not the real parties. Babus Run Bahadur Singh and Murlidhar Singh were *mokurraridars* in equal shares . . . For this reason it was taken in the names of the servants of the two persons, that no dispute should arise between the two persons.”

Again :—

“ Babu Bishen Singh took the *mokurrari* for Babu Run Bahadur and Babu Murlidhar At the consultation held on that and other subjects of [314] *jama* and the selection of *mokurrari* *moujabs*, Run Bahadur and Murlidhar were both present Babu Bishen Singh was the person who actually took the *mokurrari*.”

On being asked—

“ How came you to know that Babu Bishen Singh made over the *mokurrari* to Babus Run Bahadur and Murlidhar ?”

The witness answered,

“ I know, having been told by Bishen Singh and Run Bahadur and Murlidhar.”

In other parts of their evidence these statements are in substance repeated.

Run Bahadur was called as a witness, and, although he in general terms denied that there was a separation between him and his brother, he gave no evidence with respect to the above transaction, at which Ramkishen alleged he was present, nor did he deny having said to Ramkishen what Ramkishen deposed to. The rest of his evidence may be described as mainly consisting of witnesses who deposed that the brothers lived and messed jointly, against whom a nearly equal number of witnesses for the defendant may be set off who deposed that they lived and messed separately

The evidence of the Maharani and Ramkishen is confirmed by Hafiz Syed Ahmed Reza, a pleader and zamindar, who appears to have long been on intimate terms with the two brothers, and gives the same version of the transaction. He says Babu Bishen Singh said “ these men are of the world ”, therefore, according to his wish, the *mokurrari* was granted to Run Bahadur and Murlidhar in the fictitious names of other persons, and he speaks to the negotiations at the time of the preparation of the deed.

Soon after the completion of the transaction Bishen Singh retired to Benares, where he died.

The evidence of the Maharani and Ramkishen, though accepted by the Sub-Judge, has been discredited by the High Court, that of Reza, on whom the Subordinate Judge placed much reliance, has been altogether discarded.

With respect to the Maharani and Ramkishen, the High Court observe : “ They, no doubt, have deposed to statements made by Bishen Singh, Run Bahadur, and Murlidhar admitting separation, [315] but we think their “ evidence in this respect, though important, must be taken with very great “ reserve. They were both witnesses in the rent suit, and it is not often that “ in a suit of that character people of their standing come forward to give “ evidence, unless they have a strong feeling in the matter. Reading their “ evidence we find, in our opinion, a strong bias in favour of the defendant.”

Their Lordships are unable to concur in these observations.

If the Maharani and her son knew and were able to prove that Run Bahadur was setting up a false case against his brother's widow, it appears to their Lordships greatly to their credit, instead of their discredit, that they should overcome their reluctance to give evidence in order to protect her.

Bias in a witness may be inferred from his being found to mis-state facts, from his telling monstrous or improbable stories, or showing malicious temper against one of the parties. But nothing of that kind can be imputed to either of these witnesses. They appear to have answered the questions put to them straightforwardly, and their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the plaintiff, but to infer this is to beg the question in dispute.

Another reason for discrediting the Maharani is that the plaintiff had declared his intention, and instituted a suit, to set aside the compromise, whereby it is assumed that he had incurred her hostility.

The answer to this is, that she had given substantially the same evidence in the rent suit, before he had declared such an intention.

With respect to Syed Ahmed Reza, the High Court observe :—

“The Subordinate Judge has relied on the following statement by the witness. ‘At the time of the execution of the *mokurrari*, there was a talk between Run Bahadur and Murlidhar, with respect to the mention of the names of the *benami* persons, each enquired of the other which of his men would stand *benamidar* for him. At last the names of those nominated by each of them were entered.’ But the Subordinate Judge has failed to consider this gentleman’s statement in cross examination, ‘I do not recollect whether I had made a draft of the *mokurrari pottah* in favour of the plaintiff and Murlidhar. I do not know where that deed was engrossed in stamp or where it was signed, but several had witnessed it here. When the deed was written and read I was not at Tikari (the place of execution), [316] when the deed was presented to our signature as witnesses there was no mention made as to whose *benamidars* are the persons whose names are mentioned in the deed.’

“So this gentleman contradicts himself, and though practising as a *vakil* seems wilfully to have followed the too common custom of this country of attesting a deed subsequently and at a different place to its execution.”

For these reasons they place no reliance whatever on his evidence.

The High Court suppose Reza to have been a witness to one of the *mokurrari pottahs*, but this is a mistake. he was a witness only to the *ladavi ikrarnamas*, therefore the accusation of having witnessed a deed where it was not executed, together with the contradiction in his evidence, disappear. But even if the supposed contradictory statements related to the same deed, they seem by no means irreconcilable. The consultation as to the choice of *benamidars* must almost necessarily have been before the actual execution of the document, and the witness, speaking of a transaction many years ago, may well have meant by “the time of execution of a deed,” the time when it was being prepared for execution.

Their Lordships regard it as dangerous for a Court of Appeal to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it which did not occur to that Court, and which, if his attention had been called to it, he might have been able easily to explain.

Their Lordships adopt the evidence of these witnesses as credible and uncontradicted as to the circumstances attending the grant of the *mokurrari pottahs*, which they regard as the crucial point in the case, and are of opinion that whether the brothers had or had not separated, or attempted to separate, before, they received the *mokurrari* grants in severalty, and were separate from that time.

The rest of the evidence is mainly in accordance with this view. With respect to the relations of the brothers, and the dealing with the property between the execution of the *pottahs* and the death of Murlidhar in February

1872, it is enough to say that in the opinion of their Lordships the evidence of the defendant preponderates, proof is given of separate payments by [317] some tenants, and separate receipts, and some *jumma-wasil-baki* papers are produced by tenants showing that they held under separate landlords

Their Lordships cannot concur with the High Court in accusing the defendant of "manufacturing" certain *jumma-wasil* papers, the rent accounts, not having been made up for the last years of her husband's life, were made up by her directions after his death, but there was no attempt to represent them as other than they were, nor do they appear to have been relied upon by her; the term "manufacture" is not applicable to them.

After Murlidhar's death there is no question that his widow remained for more than two years in possession of her late husband's share of the property undisputed by Run Bahadur till her application for a certificate in 1874, when, for the first time, he set up his present case. During that time Run Bahadur only claimed the right to deal with his own half-share, he raised money on mortgages of that half-share only, he brought several actions in the name of Ducki Rawat, his *fursidar*, in respect of that share only, in the plants to which actions it is stated that the property was held in separate moieties. He let 2 annas of certain property in which he and his late brother had held 4 annas, leaving the widow to deal with the remaining 2 annas. Indeed, the High Court find, in agreement on this point with the lower Court, that, after Murlidhar's death, the plaintiff and defendant enjoyed the property separately. But the High Court explain this by the supposition that "Run Bahadur, who seems to have been a somewhat easy-going person, was willing that the defendant should enjoy the 8 annas by way of maintenance."

An "easy-going person" appears an expression singularly inapplicable to a man who was bound over to keep the peace towards the widow on account of continued oppression and cruelty. It is to be observed that this was not his case—that he denied the fact of her possession which has been found by both Courts against him.

Their Lordships adopt the view of the Subordinate Judge, who observes. "After the death of Murlidhar Singh, Run Bahadur Singh, for some time considering him separate, took proceedings only in respect of a moiety."

[318] For these reasons their Lordships are of opinion that the direct evidence of the transaction in 1868, the form of the grant, "in equal shares," and the subsequent dealing with the property—all point to the conclusion that the brothers were separate at and before the death of Murlidhar, that consequently the finding on this question of the Subordinate Judge was right, and that of the High Court was wrong. Therefore, although the defendant is not entitled to a decree on the issue of *res judicata* on which the High Court have given it her, she is entitled to a decree on the issue of separation of estate, and the decree in her favour will stand. The only order which their Lordships can humbly advise Her Majesty to make is, that the decree be affirmed, and both appeals dismissed. As the defendant has succeeded on the merits of the case, she should have the costs of these appeals and the costs of the appeals to the High Court.

Solicitor for the Appellant. Mr. T. L. Wilson.

Solicitors for the Respondent. Messrs. Watkins & Lattey.

Appeals dismissed.

NOTES.

[I. 'RES JUDICATA'—THE COMPETENCY OF THE COURTS—THE TEST OF CONCURRENT JURISDICTION—

The test of concurrency has regard to the pecuniary limits as well as subject-matter :—
(1900) 24 Bom., 456 (value of instalments causing difference); (1894) 16 All., 183.

Concurrence—

Thus, although the Court has jurisdiction over the mortgage, the subsequent augmentation of interest might make a difference:—(1905) 29 Mad., 65. In order to establish the plea of *res judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue, but the subsequent suit itself in which the issue is subsequently raised:—(1908) 85 Cal., 353; 12 C.W.N., 359; 7 C.L.J., 470, citing 29 Cal., 707.

Although the decision of the Appellate Court overrides that of the Original Court, the finding of the Appellate Court is, for the purposes of *res judicata*, the same as that of the Original Court.—25 Cal., 571 at 576

The competency of the first Court to try the subsequent suit is to be ascertained with reference to itself—not by reference to the Appellate Court —(1897) 25 Cal., 571 at 576; (23 Cal., 415, 8 Mad., 83, 11 Cal., 301).

The test of appealability in the same way is no longer applied.—C.P.C., 1908, sec. 11. Exp.; (1898) 25 Cal., 571; see also at 577; *contra* (1884) 9 Bom., 80

The judgment in a suit which decides merely questions of rent—in other words, a rent-suit—pronounced by a Court not having jurisdiction to decide the question of title to the property itself, cannot be regarded as amounting to *res judicata* in a subsequent suit brought to decide the question of title to that property.—(1897) 3 C.W.N., 202; 24 Cal., 569.

[II. RES JUDICATA—THE NATURE OF THE SUIT—

In (1897) 25 Cal., 136, the question in the first rent-suit was whether certain land was *mal* or *lakheraj*. In holding that the decision was *res judicata* in a subsequent suit, BANERJEE, J., observed: “No doubt there are certain observations in the judgment of their Lordships of the Privy Council in the case of *Run Bahadur v. Lucho Koer*, which apparently lend some support to the plaintiff's contention, but then a subsequent decision of the Privy Council in the case of 15 Cal., 756, clearly shows that the mere fact of the former suit, in which the question of title is determined, being a rent-suit, does not prevent that determination from operating as *res judicata* in a subsequent suit brought for the establishment of title. Their Lordships in the last-mentioned case observe: ‘Radha Madhab now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case, the question is equally—who is the true representative of Matangini? Therefore, their Lordships conceive that the matter was expressly decided by the High Court in the rent-suit.’”

In the same case BANERJEE, J., distinguished 24 Cal., 569. “There the issue tried in the former suit was, what was the share of the rent to which the plaintiff was entitled; whereas the issue raised in the subsequent suit was, what was the share of the property to which the plaintiff was entitled;” and the two questions were not identical.

In (1907) 9 C. L. J., 493, it was held that the primary issue in a rent-suit being whether the rent claimed for the particular period was due, and the suit being dismissed as no amount was found due by the defendant to the plaintiff, a further declaration by the Court that the land was held subject to payment of rent was only incidental and could not operate as *res judicata* in a subsequent suit *inter partes* for assessment of rent.

Where in a suit for rent the defendant denies the relationship of landlord and tenant and either sets up the title of a third person to the land for which rent is claimed, or pleads that she is not in occupation of the land, or that the tenancy which existed has expired, the only material issue to be decided in the first suit is whether the relationship of landlord and tenant subsisted between the parties for the period covered by the suit, and the issue, if any, raised as to the title to the land is an incidental or collateral issue not necessary for the decision of the suit; therefore, the adjudication on this latter issue cannot operate as *res judicata* in a subsequent suit between the parties for the establishment of title to the land (24 Cal., 569; 11 Cal., 301; 26 Cal. 428); but where in a rent-suit the alleged tenant denies the plaintiff's title to

the land and set up his own title to the same, the issue as to the title to the land becomes a substantial issue in the suit, and the decision of the Court on the question of title becomes *res judicata* in a subsequent suit between the parties for establishment of title to the land (21 W. R., 349, 15 Cal., 756; 25 Cal., 136):—(1906) 10 C. W. N., 820. See also (1910) 7 I. C., 15 (Cal.); (1895) 18 All., 59.

Order in execution—Validity of the same sale deed brought in question in execution first with reference to one property was held to be no *res judicata* with reference to the other property:—(1889) 14 Bom., 206.

II. RES JUDICATA—THE NATURE OF THE FINDINGS—

What was essential to the decision is *res judicata* in a subsequent suit, notwithstanding that there might have been no express finding thereon, the rule of 'might and ought' would apply: the whole subject is fully dealt with in the judgment of SUNDARA IYER, J., in (1912) 23 M. L. J., 543, F. B., on L. P. appeal from 21 M. L. J., 344

As to when finding upon several issues are *res judicata*, see (1897) 24 Cal., 900, explaining (1895) 17 All., 174, see also 24 Cal., 908 at 929, (1893) 18 Bom., 597.

Findings which are not the basis of the decision are not *res judicata*

A finding, in a suit in ejectment, that the tenure was not permanent, was held not *res judicata*, in a subsequent suit for the same purpose, when the former suit had been dismissed for want of notice to quit —(1886) 13 Cal., 17, see also (1891) 18 Cal., 647.

First suit was on plaintiff's showing dismissed as premature, though defendant had pleaded the bar of limitation, held not *res judicata*. —(1909) 15 I. C., 890.

Where the decree does not proceed upon certain findings, but is passed 'in spite of them' as it were, these findings generally have not the effect of *res judicata* —(1907) 36 Cal., 193 at 213 5 C. L. J., 611 at 628, (1886) 13 Cal., 17, (1891) 18 Cal., 647, (1897) 24 Cal., 900; (1903) 14 M. L. J., 281

As the order refusing the application for execution which was the order disposing of the execution proceeding instituted was not based upon the order disallowing the judgment-debtors' objection, but was made in spite of it, the order, disallowing the judgment-debtors' objection, cannot be held to be conclusive against them —(1900) 5 C. W. N., 80. 28 Cal., 122.

A finding, in spite of which a decree is passed, may not be *res judicata* but may be still evidence in a subsequent suit; the Court may find on all the issues even though some may be enough to dispose of all —(1904) 9 C. W. N., 60

IV. EVIDENCE—ADMISSIBILITY OF JUDGMENTS—

Findings may be evidence, though not *res judicata* —(1896) 23 Cal., 693; (1889) 12 All., 1; (1904) 9 C. W. N., 60 See the notes to 6 Cal., 171, in the Law Reports Reprints

V APPRECIATION OF EVIDENCE—

" Their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the plaintiff, but to infer this is to beg the question in dispute"—(1884) 11 Cal., 301 at 315.

To disbelieve a witness because his evidence tells in favour of the party who has called and examined him and against the adverse party is, in the language of the Privy Council in 12 I.A., 88, "to beg the question in dispute". —(1907) 9 Bom. L. R., 393]

[11 Cal. 318]
PRIVY COUNCIL.

The 18th and 19th November and 3rd, 5th and 6th December, 1884.

PRESENT :

At the first hearing of this appeal: LORD FITZGERALD, SIR B. PEACOCK,
SIR R. P. COLLIER, SIR R. COUCH AND SIR A. HOBHOUSE.

At the second hearing: LORD FITZGERALD, SIR B. PEACOCK,
SIR M. E. SMITH AND SIR A. HOBHOUSE.

During part of the argument THE LORD CHANCELLOR (THE EARL of
SELBORNE) *was present.*

Thakur Rohan Singh.. Defendant
versus
Thakur Surat Singh.....Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Tenancy under the Taluqdari Settlement—"Oudh Sub-settlement Act,"
XXVI of 1866—Tenancy-at-will—Right of resumption—
Absence of under-proprietary right.

At the confiscation and restoration of Oudh lands in 1858, it was intended to settle and restore, under regulation, to the taluqdars, with certain excep-[319]tions, the taluqdars' rights, and also to protect, as far as was necessary by sub-settlement or otherwise, the existing rights of the occupiers, but there is nothing to show any intention to advance beyond what the rights were at the time.

Where the relation of taluqdar and tenant, at a rent of land within a taluq, has been shown to have existed at that date, and since the tenant cannot defeat the taluqdar's right of resumption on due notice, notwithstanding a lengthened duration of tenancy, either on the ground that, by reason of this state of things having brought him within the meaning of para. 2 of the schedule to Act XXVI of 1866, he is entitled to an under-proprietary right, or on the ground that time and undisturbed enjoyment have ripened his holding into a species of ownership.

The issues between the parties raising only the question of some form of proprietary right, still, if the tenant had shown any right whatever to remain undisturbed by the taluqdar, such right would have been considered on this appeal, and would have received effect.

The allegation of a grant in perpetuity in 1826 at a rent to be varied according to the amount of revenue payable by the taluqdar, not having been proved, but the existence and origin of a tenancy having been shown at a rent, paid down to the commencement of the suit. *Held*, that length of enjoyment, coupled with such payment of rent, could give no greater force to the tenant's right than it originally possessed

APPEAL from a decree (19th March 1883) of the Judicial Commissioner of Oudh, reversing a decree (6th May 1882) of the District Judge of Faizabad.

On this appeal, which arose out of a claim brought by the respondent against the appellant to recover possession of villages Newada and Gadiana in the Hardoi District, the principal questions were, whether or not the appellant was entitled to hold the villages as against the respondent, in whose taluq they were situate, in virtue of an under-proprietary right within the meaning of the "Oudh Sub-settlement Act," XXVI of 1866, or to hold them in any other permanent tenure, whereby he could defeat the right of the taluqdar to evict

him on notice. The taluqdar, Thakur Bharat Singh, was brother of the plaintiff in the suit, the latter exercising his rights under a deed of gift of August 1878; and the villages were in the possession of the defendant, Thakur Rohan Singh, in succession to his uncle Kesri Singh, who, in the year 1826 (1233 Tashli), obtained them from the then taluqdar, Gunga Singh, on terms which, save as to the rent, were [320] disputed in this suit, but under which the uncle and nephew had continually held the villages from that date

During settlement operations in Oudh no claim to the under-proprietary right in these villages was made, but in 1865, at the regular settlement, the revenue on the taluq having been raised, the amount of rent to be paid by the appellant was increased from Rs. 1,454 to Rs. 1,628. In 1880 steps were taken that led to this suit. The plaintiff required the defendant to quit possession, and afterwards entered upon the villages. Upon this the defendant obtained an order for the restoration of possession under Act XIX of 1868.

The issues raised questions as to the nature of the holding obtained by Kesri Singh in 1826, whether it was an under-proprietary tenure, either by way of "*marwat*" (a holding granted to the relations of retainers killed in battle) or otherwise originating, and whether the holding was "a tenure maintainable under the present law"

The District Judge of Faizabad who heard the suit decided in favour of the defendant, giving his reasons thus

"I consider it proved beyond doubt—and it is not denied by the plaintiff—that Kesri Singh and Rohan Singh between them have held Newada and Gadiana for fifty years or more, enjoying all the zamindari dues, and paying to the taluqdar so little that they have taken by far the larger portion of the profits. For instance, the present state of affairs is that the defendant pays Rs. 1,628 out of a rent-roll of Rs. 3,464

"Of Rs. 1,628, the taluqdar-plaintiff has to pay Government Rs. 1,022.

"There can be no doubt that the tenure has been most favourable to Kesri Singh and Rohan Singh. The main difficulty in this case is to determine whether the defendant has acquired an under-proprietary right or not.

"The position of parties has been changed by annexation. The defendant would probably have held on for many years to come, at the same time he would have had no redress in the Nawabi had the taluqdar ejected him.

"Defendant's witnesses depose to this being a *marwai* grant, but I do not consider this proved. I rather find that Kesri Singh [321] was given a favourable lease in return for active service performed by his father Himmat Singh and himself

"The taluqdar of the day, Bhabuti Singh, was careful not to commit himself to any promise in writing, which he would have done if this had been an ordinary *marwat* grant. Kesri Singh appears to have been uncertain of his title, because he permitted the taluqdar to raise his lease in 1865 from Rs. 1,454 to Rs. 1,628, and also because he refrained from attempting to establish his title at the settlement

"The evidence as to Kesri Singh having adopted Rohan Singh is meagre, but it is clear that the latter succeeded the former in the full enjoyment of this lease.

"The witnesses produced by the defendant are more reliable than those on the plaintiff's side. It is not usual to see witnesses in Court, like those for the plaintiff, who depose to their being entirely at the mercy of the

" taluqdar, though they have held leases for 50 and 60 years or more. Plaintiff's first witness, Madar Baksh, though a resident of Newada, cultivates in the adjacent village of Kashipur, and he was most unwilling to admit the number of groves planted by the defendant.

" The cross-examination fully established his partisan character. The plaintiff's witnesses, in fact, proved too much : they proved that their profits were very small as compared with the defendant's ; and thus that their cases were not similar.

" Defendant's witnesses depose that the defendant wished to advance his claim to a sub-settlement at the first summary settlement, but that Thakur Bharat Singh, brother of the plaintiff and taluqdar at the time, dissuaded him ; that subsequently matters were settled by the defendant agreeing to pay an increased rent, namely, Rs. 1,628, the rent now paid.

" It may be presumed from this that Thakur Bharat Singh confirmed and ratified this long-standing lease.

" However, if the defendant had sued at the regular settlement he might have found para. 2 of the schedule to Act XXVI, 1866, rather awkward, for a plaintiff was required to show that he had inherited 'not merely through privilege granted on account of service, or by favour of the taluqdar.' Defendant has clearly no title independent of the taluqdar, and the weak point of his case is undoubtedly this one."

[322] After referring to the decision in *Drig Bijai Sing v. Gopal Dat Panday* (I. L. R., 6 Cal., 218, L. R., 7 I. A., 17), the Judge continued as follows :—

" It seems to this Court that time and undisturbed enjoyment have ripened this holding into a species of ownership, and that it would be unjust to eject the defendant for the purpose of redistributing the profits. The revenue assessment is so low that the profits go chiefly to the defendant, and it may be gnawing to the plaintiff to submit to this ; but this result has been brought about by Thakur Bharat Singh, and it is fair that the taluqdar, in understating his rent-roll, should not benefit by it. This matter of assessment is here mentioned, because it seems the only explanation of Bharat Singh's acquiescence in the defendant's position, unless, indeed, Thakur Bharat Singh considered it unassailable. It is remarkable that the plaintiff has not examined his brother, Thakur Bharat Singh, as a witness ; his testimony would have been far more reliable than that of Madar Baksh."

After further comments on the evidence, the judgment concluded thus :

" The defendant appears entitled to hold at the present rate, unless and until the revenue assessment on these two villages be raised by Government, when the amount payable by him would be again determined."

The above decision was reversed by the Judicial Commissioner on appeal by the plaintiff, in the following judgment. —

" As the defendant is holding under the plaintiff and paying him rent, it was for him to prove that he is more than a tenant. He has no lease. There is no good evidence to show on what conditions the land was made over to Kesri Singh. It is admitted that the rent has been raised.

" Adopting the defendant's view of the case, the landlord, from motives of gratitude, gave the villages to Kesri Singh at a low rent, and Kesri Singh and his successor have been allowed to retain the land ever since, and their rent has only once been raised. This does not create an under-proprietary tenure. There was no adverse possession till the defendant lately asserted that he was

"not a tenant. The second clause of the schedule to Act XXVI of 1866 bars the defendant's claim [323] to an under-proprietary right in these villages. That clause requires the claimant to show that he, or the person from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege, granted on account of service, or by favour of the taluqdar, held such lands under contract (*pukka*) with some degree of continuousness since the village came into the taluqa. According to [the defendant's own showing, Kesri Singh merely held by favour of the taluqdar.

"Mere prescription will not turn a tenant's holding into an under-proprietary tenure, and I hold that the defendant has failed to prove any sort of right to the land."

On this appeal—

Mr. J. G. W. Sykes, for the Appellant, argued that the judgment of the District Judge should not have been reversed. It might be supported on the ground that there was evidence that the villages in suit were granted in perpetuity, according to an arrangement between Gunga Singh, taluqdar, and Kesri Singh in 1826, as a compensation for the death of some relations of the latter, if not precisely as a *marwat*, still in the manner of a grant of that kind. If, however, Kesri Singh's possession did not originate in such a grant, but in a lease "for an unlimited term" (as the translation of the plaint stated, probably meaning "for an indefinite term") that was either a contract, or was an arrangement followed by such a state of things that a contract must be inferred, it having resulted in a continuous occupation by Kesri Singh, and the appellant, as his successor in the holding, for fifty-five years, a period far beyond the limitation fixed for any purposes of admitting such grants to proof. Under-tenures, held under any arrangement from which a contract might be inferred, when coupled with such lengthened possession, were within the definitions of sub-proprietary rights given in the rules contained in the schedule annexed to the "Oudh Sub-settlement Act," XXVI of 1866. That the term "holding under contract," used in the second paragraph, embraced any holding under arrangements from which a contract might be inferred, was shown by *Maharajah of Balrampur v Uman Pal Singh* (L. R., 5 I. A., 225), *Drig* [324] *Bijai Sing v. Gopal Dat Panday* (I L. R., 6 Cal., 218, L. R., 7 I. A., 17) in which latter case the judgment referring to the facts said "From the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held *pukka*, or under contract, or at all events under an arrangement from which a contract might be inferred." The appellant's holding, accordingly, fell within rule 2 of the schedule to Act XXVI of 1866, the "Oudh Sub-settlement Act," as in this case there was the requisite degree of continuousness mentioned in the rule. These circumstances would have entitled the appellant to the under-proprietary right and to a sub-settlement had he been claimant. Therefore, he could resist ouster by the taluqdar. The fact, moreover, that the rate at which Kesri Singh paid rent had once been raised in 1865, when the revenue payable by the taluqdar was increased at regular settlement, supported the defendant's claim to hold at a fixed rate, that being a certain percentage on the revenue; and such increase of rates paid by under-proprietors in respect of the revenue being within the contemplation of the rules referred to. Moreover, the possession by the defendant of *sir* and *nankar* land as shown by the evidence, attaching as these did to the proprietary right, indicating its having at one time existed, and entitling the holder under the third para. of Act XXVI of 1866 to the proprietary right in the land so held, afforded a strong presumption in his favour as to his right to the villages. Again, the fact that Rohan Singh

as well as Kesri Singh had exercised zamindari (in the sense of village proprietary) rights over the *banjar*, or waste land, in planting groves, and in other matters, strongly supported the defendant. Confirmatory, also, of the view taken by the District Judge, was the evidence that the taluqdar, at the time of the regular settlement, had induced the appellant to refrain from filing his petition for the ascertainment of his rights in the Settlement Court. Such an act on the part of the taluqdar had been held to entitle a person to all that he would have obtained had he filed his petition; and as great an effect ought to be given to the taluqdar's having held out an inducement to the defendant to abstain from [325] proceeding as had been given to the promise of the taluqdar to allow a tenant to remain in possession in the case of *Kishnanand Misir v. The Superintendent of Encumbered Estates, Mehdaona*, decided by this Committee on 20th May 1879. Reference was also made to *Mussamat Thukran Sookraj Koowar v. The Government* (14 Moo. I. A., 112), *Thakoor Hardeo Bux v. Thakoor Jowahar Singh* (L. R., 6 I. A., 161), *Raja Kishendat Ram v. Raja Mumtaz Ali Khan* [I. L. R., 5 Cal., 198; L. R., 6 I. A., 145 (156)]

The interest of the defendant might be one of those which, as intimated in the judgment in *Gowri Shunker v. The Maharaja of Bulrampore* (I. L. R., 4 Cal., 839, L. R., 6 I. A., 1), although not, in the strict sense of the term, under-proprietary interests, were such as, nevertheless, to entitle the holder to a sub-settlement. The facts showed that neither Kesri Singh nor Rohan Singh held merely "through privilege, on account of service or by favour of the taluqdar." Lastly, if the appellant had not made out his title to be recognized as an under-proprietor, he was entitled to protection as holding a permanent tenancy.

Mr. J. Graham, Q. C., and Mr. J. T. Woodroffe, for the Respondent, argued that it had been rightly decided by the Judicial Commissioner that the appellant held only a beneficial lease, terminable at the will of the lessor, on due notice. The judgments of the Indian Courts, though they differed in their view of the law, concurred upon the finding of fact which, in effect, disposed of the appellant's contention, viz., they both found that Kesri Singh did not in 1826 acquire an under-proprietary title to the land in suit. The possession was not in its inception, nor did it afterwards become, by prescription or otherwise, a tenure of the character of under-propriatorship. The tenant in this case was neither an under-proprietor, nor was he entitled to a sub-settlement, the latter right being founded upon some kind of proprietary right. It was impossible to say that, because a lease had been granted on favourable terms, and had been enjoyed for a long time, there was, therefore, a presumption in favour of its being perpetual. On the contrary, the presumption in this case was in favour of the taluqdar. Reference was made to *Sir Maharajah [326] Drig Bejar Singh v. Gopal Dat Panday* (12 Moo. I. A., 331). Such grants, as the one alleged to have been made, fell within the 52nd section of Act XVII of 1876. "The Oudh Land Revenue Act," which declared that all grants of land to be held at a favourable rate of rent should be liable to resumption, where no sanction by the Government, or the Chief Commissioner, had been given to them, unless the grantor of a written instrument expressly agree that there should be no resumption, in which case the grant was valid against him during the continuance of the settlement.

Mr. J. G. W. Sykes replied.

Judgment having been reserved, this appeal was afterwards, on the 3rd December, argued again, by direction of their Lordships.

Mr. J. G. W. Sykes, for the Appellant, argued five principal points. He first contended that the evidence established a grant to Kesri Singh in 1826,

and adverted to the general law relating to such grants in Oudh ; secondly, he referred to the evidence of Kesri Singh's rights as an under-proprietor, and to the Circular Orders and Acts, especially the schedule to Act XXVI of 1866, relating to rights to a sub-settlement ; thirdly, to the general grounds on which, as he contended, the defendant would have been entitled to a sub-settlement ; fourthly, to the *sir* and *nankar* holdings, with other matters indicating proprietary title ; fifthly, to the defendant's right of permanent occupancy of the villages as a tenant at a rent.

In addition to the references previously made, he referred to Parliamentary papers, Oudh, 1856, pp 86, 87, 160, Circular Order, Chief Commissioner, Oudh, 13th June 1863, House of Lords' Papers, 1859, Sir R. Montgomery's Report, p. 15, para. 97, Minute of Chief Commissioner, with Financial Commissioner's C. O., 12 of 1867 ; Sir J. Strachey's Minute, schedule, Act XXVI of 1866.

Mr. *J. Graham*, Q. C., and Mr. *J T Woodroffe*, for the Respondent, were not called upon.

On the 6th December their Lordships' **Judgment** was delivered by

Lord Fitzgerald.—This case is one relating to title to immoveable property, and their Lordships think the parties should [327] present their case with some degree of substantial accuracy, and prove it as alleged, in other words, that their Lordships should deal with the case on the allegation and the proof.

The plaintiff, Thakur Surat Singh, seeks to resume his right as to two villages, Newada and Gadiana. His petition puts his case thus "That Thakur Bharat Singh is the *sanad*-holding taluqdar of taluqa Atwa and Nasirpur, which includes the villages of Newada and Gadiana. According to the *sanad* granted to him by Government under Act I of 1869, he possessed all proprietary powers over the said villages, and consequently he has made over in gift to plaintiff all his *taluqa* under a deed of gift, dated 31st August 1878." The allegation is that Surat Singh became the assignee of Bharat Singh's rights. The *sanad* gives him all proprietary rights subject to the rights of occupation, and other rights of parties who were in possession at the time of the grant, and which they might have established either as a matter of under-proprietary right, or sub-settlement, or a right to be continued in occupation. So far, there is no controversy. He then alleges that the defendant was lessee of the said villages under a lease for an unlimited term—(it has been agreed in the course of the argument that "unlimited" is to be read as "undefined")—"at an annual *jama* of Rs. 1,628, the lease having been granted by Thakur Bharat Singh (the donor), whose successor plaintiff is under the deed of gift." If that were in controversy, their Lordships think there is evidence in the case which establishes that allegation, for whether the holding of the two villages was originally a separate holding of each, or a joint holding for Rs. 1,454, by the transaction which took place in 1865, at the time of the general regular settlement of Oudh, that rent had been increased under circumstances to which their Lordships will refer, to Rs. 1,628 for both, without distinction, and would seem to have constituted a tenancy at that date, in 1865, of both villages at the consolidated rent of Rs. 1,628. The remainder of the petition of the plaintiff is this: He alleges in substance that he had a right to resume possession; that he gave notice of his intention to resume, and the defendant denied his right. These facts not being controverted, *prima facie* establish the relation of landlord and tenant [328] between the plaintiff and Rohan Singh, who himself would be the lessee in 1865, and is the successor of the original grantee. Unfortunately there is no written statement on

the part of the defendant, but there is a verbal statement made at the bar, very much resembling the old Common Law Pleading "*ore tenus*." There is a verbal statement made by Mr. Sykes, counsel for defendant, taken down by the Judge, which is tantamount to this: "I admit your *prima facie* case, but my case displaces yours, and I will tell you what it is." Accordingly at page 15 we find that "Mr. Sykes states the parties are descended from a common ancestor, one Nuggar Sah. Defendant's adoptive father, Kesri Singh, got the property in dispute"—that is, the two villages—"in A. D. 1826 (1233 F.) on a contract from Gunga Baksh, that Kesri was to hold for ever, at a rental which was a certain percentage above the Government revenue." Now that is a clear and precise case, and if the defendant has sustained it in proof, he has a right to succeed here.

Their Lordships have considered the case, in the first instance on the circumstances antecedent to the time, in 1858, when the confiscation of Oudh was declared. The main point to consider is, what title the defendant had immediately before that confiscation. Mr. Sykes then in his statement adds: "The amount payable during the Nawabi being Rs 1,454, at this rate Kesri Singh paid during Nawabi, and up to 1271-72 F. In A. D. 1865, 1272 F. (*i.e.*, at regular settlement), on the revenue assessment, on the whole *taluqa* being increased, a corresponding increase in the amount payable by Rohan Singh was made, bringing the demand up to Rs. 1,628." With this explanation the rent is said to have been unchanged since 1826. "Prior to annexation Kesri Singh had acquired sub-proprietary title in this holding, and maintained that position subsequent to annexation, and through his successor up to date." The parties met "before the Judge to discuss the case and settle issues. The defendant's case was an admission that he had paid rent, and that the plaintiff was the taluqdar to whom he had paid it; and that *prima facie* imported the relation of landlord and tenant, which carried with it the right to resume possession on proper notice to quit." The Judge very properly said to [329] defendant. "The onus is thrown upon you. You allege in answer to that *prima facie* case that you are a grantee of a particular character, and I proceed now to settle the issues between you." Gunga Singh had been the taluqdar under the Nawabi, and was the party entitled to the taluq at the time of the grant to Kesri, and the plaintiff is the successor of Gunga. The two real issues are: "Did Kesri in 1826 acquire from Gunga Singh an under-proprietary tenure (granted as compensation for death of a relative in 'battle' in these two 'villages,' subject to payment of a percentage above Government revenue, and is such tenure maintainable under present law?" Then, secondly, "independent of the specific grant alleged, has the holding of Kesri been such as to entitle him to an under-proprietary right?" Both issues lay on the defendant.

Their Lordships would not be inclined to construe these issues adversely to the defendant as to the terms, proprietary right, or otherwise, but they will consider whether he has established a right to remain as he is, paying the rents for these villages, and to remain there for ever; whether you call it a right to sub-settlement or an under-proprietary right, or a right not to be disturbed, is not material. If the defendant has shown a right to remain there undisturbed by the plaintiff, their Lordships will give effect to that right.

It is remarkable that, though the beginning of this grant is shown, we have not, on either side, a shred of documentary evidence to establish what it was. It is admitted that at its inception there was no writing. No documents, no accounts, have been produced. This case, extraordinary in its character, rests entirely on the parol evidence of two old witnesses, whose statements are

said to be confirmed by the character of the enjoyment[†]. Their Lordships do not find it necessary to consider the law of Oudh under the Nawabi. It was said in the course of the argument that under the Nawabi a grant might have been made of the character which the defendant seeks to set up unevicted by writing. Their Lordships may entertain doubt as to whether such was the law of Oudh, but for the purposes of this case only, they will assume that the law under the Nawabi was, as alleged, that is to say, that such a claim as the defendant sets up might have been established and main-[330]tained though unevicted by any written evidence, or any writing or written contract, or grant. It is not pretended that there was any grant in writing, and the defendant's witnesses gave evidence that there was none. Further, their Lordships cannot forget that the defendant rests his title to both villages on one and the same grant, in perpetuity, at a rent to be varied at a certain percentage according to the Government revenue

Their Lordships will first deal with the case of the village Gadiana. That came into the possession of Kesri in 1838. There is not a word of evidence to establish what the circumstances were connected with the grant of that village. It plainly was not made in respect of the death of the two relatives, for if the statement which is made is to be believed, they died in battle over 12 years before. The grant as compensation in respect of their deaths would have been the grant of Newada. No witness tells us any circumstance connected with the grant of Gadiana, save that in 1838 Kesri got the village of Gadiana from Gunga Baksh at a rent originally of Rs 400, afterwards increased to Rs 450. The time or circumstances of the increase from Rs. 400 to Rs 450 do not appear, Kesri continued to hold the village of Gadiana. He paid that rent, and was living at the time of the confiscation of 1858. What was Kesri's title at the time of the confiscation to the village of Gadiana? He got it in 1838. He had been 20 years in possession. His possession appears to have been the ordinary possession of any person paying rent, that rent having been increased between the time of the original tenure of 1838 and 1858 from Rs. 400 to Rs. 450. It is said also that light is thrown upon the character of his possession by the fact that he exercised the zamindary rights. The evidence upon that is by no means satisfactory. Nothing precise or specific is shown and there is a mass of evidence on the other side, that in that particular district of country it was common for an ordinary lessee, who had no rights beyond those of a lessee, to exercise what are called zamindary rights. Nothing specific, however, is made out

It appears to their Lordships that, as to Gadiana, it would be impossible to come to any other conclusion consistently with the evidence, than that the allegation of the defendant that he held this village from 1826, or even from 1838, under a grant [331] for over at a rent varying only with the amount of the Government revenue, has not been proved. It appears to their Lordships that the case as to Gadiana is too plain to admit of discussion or argument, it utterly fails. Their Lordships will subsequently consider what took place after 1858, and see whether it could have conferred upon the defendant any greater right than Kesri had in 1858. The case fails as to Gadiana. One might say that, failing as to that, the defendant failed as to the whole of his allegation, but their Lordships would be very slow to bind the defendant in that way. If he has proved a case which entitles him to be protected from ejection as to the other village, Newada, their Lordships would be prepared to give effect to that right, what ever it may have been; but they cannot shut their eyes to this, that the allegation as to Gadiana has wholly failed, and it must reflect, and powerfully reflect, on the case that is made as to Newada

The evidence as to Newada consists of the verbal statement of two witnesses, Myku Lal and Jhubbu. It must not be forgotten that the case of the defendant is a perpetual grant out and out, once and for all, from generation to generation, of this village of Newada, at a certain rent. The evidence shows that the rent originally payable was Rs. 900, and probably an allowance for the chaukidar, subsequently increased, under circumstances to which their Lordships will hereafter allude, to Rs. 1,628, when joined to Gadiana. One witness is 75, and the other is 80 years of age, and they make a statement which it was not possible to contradict. Myku Lal, aged 75, says: "I knew Kesri Singh. He died about a year after the Mutiny. He held Newada and Gadiana till his death. He had held for many years—perhaps 50 years ago from this date. Rohan Singh, defendant, succeeded him" Then he states the circumstances of the fight, in which persons of the name of Man and Chain figured. They were dacoits. There is evidence in the case that those dacoits were killed, 90 or 100 years ago. The witness then gives an account of the fight in which two relatives of Kesri were killed. "On the 11th day" (*ekadasa*) Bhabuti Singh offered Kesri money for his relations. Kesri said he "would not take money, but land Newada was at that time waste." That probably means waste and unoccupied—"and so [332] Bhabuti Singh placed Kesri Singh there, telling him to locate cultivators there, pay the Government revenue, and enjoy the zamindari rights Since that time Kesri Singh alone has exercised rights in Newada. He has granted *maffi* and planted groves. I was servant of Kesri Singh for one year when I was twenty years old; I was present in the fight Kesri Singh paid the chaukidar. The patwari's pay came from the taluqdar. Rohan Singh is own nephew to Kesri Singh, who had no son Rohan Singh has succeeded to Kesri Singh's property. Defendant takes all proprietary rights in Newada and Gadiana." Cross-examined, he said: "Nothing was written by Bhabuti Singh in favour of Kesri Singh. Kesri Singh was to pay the Government revenue, the amount was not stated I do not know if the village of Newada was assessed at all. Kesri and Rohan did not engage direct with the Government. I cannot say what amount the defendant and Kesri paid the taluqdar. The taluqdar appointed the patwari and chaukidar" Now it will be observed that the statement made by that witness is not the creation of a holding at a rent, it is the statement of a verbal grant, in which not a word is said about rent no rent at all of any kind; but he put him in possession with these absolute rights, and he was to pay the Government revenue. That was the sole obligation imposed on him—not at Rs. 900—but to pay the Government revenue. The evidence given absolutely contradicts that case. Their Lordships do not mean to say it contradicts it in this respect, that in some right or other Kesri then got Newada, but that he got it in the right which this witness describes under such circumstances as that a grant for ever might be implied from it is absolutely contradictory. His statement is, that he was to exercise the zamindari rights and to pay the Government revenue, but no more

The second witness, Jhubbu, says. "Kesri Singh held them till his death, and after him Rohan Singh. Defendant Kesri first got possession 50 or 55 years ago. On the *ekadasa* Bhabuti Singh came to Kesri and offered him some money. This was declined. Bhabuti Singh then located him in Newada, and told him to get cultivators and enjoy the zamindari rights and pay the revenue," and about a year or two afterwards he got Gadiana. The evidence of that witness is in substance the same as the [333] evidence of the other. It shows, if they are to be believed, a grant under circumstances from which fairly some implication might be made of a

continuing grant, but which, in its main particulars, is contradicted by the other evidence in the case. It is now proved beyond doubt that, so far from getting the village subject to no rent, Kesri was to pay the taluqdar Rs. 900, with an allowance of Rs. 50 to pay the chaukidar, and that he did not pay the Government revenue; at all events there is no evidence that he ever had dealt with the Government. The evidence is that it was subject to a rent of Rs. 950, and that rent he paid.

It remains now to consider whether, upon the evidence of these two witnesses, contradicted as it is by the other evidence in the case, and supported only by the alleged exercise of zamindary rights, which have already been adverted to, their Lordships could fairly draw any inference that the village of Newada had been granted, or was intended to be granted by Gunga Singh, or his son, to Kesri for ever, to hold from generation to generation, at a fixed rent, variable only according to the change that might take place in the Government revenue? Their Lordships would be very willing indeed to draw any reasonable inference in favour of a party who has so long enjoyed certain rights, but what their Lordships are here asked to do is to invent a grant, to define its terms, to define the rent not mentioned at the time of the original supposed grant, and further to come to the conclusion that Kesri had got a grant for ever. There is nothing intermediate. It is not alleged to be for the life of Kesri, or for the life of Rohan. It is either an ordinary lease granted by the taluqdar to Kesri, as a reward for the services of his family, at a rent profitable to him, but with the incident that it might be resumed upon proper notice by the taluqdar, or it is a grant for ever. Their Lordships are now asked, in a case where the commencement of defendant's title is shown, to invent a grant in all its terms, and convert it into a holding for ever, by the descendants of Kesri. Their Lordships feel, dealing with the title of Kesri as it stood in 1858, and quite irrespective of the subsequent increase of rent, there are no circumstances from which they could reasonably come to the inference that in 1858, even as to the village of Newada alone, Kesri had any such title as alleged.

[334] In 1858 came the confiscation of Oudh, the result of which was the determination of all existing interests, and taking them into the hands of the Government. But the Government of India did not intend any such injustice as an absolute confiscation of those rights. In certain instances, where taluqdars or others had been guilty of great crimes, absolute confiscation did take place; but otherwise it was intended, under certain regulations, to settle and restore the taluqdars, and to protect, as far as necessary, by sub-settlement, or by some other process, the existing rights of the occupiers. It will, therefore, be seen how necessary it is to inquire what those rights were at the time of the confiscation, for though in the letter of Lord Canning in 1859, and in the subsequent circulars which were issued from time to time, every intention is shown to do justice to all the parties, and to compel the taluqdars to do justice to the occupiers, yet there is nothing to show any intention to advance beyond what the rights were at the time of the confiscation, and the intention was generally to restore and to protect those rights. The defendant says: "But I had a right to a sub-settlement of some kind or other." Their Lordships will not at present go into the distinction between a sub-proprietary right or a right to a sub-settlement, and a right to be protected in the occupation which a person already had, nor bind the defendant too nicely by those terms, but they will take it that, if he had a right, he might have protected it under the Act of Settlement of Oudh, or some one of the circulars and rules which are adopted and confirmed by that Act. He might have protected that right by either getting a sub-settlement or a recognition of his existing title or

possession. What took place was this, and it also depends on the evidence of two witnesses. The possession, it is to be observed, was not disturbed by the confiscation. The taluqdar remained as he was, and the occupying tenants remained as they were. Then came the Settlement of 1861, which was only temporary. The witness Canogi says "Rohan Singh, after the Mutiny, wanted to file a petition, but Bharat Singh said, 'there will be confusion in the estate, pay what you used to pay,' and that in consequence of that he did not file a petition to protect his right whatever it might have been. Again, a subsequent witness, Omaid Singh, says "At the settlement after the Mutiny, Bharat [335] Singh came to Naihra, and stopped at the well. Rohan Singh said the Government called for petitions. Thakur Bharat Singh said 'if you petition, my *taluqa* will be broken up Do zamindari as hitherto, and remain in the *taluqa*.'" The defendant relies upon that evidence. Bharat Singh was not produced as a witness. There is objection on the part of the high class Hindus to appear as witnesses in a Court of Justice. The more pregnant observation to be made is that this equitable contract, or whatever it is, was made with Rohan Singh, on whom the issue lay, whose title, if he has any, may rest upon this altogether, and he is not called as a witness. Their Lordships cannot tell whether he was present at the trial or not, but it strikes them as a very remarkable fact that Rohan Singh, the defendant and party to this alleged agreement, was not called. Well, then, it rests on the conversation represented to have been overheard by two witnesses, nearly 20 years before the institution of this suit, and being uncontradicted, their Lordships would be quite prepared to consider it, but it is obvious it could only take effect to establish such right as Kesri Singh had before the confiscation. As has been pointed out, the real point, therefore, for their Lordships to inquire into, is what title had Kesri at the time of the confiscation? Their Lordships have been obliged to come to the conclusion upon the evidence that Kesri at that time had no more than a lessee's right subject to resumption at the will of the landlord upon giving proper notice. The view their Lordships take of it is this, putting it in the largest way for the defendant, that the parties at that time probably did not understand exactly what this sub-settlement or re-arrangement was, that Bharat Singh, anxious to get his taluq in safety, was unwilling that there should be any petitions, and what he says is substantially this "It might create disturbance, it might break up the taluqa, and what ever rights you now have I will preserve," and to that extent their Lordships would be fully prepared to give effect to this agreement, if such it can be called, but unfortunately in giving effect to that, they could only give effect to and protect the interest which the lessee had in 1858. The case goes a step further, because it is alleged that a transaction took place subsequently which established the right of the defendant to hold these two villages for ever. The allegation [336] in the defence is that there had been an agreement between Bharat Singh and the present defendant, that the defendant, agreeing to pay an increased rent, should hold two villages for ever at that increased rent. Let us see what that transaction was, and whether, in place of supporting the defendant's case, it does not go far to destroy it. It is thus described by the two witnesses "At the Regular Settlement Rohan Singh went to Hakaura" (the Regular Settlement was in 1865, four years after the alleged conversation) "being called by Bharat Singh, who said that the revenue had been assessed heavy;" not that Rohan Singh's was heavy, but that the taluqdar's revenue had been assessed heavy, "that he had to pay Rs. 1,022 on Newada and Gadiana, and he demanded from Rohan Rs. 511, Rs. 48 for chaukidar, and Rs. 47 for patwari: since that Rohan Singh has paid Rs. 1,628." The exact sums are, Rs. 1,022, Rs. 511, Rs. 48, and Rs. 47, which just make up the

Rs. 1,628. There is not a word said to this effect: "If you will pay the increased rent, I will maintain you in possession." It is the simple case of a taluqdar whose payment to the Government had been increased going to his tenant and saying. "I must now increase your rent. I have to pay more myself, and you must pay me more," and in addition to paying for the chaukidars, he pays for the patwari, and he pays such a sum as above the Government revenue, and over those two payments, will leave a clear profit of Rs. 511 at least going into the hands of the taluqdar. But it is not shown what the increase of Government revenue was. It is not shown that the increase of rent by Rs. 174 had any relation, or what relation to the increase of Government revenue. It simply shows that the two villages appear to have been consolidated, and that they are held together at a consolidated rent which exceeds by Rs. 174 annually what had been paid before. Their Lordships have already stated their view that he had only the title of an ordinary lessee, subject to the acknowledged right of the landlord to resume upon giving due notice. If there was a contract in 1861, it was a contract only to maintain Rohan Singh in that which his ancestor had at the time of the settlement, and nothing more, and the transaction of 1865, in place of establishing any title greater than that of an ordinary [337] tenant in Rohan Singh, simply shows that he agreed to hold at an increased rent, and without any stipulation that his tenure was to be, as it is now alleged to be, a tenure for ever.

Their Lordships do not consider it necessary to express any opinion on the questions of law which have been raised. The facts of the case establish that the decision of the Judicial Commissioner of Oudh was correct, and that the defendant failed to establish his case upon the facts. Many cases have been cited, and a very interesting argument has taken place upon the effect of the rules and Legislative Acts with regard to confiscation in Oudh. Their Lordships have also had these rules illustrated by a number of decisions to which Mr Sykes referred. It appears to their Lordships quite unnecessary to deal with any of those decisions, or any of those cases. This defendant has not been protected by any sub-settlement. There has been no Government recognition of his right. Their Lordships arrive at the conclusion that he is probably in as good a position as if his right, whatever it was, had been recognised in some way under the rules regulating the settlement of Oudh. But what was that right, to which only we can give effect? Their Lordships have already pointed out what the right was in 1858, and nothing that has occurred since that has given greater effect to, or increased the right.

Their Lordships, therefore, think that the decision of the District Judge was erroneous, especially when he says that, while holding there was no evidence of any grant, and the evidence entirely failed, he still comes to the conclusion that time and undisturbed enjoyment had ripened this holding into a species of ownership, and again, defendant had acquired by prescription a holding such as to entitle him to an under-proprietary right. Such propositions are wholly inapplicable to such a case as this, where the origin of the tenancy is shown at a rent twice increased, and paid down to the commencement of the suit. In such a case, length of enjoyment, coupled with the payment of rent, can give no greater force to defendant's right than it originally possessed. Their Lordships have come to the conclusion that the decision of the Judicial Commissioner of Oudh was correct. [338] They do not adopt some of his reasons, but they adopt his conclusion.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss this appeal. The costs will be paid by the appellant.

Appeal dismissed.

Solicitor for the Appellant: Mr. W. Buttle.

Solicitors for the Respondent: Messrs. Watkins & Lattey.

NOTES.

[See also the following cases —5 O.C., 97, 6 O.C., 119, 11 O.C., 240; 17 Cal., 444—17 I.A., 54.]

[11 Cal. 338]

APPELLATE CIVIL.

The 11th February, 1885.

PRESENT

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY.

Bechu Lal..... Defendant

versus

Oliullah.....Plaintiff.*

Mahomedan law—Parties—Endowment—Joint Mutwallis—Joint Trustees— Joinder of Parties.

Where property belonging to an endowment is sought to be recovered from a third party, who asserts that he is the owner thereof, all the *mutwallis* of the endowment should be made parties to a suit instituted for the recovery of such property. Such of the *mutwallis* as refuse to join as plaintiffs, should be made defendants.

THIS was a suit to recover possession of certain property, the facts of which were as follows —By a deed executed on the 16th of November 1860 one Bibi Gardin conveyed all her real property to the plaintiff and four other persons, to be held by them and their heirs, representatives and assigns in trust for the benefit of a certain mosque, and to retain and keep for their use as tenants in common any surplus of the profits after defraying all the expenses of the mosque. The deed contained a clause stating that no act of any of the parties separately to whom the property was given to be held by them, their heirs, representatives or assigns in trust and as tenants in common, was to be valid unless the same was agreed to by all the parties.

[339] On the 4th of May 1882 the plaintiff instituted the present suit against the defendant Bechu Lal for recovery of possession of certain land which the plaintiff alleged was part of the property conveyed by the deed of the 16th of November 1860. At the date of the institution of the suit the plaintiff was the sole survivor of the five persons to whom Bibi Gardin had conveyed the land.

The defendant in his written statement alleged that the property in question was his own absolute property. He also alleged that some of the

* Appeal from Order No. 320 of 1884, against the order of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 30th of July 1884, reversing the order of Baboo Nilmani Das, Munsiff of Sealdah, dated the 29th of September 1883.

deceased trustees had died leaving sons, and he made an application to the Court that the heirs of the deceased trustees should be joined as plaintiffs in the cause. This application was granted on the 6th of April 1883. Some of the heirs refused to join as plaintiffs, and thereupon the plaintiff applied to the Court for an order that the heirs refusing to join as plaintiffs should be made defendants. This the Judge refused to do, on the ground that, under the terms of the deed of the 16th November 1860, the plaintiff could not maintain the suit without the consent of his co-trustees; and he dismissed the same with costs on the 24th of September 1883. This decree was reversed on appeal by the District Judge, who remanded the case for trial on the merits, stating that it was not necessary to make the heirs of the deceased *mutwallis* defendants.

The defendant appealed to the High Court, on the grounds (1) that the suit should have been dismissed for non-joinder, (2) that the plaintiff could not sue alone, and (3) that the suit could not proceed in the absence of the other *mutwallis* or their heirs.

Mr. Bonnerjee, and Baboo Amarendronath Chatterjee, for the Appellant.

Mr. Twidale, Munshi Serajul Islam and Baboo Saligram Singh for the Respondent.

The Judgment of the Court was delivered by

Pigot, J.—This is an appeal against a remand order of Mr. Beveridge, dated the 30th July 1884.

The circumstances out of which this case has arisen are these: [340] Munshi Oliullah sued Bechu Lal for land, claiming it as endowed property, and seeking to establish his right thereto as *mutwalli*.

The defendant raised several objections and among them he stated that all the *mutwallis* should be made parties to the cause. This seems to have been the view taken by the Munsiff, who, on the 6th day of April 1883, passed the following order. "I order the heirs of Nezatullah, Sadut Hosein, and Budhu Khan to be made plaintiffs in this suit, provided, on receiving notice of " this order, they consent to be made parties "

Against this order, an appeal was preferred to the District Judge, but without success, the order being confirmed. Subsequently, on the 29th September 1883, the plaintiff applied that those persons, who did not consent to be made plaintiffs in the cause, should be made defendants in the suit. This was refused: and the suit was dismissed on the ground that it could not proceed at the instance of the plaintiff alone.

An appeal was preferred to Mr. Beveridge, and he held that the suit could be carried on by the plaintiff alone, reversed the decree of the Munsiff, and remanded the case to be tried on the merits.

That order has given rise to the appeal before us.

The first point for our decision is, what was the effect of the order of the 6th April 1883?

I am of opinion that it simply directed the parties to be made plaintiffs with their consent, but it never prohibited further application, such as one made on the 29th September 1883, to have them made defendants in case they did not consent to be made plaintiffs.

As to the opinion expressed by Mr. Beveridge, that the plaintiff can carry on the case by himself, we are of opinion that that is not correct. Looking at the case of *Luke v. South Kensington Hotel Company* (L. R., 11 Ch. D., 121), the case of *Rajendronath Dutt v. Shaik Mahomed Lat* (L. R., 8 I. A., 135), and other cases, we think, that in such a suit as this, all the *mutwallis* should, if possible, be made plaintiffs, but if any of them refused, then they should be

made defendants in the case. In this view we consider the decision of Mr. Beveridge should be set aside, and the case remanded with instructions that the [341] non-consenting persons be made defendants in the cause if the plaintiff applies that they be made defendants, and the case be proceeded with. Costs to abide the result.

Appeal allowed and case remanded.

NOTES.

[All the trustees should ordinarily be co-plaintiffs, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs, because where the administration of the trust is vested in several trustees, they all form, as it were, but one collective trustee and they must exercise the powers of their office in their joint capacity. Their interest and authority, being equal and undivided, they cannot act separately but all must join —(1906) 5 C L J., 527. distinguishing 26 Cal , 409

See also 24 All , 226 , 29 Mad , 302 , 26 Mad , 649 , 20 M L J , 957]

[11 Cal. 341]

APPELLATE CIVIL.

The 26th February, 1885.

PRESENT :

MR JUSTICE PIGOT AND MR JUSTICE O'KINEALY

Rameswar Nath Singh.....One of the Defendants

versus

Mewar Jugjeet Singh and another.....Plaintiffs.

Mortgagor and Mortgagee—Execution of decree -- Sale in execution—Foreclosure proceedings—Purchaser—Notice

Where a person mortgages his property by deed of conditional sale, and afterwards the right, title and interest of the mortgagor is sold in execution of a money-decree previously obtained against him, the purchaser at such sale is entitled to due notice of foreclosure proceedings instituted subsequently to the sale, but before the confirmation thereof.

Bhyrub Chunder Bundopadhyay v Soudamini Dabee (I L R , 2 Cal , 141) followed

THIS was a suit for the possession of land which arose out of the following circumstances —The land originally belonged to the defendants, other than the defendant Rameswar Nath Singh. In August 1876 the last-named defendant obtained a money-decree against the other defendants, which decree was finally confirmed on special appeal to the High Court in June 1878. On the 11th of July 1877 the defendants, judgment-debtors, executed a *by-bil-wafa* of the land now in suit in favour of Surabjit Singh, the father of the present plaintiffs, which was presented for registration on the 16th of July 1877, and finally registered on the 22nd of August 1877. On the 26th of July 1877, Rameswar Singh applied for execution of his decree by attachment of the same property. On the 5th of August 1877 the property was attached, and was afterwards sold in execution to Rameswar Nath Singh on the 16th of September 1878. This sale was confirmed on the 25th of January 1879, but no sale [342] certificate

* Appeal from Appellate Decree, No. 997 of 1884, against the decree of H.L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 18th of March 1884, affirming the decree of Major Samuells, Assistant Commissioner and Subordinate Judge of Hazaribagh, dated the 13th of July 1881.

was issued until the 3rd of October 1879. In the meantime the plaintiff's father, the mortgagee under the deed of the 11th July 1877, instituted foreclosure proceedings on his mortgage under Regulation XVII of 1806 on the 2nd of November 1878, and under these proceedings the foreclosure became absolute on the 2nd of November 1879. On the 10th of May 1880, the plaintiffs, the heirs of Surabjit Singh who was then dead, instituted the present suit for possession.

The sole question arising on this appeal was, whether Rameswar Nath Singh was entitled to notice of the foreclosure proceedings instituted on the 2nd of November 1878. This point was found against him by the lower Courts on the authority of *Basapa v. Marya* (I L R., 3 Bom 433), *Sheo Golam Singh v. Ram Roop Singh* (23 W.R 25), and *Beepin Beharee Biswas v. Judoonth Hazrah* (21 W. R., 367). The defendant Rameswar Nath Singh, alone appealed to the High Court.

Mr. Gregory and Baboo Aukhil Chunder Sen for the Appellant

No one appeared for the Respondents

The Judgment of the Court was delivered by

Pigot, J.—The foreclosure proceedings in this case were instituted on the 2nd November 1878. The sale took place on the 16th September 1878. The sale was not confirmed until January 1879, nor was the sale certificate issued until the 3rd October following. But on the authority of the Full Bench decision of this Court of *Bhynub Chunder Bundopadhya v. Soudamini Dabee* (I. L. R. 2 Cal., 141), it must be taken that the decree-holder became purchaser at the time of the sale, and not at the time of its confirmation or on issue of the certificate. Under these circumstances, he was entitled at the time of the institution of the foreclosure proceedings to due notice. No such notice having been given, no right to bring this suit against the defendant has accrued to the plaintiff under the foreclosure proceedings.

The appeal must, therefore, be allowed, and the suit dismissed with costs.

Appeal dismissed.

NOTES.

[By sec 65 of the C. P. C. 1908, where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.]

[343] APPELLATE CIVIL.

The 26th February, 1885.

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY.

Gopal Chunder Nath Coondoo and others..... (Petitioners) Appellants

versus

Haridas Chini and another.....(Opposite Party) Respondents.*

*Hindu law—Succession—Spiritual benefit—Father's brother's daughter's son—
Father's father's brother's son—Act XXVII of 1860—Certificate.*

The father's father's brother's son of a deceased person stands nearer to him in right of succession than his father's brother's daughter's son; the former is therefore preferentially entitled, on the death of the deceased person's widow, to a certificate under Act XXVII of 1860, enabling him to collect the debts due to the estate.

IN this case Gopal Chunder Nath Coondoo and others applied to the District Judge of Hooghly for a certificate to enable them to collect the debts due to one Kamini Dossee, deceased, the widow of one Pertab Chunder Coondoo. The applicants were the father's father's brother's sons of Pertab Chunder Coondoo. The application was opposed by Haridas Chini and another, who claimed a preferential right to the certificate as being the father's brother's daughter's sons of Pertab Chunder Coondoo. The District Judge ordered the certificate to issue to Haridas Chini and the other objectors, holding that the degree of relationship in which they stood was nearer than that of the applicants in respect of right of succession. The Judge referred to *Guru Gobind Shaha Mundal v. Anand Lal Ghose Mazumdar* (5 B. L. R., 15) and the *Daya Krama Sangraha*, Chap. I, s. 10. The applicants appealed to the High Court.

Baboo *Trolokhnath Mitter*, Baboo *Aushotosh Dhur*, and Baboo *Umakali Mookerjee* for the Appellants.

Baboo *Hem Chunder Banerjee* and Baboo *Bordo Nath Dutt* for the respondents.

The **Judgment** of the Court was delivered by

Pigot, J.—We think the appeal must succeed on the authority of the cases cited before us namely, *Gobind Pershad Talookdar [344] v. Mohesh Chunder Surmah Ghuttack* (23 W. R., 117), and *In re Oodoy Churn Mitter* (I. L. R. 4 Cal., 411), the case mentioned in the note to that case, viz., *Juggut Narain Singh v. The Collector of Manbhoom*, heard before the present Chief Justice, and the three unreported cases mentioned to us in which the same principle was adopted. The appellants, who are related to the great-grandfather, through the male line, are, for the reasons referred to in the judgment in *Gobind Pershad Talookdar v. Mohesh Chunder Surmah Guttack* (23 W. R., 117), entitled to the certificate here in preference to the respondents who claim through a succession of persons, one of whom was a female.

* Appeal from Order No. 221 of 1884, against the order of J. P. Grant, Esq., Judge of Hooghly, dated the 30th June 1884.

The order of the lower Court must be reversed, and a certificate must be granted to the appellants. The Judge of the Court below must determine any question as to security as he may think fit. The appellants will have their costs.

Order reversed.

NOTES.

[DAYABHAGA LAW—COGNATE'S SUCCESSION—

It has been held following this case that a brother's daughter's son does not succeed in preference to a great-grandson of the paternal grandfather of the deceased, (1888) 15 Cal. 780.

A sapinda cognate however comes before a *sakulya*, the son of the daughter of the father's brother is preferred to the great-grandsons of the great-great-grandfather —(1912) 16 C. L. J. 342 : 17 I C 283 ;

The paternal cognate takes before the kinsmen through the mother ; thus, the father's brother's daughter's son as heir is preferential to the mother's brother's son.—(1893) 26 Cal., 285 ; likewise, the paternal great-grandfather's son's daughter's son is preferred to the mother's brother.—(1913) 18 C. W. N 477.]

[11 Cal. 344]

APPEAL FROM ORIGINAL CIVIL

The 5th January, 1885

PRESENT ·

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Mutty Loll.....Plaintiff

versus

Chogemull.....Defendant.*

Hundi—Liability of drawer—Time of presentation—The custom of Akhoteey at Jeypore—Section 61 of the Negotiable Instruments Act (Act XXVI of 1881).

A *hundi* was drawn in Calcutta upon a firm at Jeypore, and made payable on arrival at the place. The *hundi* reached Jeypore on the 5th April, but was not presented for payment until the 29th of that month ; when it was dishonoured, and soon after the drawees' firm became insolvent : Held that the *hundi* was presented within *reasonable time*, and the delay which occurred in its presentation did not absolve the drawers from liability.

In considering the question whether a *hundi* has been presented within *reasonable time*, regard should be had to the situation and interest of, both drawer and payee, and to the distance of the place where the *hundi* is drawn from that where it is to be accepted.

THIS was an appeal from a decision of Mr. Justice CUNNINGHAM, dated the 29th January 1883. The plaintiffs at Calcutta purchased from the defendants a *hundi*, dated the 31st [345] March 1881, drawn on a firm at

* Regular Appeal No. 3 of 1883, against the decree of Mr. Justice CUNNINGHAM, dated the 29th of January 1883.

Jeypore for Rs. 7,500, and payable "immediately after arrival" in rupees current in *hundi* transactions. The transmission to Jeypore was proved to have occupied four days. The *hundi* arrived at Jeypore on the 5th April, and was presented to the drawee on the 29th. Payment was refused, and notice of dishonour transmitted by telegraph to Calcutta on the 30th April. The dishonoured bill was returned, and payment from the defendants demanded and refused. The drawees' firm had in the meantime failed. The plaintiffs, thereupon, brought this suit against the drawer, stating that, according to the custom governing *hundi* transactions at Jeypore, the holder of a bill drawn elsewhere, but payable at Jeypore, might keep it, whether it was payable at sight or at a fixed date, for a period of from one to six months, and then present it shortly before or at the *akhorteey*, an occasion which in 1938 occurred on the light side of Bysack, or the 1st of May, and that relying on this and other customs prevailing among shroffs of the class to which the plaintiffs' and defendants' firm belonged, the plaintiffs delayed presentation for payment till the 29th April. They further stated that, independently of any such custom, the *hundi* had been presented within a reasonable time. The defendants, on the other hand, denied that there was any custom entitling holders of *hundis* to retain them after they were due and contended that there was unreasonable delay in presenting the bill for payment to the drawee, which discharged them from liability. The learned Judge held the custom proved, but was of opinion that even independently of the custom there did not seem to him to be any unreasonable delay on the part of the plaintiffs in presenting the *hundi*, or that the defendants' position was thereby altered for the worse, and he therefore gave the plaintiffs a decree. The defendants appealed.

Mr. Pugh (Mr. Gasper with him) for the Appellants contended that the *hundi* should have been presented for payment within reasonable time—*Hopkins v. Ware* (L. R. 4 Ex., 268), that a custom, such as the one relied upon in this case, by which one man may profit by his own default against another, could not be pleaded, that there was a difference between a cheque and a bill and that in estimating [346] time the circumstance of putting the bill into circulation ought to be taken into account. And referred to *Ram Churn Mullick v. Luchmeechund Radakissen* (9 Moo. P. C. C. 36), and *Rouquette v. Overmann* (L. R. 10 Q. B., 525.)

Mr. Phillips, Mr. Evans, Mr. Bonnerjee, and Mr. T. A. Apcar, who appeared for the Respondent, were not called upon.

The Judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

Garth, C. J.—The only point that arises in this case is, whether the *hundi*, which is the subject of the suit, was presented to the drawee within a reasonable time.

The facts were these. The *hundi* was drawn in Calcutta by the defendants upon a firm at Jeypore, in favour of the plaintiffs, for a sum of Rs. 7,500 (the defendants and the plaintiffs both residing at Calcutta)

It was drawn and dated on the 31st March 1881, and was made payable "on arrival at Jeypore."

It was sent at once to Jeypore to the plaintiffs' agent there, and it appears to have reached them on the 5th April, but it was not presented to the drawees until the 29th of that month, and it was returned on the following day, the 30th, dishonoured; a day or two after this the drawees' firm became insolvent.

I have already said that the bill upon the face of it was made payable "on arrival at Jeypore", and I think that meant not payable on arrival *at the place*, in the sense of its being delivered to the plaintiffs' agents at Jeypore, but that it was payable *on presentment to the drawees at Jeypore*

There were two or three questions raised in the Court below, and amongst others, one upon which a great deal of evidence was adduced, namely, as to whether, according to mercantile usage at Jeypore, the *hundi* was presented in due time, and upon that and the other questions raised the learned Judge found in favour of the plaintiffs.

But we think that, apart from any such local usage, as was attempted to be proved, the time (which was in this case 25 days) during which the bill was retained by the plaintiffs' agents at Jeypore, before it was presented to the drawee, was not an unreasonable time for that purpose

[347] We consider that by the general law there is no specific time within which a *hundi* payable at sight, or payable as this was, on arrival at a particular place, is to be presented.

In the case of *Mellish v Rawdon* (9 Bing., 416), which is a leading case upon the subject, and in which the plaintiff had purchased a bill that had been drawn by the defendant on a firm at Rio Janeiro, and made payable after 60 days' sight, the question arose as to whether there was a presentment in due time on the drawee at Rio Janeiro, and Chief Justice TINDAL, who tried the case, directed the jury that they were to determine, on the evidence before them, whether there had been an unreasonable delay on the part of the plaintiff, the holder of the bill, in sending it forward for acceptance, or putting it into circulation, and that, in order to arrive at a proper determination of that question, they were to take into consideration the situation and interests, not of the drawee only, or of the holder only, but the situation and interests of both, and to see whether, under all the circumstances, the delay, which in that case amounted to 4 months and 22 days, was unreasonable or not.

The jury thereupon found for the plaintiff, and a rule was afterwards obtained upon the ground that the direction of the Chief Justice was incorrect in point of law, but after argument of that rule in the Common Pleas, the Court decided that the direction to the jury was perfectly correct.

Chief Justice TINDAL pointed out (amongst other things) that the holder of a bill has at all times a direct interest in not keeping a bill out of circulation, for he thereby loses the interest of his money.

Now here it was not shown that the plaintiff had any idea that the persons upon whom the *hundi* was drawn at Jeypore were in an insolvent condition. There was no reason, so far as the drawers were concerned, why the payees should have been specially bound to present the bill earlier than usual, and, on the other hand, the observation of Chief Justice TINDAL was undoubtedly applicable here, because the longer the plaintiffs delayed presenting the bill, the longer they were kept out of the interest of their money.

[348] The case of *Mellish v. Rawdon* (9 Bing 416), to which I have referred, was cited with approval as being a leading case upon the subject by their Lordships of the Privy Council in the case of *Ramchurn Mullick v. Lutchemchand Radakissen* (9 Moo. P. C. C., 46).

In that case a bill was drawn in Calcutta on the 16th February upon a firm at Hongkong; it was payable sixty days after sight, and drawn in favour of a payee at Calcutta, and it was endorsed to another firm at Calcutta.

This bill was kept for upwards of five months before it was negotiated, and it was not presented at Hong-Kong until the following October. There, it was held, undoubtedly, that the time which had elapsed was unreasonable, but Baron PARKE, in delivering the judgment of the Privy Council, distinctly approved of the law as laid down by the Court of Common Pleas in *Mellish v. Rawdon*.

That being so, and considering that Jeypore is at a considerable distance from Calcutta, we cannot think that the 25 days which elapsed between the arrival of the bill and its presentment was an unreasonable time.

There was undoubtedly some reason given for the delay, namely, that at the beginning of May, there is a new issue of money from the mint at Jeypore, and the new money so issued is supposed to be more valuable than money which has been in circulation for some time.

If that fact influenced the plaintiffs, it was one which might fairly have been taken into consideration.

They had no reason to suppose that the short delay would be prejudicial to the drawers, and they considered that it would be of service to themselves.

We agree, therefore, with the view taken by the Court below upon this point, and we do not think it necessary to determine the other issues in the case.

We may add that, having referred to s. 61 of the Negotiable Instruments Act, we find it makes no difference in the law upon this subject. The section says that a bill of exchange payable after sight must, if no time or place is specified therein for [349] presentment, be presented to the drawee thereof for acceptance within a reasonable time after it is drawn. This section, therefore, leaves the law as it was before.

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[See also the Negotiable Instruments Act, 1881, sec. 105 ; 31 Mad., 364.]

[11 Cal. 350]
APPELLATE CRIMINAL.

The 6th March, 1885.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Loke Nath Sarkar and another.....Appellants

versus

Queen-Empress.....Respondent.*

Practice—Conviction of rioting and causing hurt by dangerous weapons—

Cumulative sentences—Distinct offences—Separate charges—

Penal Code—Act XLV of 1860, ss. 71, 148, 149, 324—

Act X of 1862 (Criminal Procedure Code), ss. 35,

235,—Act X of 1872, (Criminal Procedure

Code), ss. 314, 454—Act VIII

of 1882, s. 4.

The offences of rioting armed with a deadly weapon and voluntarily causing hurt with a dangerous weapon to two persons are distinct offences, and a person charged with such offences can be convicted and sentenced in respect of the rioting and of the hurt caused to each of the persons injured.

A and B were charged with rioting armed with deadly weapons under s. 148 of the Penal Code, and they were also charged under s. 324, coupled with s. 149, with causing hurt by a dangerous weapon to X, and B was further charged under s. 324 with causing a like hurt to Y, A being also charged under s. 324, coupled with s. 149, in respect of the hurt caused by B to Y. A and B were convicted on all charges, and separate sentences, to take effect in succession, were awarded in respect of each offence charged. The offences under s. 324 were committed during the riot.

Held, that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Indian Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that consequently under s. 235 of the Criminal Procedure Code the several sentences passed were strictly legal.

THIS appeal arose out of a trial in which the two accused, Loke Nath Sarkar and Sachani Sheikh were charged with having taken part in a riot being armed with deadly weapons. [350] The charges upon which the prisoners were tried were as follows:—Both were charged under s. 148 of the Indian Penal Code, and also under s. 324, read with s. 149 in respect of an injury said to have been caused by one Kangali Singh, one of the rioters who, however, was not before the Court, to one Joydhur. The Prisoner Sachani was further charged under s. 324, and the prisoner Loke Nath under the same section, read with s. 149, in respect of an injury alleged to have been caused by the former to another person named Kamala Kant Poddar.

The riot in consequence of which these charges were brought arose from a number of men, amounting in all to some 40 or 60 persons, armed with lathies and spears and one man with a sword, amongst which number were the accused, proceeding to a field belonging to one Nasiruddin with a number of

* Criminal Appeal No. 22 of 1885, against the order of J. F. Stevens, Esq., Sessions Judge of Mymensingh, dated the 17th November 1884.

cattle and setting the cattle to eat up the rice crop standing on the ground. Upon being remonstrated with by Nasiruddin and some of his people the riot occurred, during which the injuries forming the subject of some of the charges were inflicted.

The Sessions Judge, agreeing with the Assessors, convicted the accused on all the charges, and proceeded to pass the following sentences, *viz.*,—

Under s. 148, Loke Nath Sarkar to two years' rigorous imprisonment ;

Under s. 148, Sachani Sheikh to 1½ years' rigorous imprisonment ;

Under s. 324, read with s. 149, Loke Nath to a fine of Rs. 200 and Sachani to a fine of Rs. 50, and in default each to be additionally imprisoned for a period of nine months ,

Under s. 324, read with s. 149, Loke Nath Sarkar to 1½ years' rigorous imprisonment in respect of the third charge, to take effect upon the expiry of the sentence passed under the first head of the charge , and

Under s. 324, Sachani Sheikh to 1½ years' rigorous imprisonment, to take effect upon the expiry of the sentence passed under the first head of the charge

[351] Against these convictions and sentences the prisoners preferred this appeal, both upon the ground that the evidence did not support the findings of the Court below, and that the sentences were illegal and ought to be set aside.

Baboo *Ambica Churn Bose* appeared for the Appellant.

No one appeared for the Crown.

The **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows .—

We see no reason to differ from the Court below as to the facts found by it. These are that both the prisoners took part in a riot, being armed with deadly weapons , that in the prosecution of the common object of the rioters the prisoner Sachani Sheikh caused hurt with a dangerous weapon to one Kamala Kant Poddar, and another of the rioters caused hurt with a dangerous weapon to one Joydhur.

Upon these facts both of the prisoners have been convicted under s. 148 of the Penal Code, both have been convicted under s. 324 by the operation of s. 149 in respect of the hurt caused to Joydhur. Loke Nath Sarkar has been further convicted under the same section in respect of the hurt caused to Kamala Kant, and Sachani Sheikh has been further convicted under s. 324 only in respect of the latter hurt caused by himself.

Separate sentences have been passed upon the prisoners in respect of each separate conviction. The sentences on Loke Nath Sarkar amount in the aggregate to three and a half years' rigorous imprisonment and a fine of Rs. 200; and the sentences on Sachani Sheikh aggregate to three years' rigorous imprisonment and a fine of Rs. 50. and in default of payment of the fines the prisoners are to suffer further imprisonment each for nine months.

Baboo *Ambica Churn Bose*, who appeared for the appellants, contended that the prisoners could not legally be convicted of more than one of the offences, the whole of which formed parts of the same transaction , or, that at any rate, though the several convictions might be legal, the prisoners could not lawfully be sentenced in respect of more than one of them. He relied upon [352] the rulings of this Court in *The Queen v. Durzoolla* (9 W. R. Cr., 33), *The Queen*

v. *Dina Skeikh* (10 W. R. Cr., 63), *The Queen v. Shahabut Sherkh* (13 W. R. Cr., 42), and *Empress v. Jubdur Kazi* (I. L. R., 6 Cal., 718), which more or less support his contention

We have not, however, been able entirely to follow the reasoning of the learned Judges by whom those cases were decided; and we think that in the present case it is unnecessary for us to express either assent to, or dissent from, the law laid down by them. The terms of the former Codes of Criminal Procedure, with reference to which those cases were decided, were perhaps less clear than the provisions of the Code now in force. By s 35 of that Code, as well as by s. 314 of the previous Code, it is provided that, when a person is convicted at one trial of two or more distinct offences, the Court may sentence him for such offences, to the several punishments prescribed therefor, which such Court is competent to inflict, subject to certain provisions as to maximum which are not material in the present appeal. Then s. 235 provides in clause (1) which seems to apply to the present case, that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence, and, if tried, he must be either acquitted or convicted.

As regards punishments, this section enacts nothing beyond this, that "nothing contained in this section shall affect the Indian Penal Code, s. 71." That section, as amended by Act VIII of 1882, s. 4, contains the same provisions as to limit of punishment which were embodied in clauses 2 and 3 of s. 454 of the former Code of Criminal Procedure. As the law now stands, therefore a person, tried and convicted of several offences under s. 235 of the Code of Criminal Procedure, is liable to be punished for each such offence, unless he is protected by s. 71 of the Penal Code. Section 71 then provides. (1) that when anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished for more than one of such offences, unless [353] it be so expressly provided. (2) that if a single act falls within two separate definitions of offences, the offender shall not receive a more severe punishment than could be awarded for either of them, and (3) that if several acts, of which one or more would by itself constitute an offence, form, when combined, a different offence, the offender must not receive a punishment more severe than that provided for any one of such offences.

It seems to us that the present case does not come within the purview of s. 71.

The offences, of which the prisoners have been convicted, are distinct: (1) rioting armed with deadly weapons; (2) voluntarily causing hurt with a dangerous weapon to Kamala Kant Poddar, (3) a similar offence with regard to Joydhar.

The several acts, in support of which the prisoners were charged, do not in combination form any other offence defined by any law with which we are acquainted, nor do they fulfil any other condition of s. 71 which would protect the accused from more than one punishment or limit the severity of the sentence passed upon them.

If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted on the two men wounded.

We note that the view of the law which we have taken was adopted by the High Court at Allahabad in the recent case of *Queen Empress v. Dugar Singh* (I. L. R., 7 All., 29).

It appears to us, therefore, that the convictions and the several sentences passed were strictly legal, and that they cannot be set aside on the grounds put forward by the vakeel for the appellants.

But we think that we may, under the circumstances of the case, mitigate the punishment to some extent. We accordingly reduce the sentences passed under s. 148 to rigorous imprisonment [354] for one year in the case of Loke Nath Sarkar, and to six months in the case of Sachani Sheikh; and that the fines imposed in respect of the second head of the charge be reduced to Rs. 100 and to Rs 30 respectively

Convictions upheld and appeals dismissed.

NOTES.

[A member of an unlawful assembly some members of which caused grievous hurt cannot lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt; 16 Cal., 442 (F. B.) overruling 11 Cal., 349, and following 6 All., 121, 4 C. W. N., 245, 3 C. W. N., 761, 8 C. W. N., 519, 9 All., 645.]

[11 Cal. 354]

MATRIMONIAL JURISDICTION.

The 30th March, 1885.

PRESENT

MR. JUSTICE NORRIS.

J. D. Bennett..... Petitioner

versus

A. C. N. Bennett.....Respondent and another.

Ex parte A. C. N. Bennett.

Alimony pendente lite—Permanent Alimony—Practice—Divorce Act—Act IV of 1869, ss. 36 and 37.

Alimony *pendente lite* cannot be granted on an application made after a decree *nisi* in the suit has been passed, nor is it in the power of the Court to grant permanent alimony until an application is made to make such decree absolute.

THIS was an application made on the 30th March 1885, by A. C. N. Bennett for alimony *pendente lite*.

It appeared that J. D. Bennett, the husband of the applicant, had instituted a suit against his wife for dissolution of marriage on the ground of her adultery with one Smith, and that on the 16th March 1885, he had, *ex parte*, obtained in such suit a decree *nisi* dissolving the marriage on the ground set out above. This decree had not at the time of the application for alimony (on the 30th March 1885) been signed, sealed or enrolled.

The applicant set out in her petition that the income of J. D. Bennett, who was a licensed Master Pilot in the service of the Government of Bengal, amounted annually to between five and seven thousand rupees, and that she had not appeared in the suit and had not for that reason previously asked for alimony, and now asked the Court to suspend the signing, sealing and enrolment of the decree *nisi*, and to grant her such alimony as might be deemed meet.

J. D. Bennett filed an affidavit stating his average yearly income for the last three years, and stating that, up to the date on which the decree *nisi* was granted, he had allowed his wife Rs. 60 per month for board and lodging, and Rs. 40 per month for her personal expenses

[355] The applicant appeared in person.

Mr. Hill for J. D. Bennett.

The petition is evidently one for alimony *pendente lite*, and such alimony ceases as soon as a decree *nisi* is given on the ground of wife's adultery. A wife charged on husband's petition with adultery is entitled to have alimony *pendente lite* allotted to her, though she has filed no answer, because in allotting alimony *pendente lite*, a wife is to be considered innocent—*Smith v. Smith* (4 S. & T., 228). Alimony *pendente lite* has been allotted after verdict of adultery against a wife, but before the case came on for final decree before a full Court, as she till then is to be considered innocent—*D'Oyley v. D'Oyley* (4 S. & T., 226). See also *Crampton v. Crampton* (32 L.J. P.M. & A., 142), *Phillips v. Phillips* (34 L.J. P.M. & A., 107). The cases in which alimony *pendente lite* has been held to cease on decree *nisi* on ground of wife's adultery are *Latham v. Latham* (30 L.J. P.M. & A., 163), *Wells v. Wells* (33 L.J.P.M. & A. 151, 3 S. & T., 542). The case of *Nicholson v. Nicholson* (32 L.J.P.M. & A., 127) is to the contrary, but *Latham v. Latham* (30 L.J. P.M. & A., 163) was not brought to the attention of the Court.

If the petition could be taken as one for permanent alimony (which it clearly is not) the case of *Bradley v. Bradley* (L. R., 3 P. D., 47) shows that permanent alimony cannot be given before the decree absolute, but it is not necessary to embody the order for such alimony in the decree absolute, but see *contra*—*Charles v. Charles* (L.R. 1 P. & D., 260). As to imposing conditions on wife, see s. 37 of the Indian Divorce Act, and *Keats v. Keats* (1 S. & T., 335). I am willing to give an allowance to the applicant until such time as she may be in a position to apply for permanent alimony on the condition of her leading a chaste life.

*[Sec. 37.—The High Court may, if it think fit, on any decree absolute declaring a marriage to be dissolved, or in any decree of judicial separation obtained by the wife

Power to order permanent alimony.

and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and

Power to order monthly or weekly payments.

support as the Court may think reasonable.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.]

[356] **Norris. J.**—I have no power to make an order for alimony *pendente lite*. The suit between the petitioner and the respondent came to an end when the decree *nisi* was made, and I have, therefore, no power to order alimony *pendente lite*. The respondent will be entitled to apply, when the decree is to be made absolute, for permanent alimony. Mr. *Hill*, on behalf of the petitioner, says that the petitioner is willing to make the respondent an allowance until an application can be made for permanent alimony. The payment of that allowance, Mr. *Hill* says, will be dependent on respondent leading a chaste life. At present I can make no order; with reference to Mr. *Hill's* statement that the petitioner is willing to make an allowance to the respondent, I think that Rs 60 a month would be a fair and reasonable sum to be paid to her till such time as she can make an application for permanent alimony.

Application dismissed.

Attorney for J D. Bennett. *Dignam and Robinson.*

NOTES.

[Compare with this case 36 Cal., 1018 where it was held that the principle of law laid down in *Dunn v Dunn*, 12 P D, 91 was not applicable to India and that a right to alimony cannot cease until a decree absolute was passed See also 2d Cal, 918.]

[11 Cal 356]

ORIGINAL CIVIL

The 26th March, 1885.

PRESENT

MR. JUSTICE WILSON

In the matter of Nundololl Mookerjee Applicant
versus

Chunder Kant Mookerjee..... Opposite Party.

Award—Arbitrator recommending solution of disputed points—Award objected to as being a recommendation—Objection to award—Act

XIV of 1882, s. 525

A document, although headed as an "award" and signed by the arbitrator, which merely recommends a solution of the questions referred to arbitration, will not be treated by the Court as an award on an application made under s 525 of the Code of Civil Procedure.

THIS was an application on behalf of one Nundololl Mookerjee to make absolute a rule *nisi* obtained by him on the 17th June 1884, calling upon one Chunder Kant Mookerjee to show cause why an award, dated the 17th June 1884, should not be filed, and judgment passed thereon.

It appeared that by two several letters, bearing date the 6th May, 1884, signed by Nundololl Mookerjee and Chunder Kant [357] Mookerjee one Chundy Churn Bannerjee had been appointed arbitrator to decide certain matters regarding the location of certain fish stalls in a market in Aheritolla Street which were in dispute between them. On the 17th June 1884 the arbitrator drew up a document which was headed with the word "Award," and commenced as follows: "On being appointed arbitrator at the request of both parties to decide the dispute in connection with the market No. 11, Aheritolla Street, between Baboo Chunder Kant Mookerjee, the owner thereof, and Baboo Nundololl Mookerjee, whose dwelling-house is situated directly to the

north of a portion of the said bazaar, I paid several visits to the place and heard both the parties," and after stating the two points for determination, and making observations thereon, the arbitrator concluded the document with these words: "I should therefore recommend that the fish stalls might continue where they have been for some time past; that is, in the east wing of the market, and that all the vegetable and fruit stalls might be conveniently located in the west wing, as the owner would likely suffer no loss thereby, while it would remove a source of inconvenience to Baboo Nundololl Mookerjee."

(Sd) CHUNDY CHURN BANNERJEE,

17th June 1884.

Arbitrator

Chunder Kant Mookerjee appeared, on the application, to oppose the filing of the award, setting out in an affidavit that he had had no notice of the occasions on which the arbitrator had inspected the market, nor had he attended any of the meetings of the arbitrator, that the first intimation he received of the fact that Chundy Churn Bannerjee had acted as arbitrator was on receipt of the so-called "award," and that he had written to the arbitrator declining to be bound by his award, which he (Chunder Kant) stated to be bad in law.

The arbitrator put in an affidavit stating that he had sent verbal notice to Chunder Kant Mookerjee of his intended inspection of the market, and of all meetings, and that, although Chunder Kant Mookerjee had not attended, yet his *am-mokhtar*, and the sons of Chunder Kant Mookerjee had attended the meetings and conducted the reference on behalf of Chunder Kant Mookerjee.

[358] Mr *Bonnerjee* and Mr *Mitter* appeared to show cause, and objected that the award made was not a good one, and contended that no judgment could be passed on such an award, and referred to *Ichamoyee Chowdhralee v. Prosunno Nath Chowdhri* (I. L. R., 9 Cal., 557).

Mr. *Sale* (with him Mr *Pugh* and Mr *O'Kinealy*) in support of the rule cited *Dutto Singh v. Dosad Bahadur Singh* (I. L. R., 9 Cal., 575), as dissenting from *Ichamoyee Chowdhralee v. Prosunno Nath Chowdhri* (I. L. R., 9 Cal. 557), and contended that no cause had been shown against the rule, as defined in the case of *Dandekar v. Dandekars* (I. L. R., 6 Bom., 663), it being insufficient to come in and simply object on affidavit. That cause should not only be alleged but be proved to the satisfaction of the Court, or it should be shown that there was reasonable ground for objection. That the expression "recommend" in the award was a sufficient expression of opinion on the part of the arbitrator, that the words "I am of opinion that A is entitled to claim 134 pounds for non-performance of his contract" had been held a sufficient award. *Matson v. Trower* (Ry & Moo., 17).

Mr. Justice **Wilson** considered that the document purported rather to be a recommendation than an award, and refused to make a decree in accordance therewith on the ground that the document was no award, decided nothing, and was too obscure to be enforced.

Rule discharged

Attorney for Petitioner *Mookerjee and Deb*

Attorney for Chunder Kant: *Carruthers*.

[359] APPELLATE CIVIL.

The 6th March, 1885.

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY.

The Secretary of State for India in Council..... ...One of the Defendants
versus

Marjum Hosein Khan, a minor, through his mother and guardian
Bemeharunnissa Khatoon..... ..Plaintiff.

*Appeal—Costs—Execution of decree—Purchaser in execution of decree—
Revenue sale—Deposit—Recorded proprietors—Assignee—
Act XI of 1859, s. 31.*

An appeal will lie on a question of costs where a matter of principle is involved.

Section 31, of Act XI of 1859, must be read strictly. An assignee of the recorded proprietors is not their representative within the meaning of that section, and the Collector is justified in refusing to pay to such assignee claiming on his own behalf, money held in deposit on account of the recorded proprietors

IN this case the facts were as follows. A certain revenue paying estate, namely, No. 1790 on the register of the Collector of Furreedpore, was held in the following proportions. Certain persons named Roy owned an 8-anna share, and certain other persons, hereinafter called the Mahomedan sharers, owned the other 8-anna share in various proportions, one of them named Ijjatunnissa Khatoon being the proprietor of a one-and-a-half anna share. A separate account had been opened in the Collectorate in respect of the latter 8-anna share.

On the 17th of June 1865, the Mahomedan sharers mortgaged their 8-anna share to the plaintiff to secure the repayment of a sum of Rs. 3,000, with interest at one per cent per month. On the 29th of November 1877, the plaintiff obtained a mortgage decree on his mortgage for the sum of Rs. 4,308-3-8, including interest and costs. On the 25th of April 1878, in execution of that decree, the plaintiff purchased the shares of all the Mahomedan sharers in the mehal, with the exception of [360] the share of Ijjatunnissa Khatoon, (that is to say, the plaintiff purchased six-and-a-half annas of the entire mehal) for about Rs. 800. A petition to set aside the sale was presented by the Mahomedan sharers, but that petition was finally dismissed on the 25th of March 1880. In the meantime, and on the 5th of January 1880, the 8-anna share of the mehal belonging to the Mahomedan sharers was sold by the Collector of Furreedpore for arrears of revenue under the provisions of Act XI of 1859, and purchased by one Mohesh Chunder Sircar for Rs. 5,700. After payment of the arrears of Government revenue out of this sum, the balance, namely, Rs. 5,654-11-8½, remained in the Collectorate to the credit of the recorded proprietors of the 8-anna share of the Mahomedan sharers.

The plaintiff's decree not having been satisfied by the purchase of the 6½-annas share above-mentioned, he, on the 14th of March 1880, attached the said sum of Rs. 5,654-11-8½ in execution of his decree. In June 1880, he

* Appeal from Original Decree No 178 of 1883, against the decree of Baboo Jagutdurlubh Muzoomdar, Rai Bahadur, Subordinate Judge of Furreedpore, dated the 22nd June 1883.

applied for and obtained from the Civil Court an order, which was despatched to the Collector for his information, and which ran as follows: "That the Collector be pleased to pay to the decree-holder, through his pleader, the sum of Rs. 1,060-3-8 $\frac{1}{2}$ on account of the share (1 $\frac{1}{2}$ -anna share) of the judgment-debtor Ijjatunnissa Khatoon out of the aforesaid sum under attachment, and to order the balance to be released from attachment." In August 1880, the Collector complied with this order, and paid to the plaintiff the sum of Rs. 1,060-3-1 $\frac{1}{2}$, being the portion to which Ijjatunnissa Khatoon was entitled in respect of her 1 $\frac{1}{2}$ -anna share of the total sum attached. It did not appear from the record whether or not these proceedings were *ex parte* without notice to the opposite side.

On the 18th of May 1881 the plaintiff applied to the Collector of Furreedpore, for payment out to him of the sum still remaining in the Collectorate to the credit of the recorded proprietors, namely, of the sum of Rs. 4,594-7-11 $\frac{1}{2}$, as purchaser under the sale of the 25th of April 1878. This application was supported by a petition signed by all the Mahomedan sharers, with the exception of Ijjatunnissa Khatoon. On the 18th of July 1881, a second application for payment was made, and supported by a similar petition. The Collector refused to pay the money to [361] any but the recorded proprietors, and his decision was upheld by the Commissioner on appeal, therefore the plaintiff instituted the present suit against the Secretary of State for India in Council, and the Mahomedan sharers, praying for a declaration of his right to the sum deposited in the Collectorate, for an order that the same should be paid over to him, and for an order, that the Secretary of State for India in Council should pay to the plaintiff his costs of suit. The Secretary of State for India in Council, in his written statement, upheld the action of the Collector, but stated that he was willing to hand over the deposit to the plaintiff, should the Court declare that the plaintiff was rightfully entitled thereto. The Subordinate Judge decreed the plaintiff's claim, and ordered the Secretary of State for India in Council to pay the costs of the suit, on the ground that the plaintiff, by his purchase, had become the representative of the recorded proprietors within the meaning of s. 31 of Act XI of 1859, and therefore the refusal by the Collector to pay the money was not justifiable and that by such refusal he had unauthorizedly withheld the money from the plaintiff.

The Secretary of State appealed to the High Court, on the ground that the plaintiff was not the representative of the recorded proprietors; and on the question of costs

Baboo *Unnoda Pershad Banerjee* for the Appellant

Baboo *Baikant Nath Das* for the Respondent

The Judgment of the Court was delivered by

Pigot, J.—We think the appeal as to costs must succeed. We think the matter is clearly one in which it is competent to have an appeal, even although it is on a matter of costs, it being one affecting principle.

We think that the ground, put forward in the judgment of the Subordinate Judge, for the order as to costs is one in respect of which the lower Court is mistaken. It appears to us that the Collector did not unauthorizedly withhold the money from the plaintiff. The plaintiff claimed an independent right to demand the money from the Collector in virtue of the petition of the holders of the estate. Under s. 31 of [362] Act XI of 1859 he had not the right in that capacity to claim the money it was payable only to the recorded proprietor or his representative, or, supposing the proportionate shares to have been ascertained, to the persons recorded as entitled to the ascertained

shares, or their representatives. Here, there was no receipt tendered by, or on behalf of, the recorded proprietors; nor did plaintiff apply for the money on their behalf, but on his own. The petition, even had it been signed by all the recorded proprietors (which it was not), did not clothe the plaintiff with such an authority to receive the money as entitled him to demand it from the Collector. Plaintiff did not demand the money on behalf of the recorded proprietors, with a receipt from them, as required by the section. He demanded it as their assignee. The section does not contemplate such a case, it does not cast on the Collector the duty of giving effect to, and as a preliminary of verifying of, such assignments. It must be read strictly. On these grounds, the order as to costs cannot be justified. The appeal must succeed, the order as to costs must be set aside, and the respondent must pay the costs of the appeal.

* *Appeal allowed.*

NOTES

[Appeals are allowed on a question of costs where a question of principle is involved, B L R., Sup 496, 11 Cal, 359, 34 Cal, 878, 12 Cal, 179, 12 Cal 271, (1908) 1 K B. 24, 16 Bom, 676

As regards appeal on costs only, see 12 Cal, 179, 28 Cal., 567, 16 Bom., 676, 22 Bom, 164]

[11 Cal 362]

APPELLATE CIVIL

The 17th February, 1885.

PRESENT

MR. JUSTICE MITTER, AND MR JUSTICE TREVELYAN.

Murari Singh. . . . Plaintiff

versus

Pryag Singh and others.... Defendants.

Execution -Sale in execution of decree—Suit for possession against auction-purchaser by setting aside sale—Civil Procedure Code (Act X of 1877) s. 244.

In execution of a decree certain property was sold in pursuance of an order under s. 244 of the Civil Procedure Code, and purchased by a person not a party to the suit, who subsequently obtained possession of the property. That order was subsequently set aside. In a suit by the judgment-debtor to recover possession of the property from the auction-purchaser by setting [363] aside the sale, *Held*, that the order directing the sale had the force of a decree, and that the plaintiff was not entitled to the relief claimed.

Jan Ali v. Jan Ali Chowdhry (10 W. R, 154) followed

THE facts of this case were as follows:—The defendant (respondent), Pryag Singh sued the father of the plaintiff (appellant), one Ramdhoe Singh,

* Appeal from Appellate Decree No 2067 of 1883, against the decree of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 15th of May 1883, affirming the decree of Babu Kali Proseno Mukerji, First Subordinate Judge of that district, dated the 22nd of April 1882.

* on a bond and a *sharakutnama*. Whilst that suit was pending Ramdhee Singh died, and his sons, including the plaintiff in this suit, Murari Singh, were substituted as defendants in his place. A decree was then passed against them on the 17th January 1876. The case was not defended, and that decree was consequently obtained *ex parte*. It was found on the evidence in the suit that the then defendants had succeeded to the estate of their father, the deceased obligor, and that therefore they must be held answerable for his debt. It did not appear that any steps were taken to set aside that decree, and when it came to be executed the property in dispute in this suit was attached. Murari Singh thereupon objected that the property was his own, and had been purchased by himself, that he had been separate from his father in food and estate and had inherited nothing from him. This objection was allowed on the 2nd July 1877 by the Subordinate Judge, but upon an appeal being preferred the order passed was reversed by Mr. Drummond, the District Judge, on the ground that, as Murari Singh was himself a defendant in the suit in which the decree sought to be executed was passed, he was liable under that decree, and the questions raised by him in the execution proceedings were immaterial. A special appeal was thereupon preferred to the High Court, and on the 25th February 1878 the case was remanded to the District Judge's Court to determine, *firstly*, whether the property attached was part of the estate of the deceased Ramdhee Singh, if not, *secondly*, whether, if it were the separate property of Murari Singh, it had been shown that he had misapplied the property received by him from his father, so as to make himself personally liable to compensate the judgment-creditor in full or in part out of his own separate estate. On the 21st January 1880 the case was taken up by the District Judge, [364] and fresh evidence heard, and the appeal dismissed on the ground that the decree-holder had failed to prove his allegations.

After Mr. Drummond's order of the 28th August 1877, and before that order was set aside by the High Court, the property was brought to sale on the 4th December 1877, and purchased by Dilraj Singh, the second defendant in the suit. The sale was confirmed on the 10th January 1878. Dilraj Singh subsequently applied for a sale certificate, and, though Murari Singh opposed the application, the certificate was granted on the 23rd April 1881, and delivery of possession formally given.

Dilraj Singh died after the institution of the present suit, and his representatives were made party defendants in his place.

Murari Singh, after being unsuccessful in his opposition to the granting of the sale certificate, instituted the present suit on the 7th July 1881, against the decree-holder and the auction-purchaser, claiming that the property in question should be declared to belong to him, and that the sale should be set aside; for possession of the property, for mesne profits, and praying that the order of the 23rd April should be set aside.

The first Court held that the plaintiff's cause of action was the sale, and that consequently the suit was barred under art. 12 (a), schedule 2, Act XV of 1877; that the sale, having been duly made and confirmed while Mr. Drummond's order was in force, was valid; that whatever right, title and interest the plaintiff possessed passed to the auction-purchaser; and that without setting aside the sale he could have no right as against the auction-purchaser to recover the property. On the facts the first Court was not satisfied that the property in suit was really acquired by the plaintiff, and it held that, even assuming that to be the case, inasmuch as the original judgment of the 17th

January 1876 found as a fact that he had succeeded to his father's estate, he * was bound to account for the properties so received by him, and as he had failed to do so the property in suit must be held liable to satisfy the decree.

Against that decree the plaintiff appealed.

The lower Appellate Court upheld the decree of the Court below, holding that the suit was barred by limitation, and that [365] the plaintiff had failed to prove that the property in suit was his self-acquired property.

The appeal was consequently dismissed with costs, and the plaintiff now specially appealed to the High Court.

Baboo *Kali Kissen Sen* for the Appellant.

Baboo *Mohesh Chunder Chowdhry* and *Munshi Mahomed Yusoof* for the Respondents.

The **Judgment** of the Court (MITTER and TREVELYAN, JJ.) was as follows.—

We are of opinion that the appeal in this case must fail. Without expressing any opinion upon the question whether the plaintiff's suit is barred by limitation, we think that upon the facts admitted in this case the plaintiff is not entitled to have a decree setting aside the sale. We think that the ruling in *Jan Ah v Jan Ah Chowdhry* (10 W R., 154) will govern this case.

There was an order by Mr. Drummond which, under s. 244 of the Code of Civil Procedure, had the force of a decree directing the sale of the property in dispute, and in execution the property in dispute was sold and purchased by a person who was not a party to the suit. That decree was subsequently set aside.

According to the authority referred to above, this will not entitle the plaintiff to bring a suit to set aside the sale. That being so, we think that the judgment of the lower Courts dismissing plaintiff's suit is correct.

We dismiss this appeal with costs

Appeal dismissed.

NOTES.

[The distinction has been maintained between the *bona fide* purchaser in execution sales and the purchaser who is or may be affected with notice. The former's purchase is not generally set aside (1 B.L.R.A.C., 56, 4 Cal., 142, 11 Cal., 362, 10 All., 83; 20 All., 237; 22 All., 168, 23 Cal., 857, 21 Bom., 463, 26 Cal., 734), but the latter buys subject to the vicissitudes of the litigation.—10 All., 166, 31 Cal., 499, 15 C.W.N., 78.]

[11 Cal. 365]

CRIMINAL MOTION.

The 24th February, 1885.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Ambler and another.....Petitioners

versus

Pushong and anotherOpposite Parties.

Possession, inquiry as to—Time at which Magistrate is to determine who was in possession—Actual possession—Criminal Procedure Code (Act X of 1882), s. 145.

Under s 145 of the Criminal Procedure Code the Magistrate has to find [366] which of the parties is in possession of the subject-matter of the dispute at the time when he is inquiring into the matter, which in the contemplation of the law is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in his possession.

THIS case arose out of a dispute between the respective parties as to the right to hold possession, for a particular purpose, of a certain hill called Bhoika Hill, the property of the Maharaja of Gidour

The petitioners, Ambler and Stephens, claimed under an unregistered lease for a period of five years from November 1882 to November 1887, and the opposite party, Pushong and Sên, claimed under a lease dated the 20th September 1884, and registered on the 13th October 1884. Both the leases were of the same nature and were granted to the respective parties by the Maharaja for the purpose of giving the holders the right to quarry and remove the stone in and from the hill in question. The facts as proved, and the allegations on either side, so far as are material, were as follow :—

There was no dispute that Ambler had originally entered into possession under his lease and worked the quarries, but it was alleged on behalf of the opposite party that he only worked them for a period of about two months and then abandoned them in 1884 Ambler entered into partnership with Stephens and others, and it was alleged that the partnership thus constituted determined to abandon the quarries, but the Magistrate found that Ambler had certainly not determined on that course. The question depended apparently upon whether the Railway Company would or would not run a siding up to the hill to facilitate the removal of the stone when quarried so as to enable the quarries to be worked at a profit.

The time for the registration of Ambler's lease having expired, the Maharaja re-dated the lease. The Magistrate found as a fact that Ambler continued to deliver stone that had been quarried up to August 1884, and Ambler contended

* Criminal Revision No. 12 of 1885, against the order of C. R. Marindin, Esq., Joint Magistrate of Monghyr, dated the 11th December 1884.

that he had never given up possession of the hill. Pushong and Sen contended that they found the hill unoccupied and commenced working there under the [367] lease on the 22nd September, and continued in undisturbed possession till the 16th October, when they were turned out by Ambler with the aid of the Police. It appeared that on the 15th October, Ambler complained to the Police that Pushong and Sen had, on the 14th, forcibly turned out his coolies and taken their tools, and on the 16th the Police proceeded to the spot, and finding none of Pushong's men there, save two who at once decamped, Ambler was put in possession. Pushong and Sen in their turn complained that they had been forcibly dispossessed by Ambler and the Police on the 16th October. The present proceedings were instituted on the 18th October, and at that time it was not disputed that Ambler was in possession.

The Magistrate came to the following conclusions, *viz.*, that Ambler was dispossessed on the 22nd September, and that he did not complain till the 14th October, that Pushong and Sen obtained possession on the 22nd September and held it till the 14th October; and that on that day the dispute arose while they were in peaceful possession. He, therefore, treating the question as one to the right to possession of the hill declared that Pushong and Sen were entitled to retain possession until legally evicted.

It appeared that on the 17th October Pushong and Sen made the complaint upon which the proceedings were initiated by the Magistrate on the 18th, and that Ambler lodged a cross complaint. The Magistrate issued his proceedings under s. 145 of the Criminal Procedure Code "with regard to the right to excavate ballast at a certain hill situated in the district," treating the dispute as regards that right and not a right to possession of the hill, and he did not specify the hill in question in his initiatory proceedings. In his judgment, however, he treated the dispute all along as to the right to possession of the hill, and upon the above facts dismissed the summons against Pushong and Sen, and ordered Ambler to give security to keep the peace for one year with two sureties to the extent of Rs. 1,500 each.

Against this order Ambler now applied to the High Court under the revisional sections, and in his petition set out the facts, and further stated that on the 24th October Pushong [368] and Sen had instituted a civil suit against him with reference to the subject-matter of the dispute.

The order of the Magistrate, on the subject of the present application, was dated the 11th December 1884.

Mr. M. Ghose, Mr. M. P. Gasper and Mr. R. E. Twidale for the Petitioner.

Mr. Pugh and Baboo Bolye Chand Dutt for the Opposite Party.

Mr. Ghose for the petitioner.—A right of this nature is not such a right as is within the scope of s. 145, and therefore the Magistrate had no jurisdiction to entertain the matter at all. •

If s. 145 does apply the Magistrate had no business to act as he has done; but all he could do was to find who was in possession at the time when he instituted his proceeding, and if he was bound to go back at all, he was bound to go back to the time before any dispute at all arose, *viz.*, before the 22nd September, when we were in peaceful possession. See *Pirtharam Chowdhry Bai Bahadoor* (20 W. R., Cr., 51), and in the matter of the petition of *Mohesh Chunder Khan* (I. L. R., 4 Cal. 417).

Further once the other side having instituted civil proceedings there was an end to the jurisdiction of the Magistrate under this section; the opposite party in their plaint in the civil suit admit that we are in possession, and say that we dispossessed them on the 16th October, and they seek to recover possession and yet the Magistrate has made an order that they be "retained in possession."

In addition there is no evidence to support that portion of the order requiring us to give security to keep the peace, and that part is clearly bad.

Mr. *M. P. Gasper* on the same side.—Section 145 has no application to a case where a right of the kind is in dispute—*Bejoy Nath Chatterjee v. The Bengal Coal Company, Limited* (23 W. R. Cr., 45) as the right is not to possession of the land, but only to quarry stone, *i.e.*, to go there, quarry the stone and take it away.

Mr. *Pugh (contra)*.—There is no doubt that we were in actual physical possession up to the 16th October, the day on [369] which the dispute arose, and the "possession" mentioned in the section means the possession at the time when the dispute arises. *Pirthiram Chowdhry, Rai Bahadoor* (20 W. R., 51); *Rakhal Dass Singh v. Rajah Sheo Pershad Singh* (24 W. R. Cr., 73), *Bunwar Lall Misser v. Rajah Radha Pershad Singh* (1 C. L. R., 136), in the matter of the petition of *Mohesh Chunder Khan* (I. L. R., 4 Cal., 417). Besides, this is a totally different case to that quoted by Mr. *Gasper*, viz., *Bejoy Nath Chatterjee v. The Bengal Coal Company* (23 W. R. Cr. 45), in which case there was no possession, at any rate, of more than a very small quantity and only a right to dig as to the greater part, and the Magistrate had clearly jurisdiction to take it up. The right to quarry stone may be the right in respect of which possession was taken, but however taken, there was the fact of possession, and the Magistrate treats the case with the assent of both parties, as one in which the possession of the hill or quarry is at issue.

If your Lordships adopt the suggestion of Mr. *Ghose*, that the possession referred to is the possession at the date of the Magistrate's initiatory proceeding, you will be adopting a forced construction that will put a premium on lawlessness, and oblige a Magistrate to retain anyone in possession who may clearly be a wrong-doer and have forcibly dispossessed another.

Mr. *Ghose* in reply.—The cases cited on the other side are no authority under the wording of the section in the present Code. Act XXV of 1861, s. 318, contained no provision enabling a party wrongfully dispossessed to be restored to possession. The Madras High Court held (6 Mad. H. C. App., XIII) that a trespasser's possession could not be considered, but the Calcutta and Bombay High Courts took a different view. It was contended that a possession obtained by force or fraud could not be considered, but it was held that it was immaterial how the possession was obtained. That view was also adopted by the Agra High Court. See *Government v. Gholam Mahommed* (1 Agra H. C. Cr., 33), (*cf.* Prinsep, 5th edition to Code of 1872, p. 471). These cases were before the Legislature, and a substantive [370] provision was enacted by Act X of 1872 to give a Magistrate power to give relief where they occurred (see Act of 1872, s. 534). That section is now substantially reproduced by s. 522 of the present Code.

The decision of Mr. Justice AINSLIE in *Mohesh Chunder Khan's* case went too far, and the provision of the present Code overrules it. It evidently overlooked the fact that special provisions had been made by s. 534 of Act X of

1872 to meet a class of cases in which the Courts were previously powerless to give any redress. In *Pirthiram Chowdhry, Rai Bahadoor* (20 W. R., 51) the Chief Justice was of opinion that under the old Code even the Magistrate should find who was in possession at the time of the institution of the proceedings, and the Legislature seems now to have adopted that decision, and also one of a Full Bench of the Madras High Court (unreported, but referred to in *Weir*, 2nd ed., p. 437) for they have inserted the word "then" in the present section. The Madras decision was in 1880, and upon the footing of that case, and the true reading of the present provision of the Code, I contend that the Magistrate must retain the party in possession who is actually in possession at the time of the institution of the proceedings.

The case of *Bunwar Lall Misser v. Rajah Radha Pershad Singh* (1 C. L. R., 136) contains remarks of Mr. Justice AINSLIE which have no further application than that particular case, but if you do adopt that view then you must adopt it as a whole and go back to the time when another was in undisputed possession.

The **Order** of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

Tottenham, J.—This was a case under s. 145 of the Code of Criminal Procedure, the Magistrate deciding it in favour of the second party, and the first party have moved this Court to set aside the order on various grounds.

In the first place, it was urged that the case did not properly fall under s. 145 at all, the matter in dispute not concerning any tangible immoveable property, and in the next place, it was contended that if this section did apply then the first party were entitled upon one of the findings of the Magistrate, [371] himself to an order in their favour, the Magistrate having found that the first party were actually in possession at the time when these proceedings were instituted. The Magistrate appears to have decided in favour of the second party, because he considered that they were in possession up to within a few days before this case was instituted, and that the possession of the first party had been wrongfully obtained by force.

It seems to me that the first objection taken by the petitioners cannot be maintained. No doubt the Magistrate in his initial proceeding speaks of the dispute as concerning a right to quarry stone in a certain hill, but what he meant was that a dispute existed concerning the possession of the hill itself. Both parties so understood the matter, and both parties adduced evidence upon that understanding and the Magistrate's decision is as to possession of the hill itself, which certainly is tangible immoveable property. Were we to set aside the order upon the ground that the Magistrate's proceeding was not sufficient to give him jurisdiction, the only result would be that proceedings would be taken afresh, and then the Magistrate would correctly describe the subject of dispute by the name of the hill of which each party claims possession.

As regards the other objection, that depends upon the construction to be put upon s. 145, as to the period at which the Magistrate is to determine in whose possession the subject of dispute is or was. After setting out what proceedings the Magistrate is to take, the section says, "The Magistrate shall, if possible, decide whether any and which of the parties is then in such possession of the said subject." And it further provides that, "if the Magistrate decides that one of the parties is then in such possession of the said subject, he shall issue an order declaring such party to be entitled to retain possession thereof until evicted therefrom in due course of law." The question is what

is meant by the word "then." It has been argued, on the other side that, "is then in such possession" really means was in possession at the time the dispute began, or, "was in possession at the time when the Magistrate's attention was called to the dispute." For the petitioners it has been contended that "is then" has its literal meaning, and means the time during which [372] the enquiry is being made, or at any rate, it cannot be construed as having reference to a period previous to the time when the case was instituted by the Magistrate; and this view, I think, is the correct one. The section expressly prohibits the Magistrate from taking into consideration the merits of the claim of any party to possess the subject of dispute. He has simply to determine which party is *de facto* in possession at the time when he is enquiring into the matter. And I think that the law contemplates that the time of the institution of proceedings and the time of deciding the case are practically identical. It does not contemplate any change of possession pending the proceedings. The proceedings are intended to be prompt and to be concluded without any delay.

In the present case the Magistrate distinctly finds that at the time when he instituted his proceedings, that is, on the 18th October last, the first party were in possession, having two or three days before ousted the second party who had been in possession for some three or four weeks. That being so, the Magistrate's simple duty was to maintain the first party in possession, although he might be of opinion that they were in wrongful possession. He had no power in law in these proceedings to oust the party whom he considered in wrongful possession, and maintain in possession the party whom he considered rightfully entitled to possession. That being so, the rule must be made absolute. The order of the Magistrate is set aside and in lieu thereof he is directed to maintain the first party in possession until ousted by due course of law.

Another objection was taken by the petition. The Magistrate required the first party to enter into recognizances to keep the peace under s 107. We find that there is no evidence to warrant him to make that order. That order therefore is also set aside.

Ghose, J.—I concur in the judgment just delivered by my learned colleague. There seems to me to be a certain amount of conflict of authorities upon the question whether the Magistrate is bound to enquire as to which party was in possession at the time when the dispute arose, or whether he should confine his enquiry to the time when the proceedings were instituted before him. These rulings were either under [373] s. 318, Act XXV of 1861, or under s. 530 of Act X of 1872. The latest case upon the point is a Full Bench decision by the Madras High Court, which is to be found in Mr. *Weir's* edition of the Madras High Court Reports, page 437. This decision was passed in 1880, overruling an earlier decision of the same Court which had taken a contrary view. It held that the Magistrate was to ascertain who at the time of enquiry was in possession, and it was probably this decision, as was contended by Mr. *Ghose*, that the Legislature had in view when, in s. 145 of the law of 1882, they introduced a change of wording. The words I refer to are to be found in the second paragraph of s. 145, namely, "which of the parties is then in such possession." I believe the Legislature by introducing the word "then" intended to remove the doubt which had existed before in this matter, and it seems to me that what the Magistrate is required to do under s 145 is to enquire which party is in possession at the time of the institution of the proceedings, and not at the time when the dispute arose.

Order set aside.

Subsequently to this order of the High Court, directing the Magistrate to maintain Ambler in possession, an application was made by Ambler to the Magistrate, for the purpose of obtaining possession, and for the withdrawal of the order of the 11th December 1884, under which Pushong and Sen had been retained in possession.

The Magistrate then passed an order to the effect that Ambler should be put in possession. Thereupon Pushong and Sen presented a petition to the Magistrate, in which they urged that Ambler had relinquished possession of his own accord, and that they having obtained possession, the order of the High Court could not be carried out if it was intended by that order that Ambler should be restored to possession, they also urged that the Court had no power, under the circumstances, to restore a party to possession. The Magistrate, after hearing both sides, directed that his previous order should be stayed, pending a reference to the High Court to ascertain whether the High Court intended that Ambler should be restored to possession, and, if not, what [374] effect should be given to the order. Before this reference reached the High Court, Ambler moved the High Court in the matter, and obtained a rule calling upon Pushong and Sen to show cause why the order of the High Court, dated the 24th February 1885, should not be carried out by the Magistrate, and why the order of the Magistrate, dated 11th December 1884, should not be withdrawn. Before the hearing of this rule the reference made by the Magistrate reached the High Court, and the two matters were heard together at the hearing of the rule on the 1st May 1885.

Mr. *Ghose* for Ambler contended that possession given under an illegal order, subsequently set aside, must be ignored, that the true effect of the High Court's order was that the Magistrate should regard Ambler as in possession from the date of his order of the 11th December 1884; that there would be no object in the High Court possessing powers of revision in such cases if orders made by it were to have no effect. [GHOSE, J.—But it is said that you relinquished possession of your own accord.] Mr. *Ghose* contended that there was nothing to support that allegation, and that the Magistrate had stated that the other side were now in possession under his own order; that until that order had been withdrawn Ambler was bound to obey it. That in a similar case to this, viz., in the matter of *Chulraput Singh* (5 C. L. R., 200) the High Court had directed what was practically restoration to possession; it directed the Magistrate, whose order was reversed, to see that the other side was kept in possession, and that, although it was doubtful whether under the Code of 1861, the High Court possessed this power, yet since the passing of the Code of 1872 there was no longer room for doubt.

Mr. *Mullick* for Pushong and Sen contended that the Court had no power to restore a person to possession, except under the provisions of s. 522 of the Code.

Mr. *Ghose* was not called upon to reply.

The **Order** of the Court (TOTTENHAM and GHOSE, JJ.), was as follows:—

On the 24th of February last, this Court on revision set aside an order of the Joint Magistrate of Monghyr, under s. 145 of the Criminal Procedure Code, in a case of disputed possession, [375] between Charles Ambler on the one side, and Pushong and Sen on the other. The present proceedings have arisen out of that order of the 24th of February, which comes before us in a two-fold manner: Ambler, in whose favour the order of this Court was passed, applied to us that the Magistrate of Monghyr may be informed that it was his duty,

in carrying out the orders of this Court, to put the petitioner in possession ; and the Magistrate directed to withdraw the order by which Pushong and Sen were put into possession. Upon this petition a rule was issued on the other side to show cause. In the meantime the Magistrate had by a letter referred to this Court to know whether the High Court intended to restore Ambler to possession, or, if not, what effect was to be given to the High Court's order.

It appears to us that neither the reference nor the application upon which the present rule was granted should have been necessary. It is difficult to conceive how any Magistrate could doubt what the meaning of this Court's order was, or what his duties were in respect of that order. The Magistrate, in December last, while deciding the case, found Ambler to be in possession of the subject of dispute, and yet because he found also that the other side, Pushong and Sen, were in actual possession on the 14th October, that is, a few days before the institution of the case, he declared them entitled to retain possession until legally evicted.

The order of this Court was, that the order of the Magistrate was to be set aside, and in lieu thereof the first party, Ambler, should be maintained in possession till ousted by the due course of law. It seems perfectly clear that the meaning of this order is that the possession of Ambler be declared, and that at the time when the Magistrate made the order in favour of Pushong and Sen, his order should have been in favour of Ambler. We now direct that the Magistrate formally withdraw the order passed on the 11th of December last in the matter in question, and that in lieu thereof take the order of this Court of the 24th February as being the order which should have been passed, and accordingly declare Ambler to be in possession, and entitled to retain possession until ousted by due course of law. This order will govern the reference.

Rule absolute.

NOTES.

[A Magistrate is not concerned with *how* a party in possession came by the possession :— 6 Bom H C R. Cr , 30 , 11 Cal , 365 , 12 Cal , 521 , 21 Cal , 404 (410, 411).]

As to what is actual possession, *see* 3 Cal., 320 ; 16 Cal., 513 , 18 W. R. Cr., 11

The Cr. P. C., 1898, sec. 145, sub-sections (1) and (4) make the date of the order the date for determining possession, superseding 11 Cal , 365 , 12 Cal , 539 , 12 Cal., 521 ; 22 Cal., 297 ; 21 Cal., 404 ; 16 Cal., 281 , 18 Mad , 41 , 15 Bom , 152 ; 13 All , 762.

The effect of the Magistrate's order is to maintain in possession the party in whose favour it is made until it is superseded in the regular way —29 I A , (24) 34 18 M. L. J , 83 ; 25 Cal , 630 (in argument)]

[376] APPELLATE CIVIL.

The 10th March, 1885.

PRESENT.

MR. JUSTICE PIGOT AND MR. JUSTICE BEVERLEY.

Saroda Churn Chuckerbutty and others... ..Defendants

versus

Mahomed Isuf Meah..... ..Plaintiff.*

Execution of decree which is barred by limitation, Sale under—Sale certificate, Effect of—Act XIV of 1882, ss. 244, 316—"Subsisting decree," Meaning of—Costs.

The words "subsisting decree" in the proviso to s. 316 of the Code of Civil Procedure refer to a decree which is unreversed and in full force, and not to a decree the execution of which is not barred by limitation.

Where a decree under which a sale takes place remains unreversed, and the sale under it has been confirmed, a sale certificate will operate as a valid transfer of the property sold, notwithstanding that the sale has actually taken place at a time when execution of the decree is barred by limitation.

THIS was a suit brought to set aside a sale held in execution of an *ex parte* decree for arrears of rent due in respect of an under-tenure, obtained by the defendants against the plaintiff. This decree was not appealed from, at the execution sale the defendants themselves became the purchasers of the under-tenure at the price of one rupee, and the sale was duly confirmed and a certificate granted to the purchasers. The plaintiff in the present suit alleged that no notice of the sale had been given as directed by s. 59 of Bengal Act VIII of 1869, and that he had no knowledge of any of the execution proceedings, and further stated that execution of the defendants' decree had been taken out at a time when execution of the decree was barred by limitation.

The defendants denied these statements, and contended that no suit would lie to set aside the sale.

The Munsiff found that the sale had not been published in accordance with s. 59 of Bengal Act VIII of 1869, and that the sale notification had been fraudulently concealed from the plaintiff, adding "that it further appeared that "after the decree had [377] been barred by limitation, the *mehal* in default was "sought to be sold by auction, and was sold accordingly. Consequently, "according to s. 316 of the Code of Civil Procedure when the decree was not "in force at the time of the sale, the said sale could not transfer the right of "the plaintiff to the defendants," and he therefore gave the plaintiff a decree.

The defendants appealed to the Subordinate Judge, who held that under s. 244 of the Code no separate suit would lie to set aside the sale; but dismissed the appeal on the ground that the decree was not "subsisting" at the time of the sale, and that, therefore, the sale certificate under s. 316 of the Code did not operate to pass the title in the property to the purchaser.

The defendants appealed to the High Court.

* Appeal from Appellate Decree No. 1474 of 1883, against the decree of Baboo Juggut-durlabh Mozoomdar, Subordinate Judge of Farridpore, dated the 19th of March 1883, reversing the decree of Moultvi Mohabat Ali, Munsif of Goalundo, dated the 12th of September 1881.

Baboo *Iswar Chandra Chakrabarti* for the Appellants contended that the words "subsisting decree" in the proviso to s. 316 of the Code of Civil Procedure meant merely a decree which had been unreversed—*Mahomed Hossein v. Kokil Singh* (I. L. R., 7 Cal., 91), and that the Judge having found the suit could not lie erred in granting the plaintiff a decree.

Baboo *Kalkissen Sen* for the Respondent.

Judgment of the Court (PIGOT and BEVERLEY, JJ) was as follows —

This appeal arises out of a suit to set aside the sale of a certain *jote* in execution of a decree, on the ground that the sale had been brought about fraudulently without proper notification, and at a time when the execution of the decree was barred by limitation. On the part of the defendants it was contended, amongst other things, that no separate suit would lie to set aside the sale. The Court of First Instance found that the sale notification had been fraudulently suppressed, and held that a separate suit would lie to set it aside, and the Munsiff further held that inasmuch as execution of the decree was barred at the time of the sale, the sale certificate, under the proviso to s 316 of the Code of Civil Procedure, could not operate to create a valid transfer of the property sold. He, therefore, gave the plaintiff a decree.

[378] The Subordinate Judge, on the other hand, relying on the case of *Chowdhry Wahed Ali v. Mussamat Jumae* (Suth. P. C., 680) and on the case of *Viraraghava Ayyangar v. Venkatacharyar* (I. L. R., 5 Mad., 217), held that no separate suit would lie, but he dismissed the appeal on the ground that the decree was not subsisting at the time of the sale, and that, therefore, the sale certificate under s. 316 did not operate to pass the title to the purchaser.

It is contended here that this decision is wrong in law, that the words "subsisting decree" in s. 316 mean a decree unreversed and in full force, and not a decree, the execution of which is not barred by limitation, and further that, when the Subordinate Judge found that a separate suit would not lie, he was wrong to grant the plaintiff a decree.

We think that these contentions must prevail

The cases of *Mahomed Hossein v. Kokil Singh* (I. L. R., 7 Cal., 91) and *Mungul Pershad Dicht v. Griya Kant Lahiry* (I L R., 8 Cal., 51) are authority for holding that the sale certificate operated as a valid transfer, notwithstanding that the sale actually took place at a time when execution was barred by limitation. The decree under which the sale took place was a good decree, and is in force up to the present time, and the sale which took place under it has been confirmed, and must be held to be a valid sale.

Then the question arises whether this separate suit would lie to set aside the sale on the ground of fraud; and on this point we agree with the decision in *Viraraghava Ayyangar v. Venkatacharyar* (I L. R., 5 Mad., 217), we think the question raised is certainly one relating to the execution of the decree, and that it is between the parties to the suit in which the decree was passed.

We think, therefore, that the decree of the lower Appellate Court must be reversed, and the plaintiff's suit be dismissed. But having regard to the circumstances of the case and the conduct of the defendants, we shall follow the

course taken in the Madras case cited, and in a somewhat similar case of *Paranjpe v. Kanade* (I. L. R., 6 Bom., 148); and shall direct that each party do bear his own costs throughout.

Appeal allowed.

NOTES.

[The proviso to sec. 316 of the C. P. C., 1882, has been omitted in the C. P. C., 1908, and therefore it is now no longer necessary that the decree should be subsisting at the time of the confirmation of sale.

Strangers to a suit are justified in believing that the Court has done that which, by the direction of the C. P. C., 1908, it ought to do. 25 Bom., 337 at 347. So a sale cannot be set aside on the ground of any irregularity.—17 Mad., 58; 19 Mad., 219; 21 Bom., 463; nor on the ground that the property was not attachable or saleable.—28 Bom., 125, nor that the execution was barred by limitation.—11 Cal., 376. But it is otherwise if the Court has no jurisdiction to sell.—32 Cal., 296 P.C.

The above principles do not apply where the purchaser, being a decree-holder, buys with notice:—32 Cal., 396 P.C.

In *Mon Lal v. Uma Charan*, (1913) 20 I. C., 337; it was held by the Calcutta High Court that when a sale had taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bona fide* purchaser for value without notice.

On the question whether a suit will lie independently of sec. 47, C. P. C. (1908), see 19 Cal., 633; 25 Mad., 529; 26 Mad., 740; 27 Cal., 34, 30 All., 72, 17 Cal., 769, 16 Cal., 794 (*arg.*); see also 15 Cal., 179.]

[379] PRIVY COUNCIL

The 11th December, 1884.

PRESENT.

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE.

Gangapershad Sahu....Plaintiff

versus

Maharani BibiDefendant.

[On appeal from the High Court at Fort William in Bengal.]

Act XL of 1858, s. 18—Power of guardian of minor to mortgage minor's property—Rate of interest.

A guardian to whom a certificate had been granted under Act XL of 1858 (relating to minors) having obtained, under s. 18, an order of a Court authorising the raising of money

by mortgage of the minor's immoveables, mortgaged accordingly. In the order so obtained, the rate of interest at which the money was to be raised was not specified. On a question whether, there being no proof of the necessity or expediency of agreeing to pay interest at a rate so high as eighteen per cent., the agreement to pay at this rate was rightly set aside by the High Court, which decreed interest at twelve per cent., *held*, that the proper construction of the order, and the one most favourable to the lender regarding the rate of interest was, that the guardian was authorized to borrow only at a reasonable rate of interest; and that consequently the decree of the High Court was right.

APPEAL from a decree (20th January 1882) of the High Court, reversing a decree (21st April 1880) of the Subordinate Judge of Tirhoot.

The question raised by this appeal related to the effect of s 18 of Act XL of 1858 (an Act for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal). Section 18 enacts that every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the minor; but no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.

During the respondent's minority, Parbutti Koer, the mother of the minor's deceased husband, having obtained a certificate [380] authorizing her to represent the minor under s 7 of the above Act, acted as her guardian, and as such obtained, under s 18 of the above Act, an order of the Judge of Tirhoot, authorising her to raise Rs. 8,000 by mortgage of the minor's property. Parbutti accordingly mortgaged, on the 25th March 1869, mouzah Sahu, part of the minor's estate, for Rs. 8,000. Part only of this sum having been repaid, and the minor having now attained full age, the present suit was brought against her by the mortgagee to recover the balance Rs. 6,703, principal, together with Rs. 4,570, interest, at the rate of one rupee eight annas per cent per mensem.

The plaintiff's claim having been decreed in the Court of First Instance, with interest from the date of the institution of the suit down to realization of the decree, the High Court (MITTER and MACLEAN, JJ.) on appeal reversed so much of this decision as related to the question as to the respondent's liability to pay the stipulated rate of interest. MITTER, J., said "The next question is, whether she is bound to pay interest at the rate of 18 per cent as stipulated in the bond"; and then added "Having regard to the facts proved in this case, it seems to us that the appellant ought not to be held liable to pay interest at the rate of 18 per cent per annum, and that the stipulation to pay interest at a higher rate should not be enforced. The debts which have been paid bore

*[Sec. 7.—If it shall appear that any person claiming a right to have charge of the property of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the minor who is willing and fit to be entrusted with the charge of his property, the Court may grant a certificate to such relative.]

The Court may also, if it think fit (unless a guardian has been appointed by the father), appoint such person as aforesaid, or such relative or any other

Court may appoint such relative or friend of the minor, to be guardian of the person of person guardian. the minor.]

interest at the rate of 12 per cent. per annum. Consequently it cannot be said that the agreement to pay interest at a higher rate was in any way beneficial to the appellant's interests. There is nothing in the evidence which would warrant the finding that the transaction was one which a prudent owner would enter into to benefit the estate. Nor is it shown that there was any such pressure on the estate which would justify a manager in raising money at 18 per cent. interest on the hypothecation of immoveable property. It was recited in the petition of the guardian praying for permission to raise a loan of Rs. 8,000 on the mortgage of mouzah Sahu, that some property of the minor had been attached and advertised to be sold in execution of a decree, but of this fact no evidence has been given in this case. Before the plaintiff can recover interest at the rate of [381] 18 per cent., he is bound to prove some circumstance which rendered it necessary to raise a loan immediately at such a high rate of interest. It has been urged before us that, as the loan was sanctioned by the District Judge under s. 18 of Act XL of 1858, the transaction must be considered to be binding upon the appellant. Giving to this argument its utmost stretch, it can only render the mortgage valid, but there is no sanction by the Judge for the agreement to pay interest at the rate of 18 per cent. per annum. On the whole, we are of opinion that the plaintiff should recover interest at the rate of 12 per cent. per annum."

The account having been made up in pursuance of this direction, it was found that the appellant's claim had been satisfied before the date of suit, and, therefore, by a decree of the High Court, the appellant's suit was dismissed with costs.

On this appeal--

Mr. J. F. Leith, Q. C., and Mr. C. W. Arathoon appeared for the Appellant.
Mr. H. Cowell for the Respondent

For the appellant it was argued that the High Court ought to have decreed that the interest was payable at the rate specified in the mortgage deed, viz., eighteen per cent. per annum. There was no evidence showing that this was not for the benefit of the minor at the time when it was necessary to raise the money. The objection that the rate of interest was excessive had not been taken in the defence made in the Court of First Instance. Reference was made to part of the judgment in *Orde v. Skinner* [I. L. R., 3 All., 91 (107), L. R., 7 I. A., 196].

Mr. H. Cowell, for the Respondent, was not called upon.

Their Lordships' **Judgment** was delivered by

Sir A. Hobhouse.—The question in this case turns upon the amount recoverable on a mortgage bond which bears date the 25th March 1869. The bond was given by Parbutti Koer, who is the grandmother and guardian of the respondent Maharani Bibi. The effect of the bond is that security is given on a certain mouzah belonging to the Maharani Bibi for the [382] sum of Rs. 8,000, to be repayable in about a year's time with interest at the rate of 18 per cent. per annum. The plaintiff has received payment of an amount equal to the principal due upon the bond with simple interest at 12 per cent. per annum, and he had received that amount of payment before he commenced the suit in which this appeal is presented. If, therefore, 12 per cent. is all that he is entitled to, the suit must altogether fail. If 18 per cent. is what he is entitled to, then there is still a sum due, and he ought to get a decree for that sum.

The Judge of Tirhoot, who heard the case originally, was of opinion that, according to the contract, the plaintiff was entitled to 18 per cent. until the

actual time of payment, but, in exercise of the power vested in the Court, he cut down the rate of interest to 3 per cent. from the date of the suit to the date of decree, and after decree he gave no interest at all. He, therefore, evidently thought that the transaction was an exorbitant one, and that, where the Court had discretion, it should lower the rate of interest. Up to the date of suit he had no discretion, and he construed the bond as has been stated.

The defendant in the suit appealed to the High Court, and that Court was of opinion that the plaintiff was entitled to interest only at the rate of 12 per cent., and inasmuch as, calculating at that rate, he had been wholly paid off, the suit was necessarily dismissed.

The sole question now is as to the additional 6 per cent. claimed by the plaintiff.

It has been stated that the bond was executed by the grandmother as guardian of the defendant, who was a minor at the time. The 18th section of Act XL of 1858 says that "no such person shall have power to sell or mortgage any immovable property without an order of the Civil Court previously obtained." The guardian obtained an order of the Court on the 5th of February 1869, on a petition in which she stated the necessity of taking a loan of Rs. 8,000 for the purpose of paying some pressing debts, which were then carrying interest at 12 per cent. The order runs in these terms: "That the petitioner be permitted to take a loan of Rs. 8,000 by mortgage of mouzah Sahu, Pergunnah Ahalwara." That order says [333] nothing whatever about interest on the Rs. 8,000. It would certainly seem desirable that a Court which has thrown upon it the responsibility of authorising loans to be raised upon the security of infants' estates should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised, especially in India, where the rate of interest bears so very large a proportion to the principal advanced. There may sometimes be difficulties in doing so. There may have been a difficulty in this case for aught we know. At all events the Judge did not do it. Supposing the Judge does not do it, that cannot give to the guardian the power of raising the authorised loan at any rate of interest that the guardian thinks fit. It has been said the guardian might think fit to raise a loan at the rate of 100 per cent. If that were brought to the notice of the Judge, he would probably institute a very rigorous inquiry before authorising such a loan. On an order of this kind, which authorises the raising of a principal sum, but says nothing about the interest, their Lordships think that the proper construction, or at all events the most favourable construction to the lender, is that it authorises a loan at a reasonable rate of interest.

With respect to the judgment of the High Court their Lordships agree with Mr. Justice ROMESH CHUNDER MITTER in his construction of the bond. It was made a question how far the bond, on the face of it, provided for the payment of interest—whether up to the date fixed for the payment of the principal, or up to the date of actual repayment? They agree with Mr. Justice MITTER in thinking that it provided for payment of interest up to the date of actual repayment.

Mr. Justice MITTER then goes on to say: "The plaintiff must show that the transaction was beneficial to the interests of the minor", and then he examines the whole transaction, and finds that the raising of Rs. 8,000 at a reasonable rate of interest was beneficial to the interests of the minor, but that the raising at the rate of 18 per cent. was not beneficial. Their Lordships think that when an order of the Court has been made authorising the guardian

of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to enquire as to the [384] expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but, apart from any charge of that kind, their Lordships think he is entitled to rest upon the order. Therefore, as regards the principal of this loan, it is sufficient for the plaintiff to say: "I have got the order of the Court." But when he comes to the rate of interest he has not got the order of the Court, and if he chooses to lend his money without an order that binds the infant's estate, then it is for him to show that the matter was one of necessity, or of clear expediency for the benefit of the infant's estate. In this case their Lordships fail to find any evidence showing any such necessity or expediency. They agree with the view taken by Mr. Justice MITTER that there is no case made on behalf of the lender to show that such a loan was for the benefit of the infant's estate. The result is, that the Court has recourse to the ordinary rate of interest ruling in that part of the country upon loans on good security, and finding that rate to be 12 per cent. it says that 12 per cent. is the reasonable rate to charge in the present instance.

Another objection has been raised, which has nothing to do with the merits of the case, namely, that this point was not raised upon the pleadings. It certainly does not appear to have been raised on the written statement. It was put at the bar that the point was waived, but there is no trace of waiver; on the contrary, the defendant seems to have been desirous to raise every point that occurred to her advisers to defeat the claim of the plaintiff. It does not appear that there was any formal preliminary settlement of issues, but in the judgment it is stated what the points for consideration are; and Mr. Leith very fairly said that he would take those points as the issues in the suit. The second of those issues is. "Whether Parbutti Koer really executed the bond in suit." That puts into issue the execution of the bond, but then it goes on. "And whether the defendant is bound to pay off the debt." That puts in issue the validity of the bond, not only on account of non-execution by Parbutti, but its validity generally as against the defendant, and therefore suggests the question whether the [385] defendant was bound by the acts of Parbutti Koer? When we come to the appeal the sixth ground of appeal is somewhat more specific than that. The sixth ground is this. "That your petitioner is in no way bound by the acts or statements of Parbutti Koer unless it is proved that those acts were done under necessity and for the benefit of the estate." No doubt that does not distinguish between the principal of the bond, which was covered by the order, and the interest, which was not covered by the order, but it shows that the defendant was disputing all disputable acts of Parbutti. On that ground of appeal Mr. Justice MITTER addresses himself to the question of necessity, and decides in favour of the defendant. Now it would be a lamentable thing if an appeal in which their Lordships are clearly of opinion that the High Court were right on the merits of the case were to be determined the other way on the ground that there was some imperfection in the pleadings. It would be lamentable in any case, and especially in India, where we know the pleadings are prepared with a considerable amount of looseness. If it could be suggested on the part of the appellant that practical injustice had been done him by the want of particularity in the pleadings, and by their not having drawn a proper distinction between the principal due on the bond and the interest, however much their Lordships might lament

it, they might be compelled to allow the appeal. But no such suggestion can be made. Their Lordships entirely disbelieve that more complete justice could be done in this case than has been done already.

There is another consideration. If this were really a point sprung upon the appellant by the judgment of Mr. Justice MITTER for the first time, it would have been good ground to apply to the Court for a review. But no such application was made; and their Lordships would be very loth to disturb the decree of the High Court upon a technical point of this kind, where the whole matter might have been set right if the High Court had been applied to. Even if the appellant were to succeed on this point, what could this Committee do? It could only advise Her Majesty to send back the case to be tried upon the question whether it was necessary or reasonable to raise this loan at the rate of 18 per cent. The High Court could have done that on [386] review, and if they thought their decree really did injustice, no doubt they would have done so. Their Lordships do not feel justified in disturbing the judgment of the High Court under such circumstances.

The result is, that this appeal must be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitor for the Appellant Mr. T. L. Wilson

Solicitors for the Respondent Messrs Barrow and Rogers

NOTES.

[Only a reasonable rate of interest should be allowed in loans raised by guardians — 11 Cal , 379 , 18 Cal , 311 , 5 C. L. J , 542 , 6 C. L. J., 490 , 30 All , 188 The same principle was applied to a loan by a trustee of endowed property — 37 Cal , 179 at 193

As regards review, see 33 Cal , 1323 at 1336 , also 11 C. L. J , 197 , 31 C., 358 , 51 C , 134 , 37 Cal , 179.]

— —

The 7th February, 1885.

PRESENT:

LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Rani Bhagoti..... Defendant

versus

Rani Chandan..... Plaintiff.

[On appeal from the Court of the Judicial Commissioner of the
Central Provinces.]

*Arbitration—Defence of submission to arbitration and award upon the
matter in suit before suit brought.*

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award

Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow, who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole.

The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only.

Held, that, in the absence of mistake, or misconduct, on the part of the arbitrators, the award was binding on the parties.

APPEAL from a decree (22nd November 1880) of the Judicial Commissioner of the Central Provinces, reversing a decree (8th May 1880) of the Additional Commissioner, Jabbalpur and Nerbudda Divisions, and remanding an appeal to him for hearing on the merits.

The principal question in the suit out of which this appeal arose related to the title of one of two widows of Rao Dhiraj Singh, taluqdar of Bilehra in the Narsinghpur district, who died [387] on the 10th December 1878 to a half share of the estate of her late husband. This she claimed from the other widow who had obtained possession of the whole estate of the deceased. Whether this claim had been disposed of in a manner binding on the parties by an award of arbitrators appointed to decide between them, was the principal question on this appeal.

The deceased Rao left no issue, and on his death change of names in the Collectorate books, *dakhil khary*, took place in favour of the widow who was defendant in the suit, and appellant in this appeal. This was the admission of the revenue authorities of her right to the possession of all the estate of the deceased; and in 1879 an application by the other widow, the present respondent, for *dakhil khary* in her name as to half the estate, was rejected.

After recourse to arbitration, Rani Chandan brought this suit in the Court of the Deputy Commissioner of Narasinghpur, claiming, as one of the two widows who survived Rao Dhiraj Singh, possession of a half share of twenty-four villages and other property belonging to his estate, valued at Rs. 63,379 in all.

Among other defences the arbitration proceedings were set up; and it was alleged that the question whether the plaintiff had not been separated from the deceased Rao in his lifetime, and had not received a fixed allowance from him, having become disentitled to succeed on account of infidelity to her husband, had been decided against the claimant by the arbitrators' award. Accordingly, at the hearing, an issue was fixed as to the fact of the reference having been made on the submission of parties, and as to the effect of the award. And the judgment of the Deputy Commissioner, thereupon, was that the submission to arbitration had not extended so far as to include the question whether the plaintiff had become disentitled to succeed by reason of adultery. He held, therefore, that the award as to her incapacity to inherit her husband's property was not binding, and decreed in the plaintiff's favour for the half share claimed by her.

The Additional Commissioner, to whom an appeal was preferred, held, on the contrary, that the award had been duly made, and [388] was binding between the parties, so as to preclude the plaintiff from maintaining this suit.

This latter decision was reversed by the Judicial Commissioner who held, in the judgment now under appeal, that the arbitrators had received no such authority, on the reference to them by the parties, as would have enabled them by their award to exclude the plaintiff from the succession. The suit was, accordingly, remanded to the Additional Commissioner, who was directed to decide it upon the merits, irrespectively of the award. This he did on the 24th February 1881, making a decree in favour of the plaintiff, and against the present appellant, who, on the 29th April 1881, obtained admission of an appeal to Her Majesty in Council against the decree of the Judicial Commissioner of the 22nd November 1880, reversing the first decree of the Additional Commissioner, which had maintained the effect of the arbitrators' award.

On this appeal,—

Mr. J. Graham, Q.C., and Mr. A.M. Bremmer appeared for the Appellant.

The respondent did not appear.

For the appellant it was argued that the award of the arbitrators was binding on the parties, and that the Judicial Commissioner had erred in holding, in the judgment of 22nd November 1880, that it was not so. The arbitrators received authority to inquire into any matters affecting the respective rights of the parties, and, as it had not been shown that they had misconducted themselves, or fallen into any error affecting the merits of the case, there was no ground for treating the award as invalid. A similar case had occurred in *Mussumut Rubbee Koor v. Jewut Ram* (2 Sel. Rep., S D. A., for 1818, p. 257), which arose in the Provincial Court of Benares in 1811, and was decided in the Sadr Diwani Adalat at Calcutta in 1818. Reference was also made to the judgment in *Eshenchunder Singh v. Shamachurn Bhutto* (11 Moo. I. A., 7).

Their Lordships' Judgment was delivered by

Sir R. Couch.—In this case the plaintiff, the younger widow of one Dhiraj Singh, who died on the 10th December 1875, [389] brought her suit to recover half of the property which had been left by Dhiraj Singh. The defendant was the elder widow of the deceased. The property which was claimed in the suit consisted of 24 villages which are specified in the schedule to the plaint. The defendant pleaded, first, that the matters between the parties had been referred to arbitration by an agreement in writing, and that there was an award of the arbitrators which decided that the plaintiff was not entitled to recover half of the property. She further pleaded that the plain-

tiff was unchaste before the death of her husband, and that therefore she would not be entitled to inherit the share of the property which was claimed:

In the first Court, the Deputy Commissioner of Narsinghpur, who tried the case, framed several issues, two being whether the question of the distribution of the property of Dhiraj Singh had been referred to arbitration by agreement between the parties in writing, and an award thereon been made, and whether the agreement was binding. Probably it was meant to include in this issue the question whether the award, as well as the agreement, was binding. Another issue was, whether the plaintiff was unchaste before the death of her husband, and so debarred from inheriting. In his judgment he said it was doubtful, he thought, whether the plaintiff did sign the submission to arbitration, but he did not consider that even if she did it was binding, and he gave a decree in favour of the plaintiff for the half share of the villages claimed.

That decision went by way of appeal to the Additional Commissioner of the Jabbalpur and Nerbudda Divisions, who came to the conclusion that the submission to arbitration was signed by the plaintiff. He also held that the award was valid, and reversed the order of the lower Court and dismissed the plaintiff's claim. He says "From a careful consideration of all these circumstances, I cannot agree with the lower Court that the award of the arbitrators is invalid, or that there is any doubt as to the contract by plaintiff to refer."

Then the case went by way of what was formerly called a special appeal, but which is now called a second appeal, to the Judicial Commissioner of the Central Provinces. The Judicial [390] Commissioner, on that second appeal, had no jurisdiction to deal with any findings of fact. The facts as found by the lower Appellate Court would have to be taken as being the real facts of the case. However, he did deal with the question whether the agreement was signed and made by the plaintiff, and he considered that the lower Appellate Court was fully justified in that finding. But he appears to have thought that he could go into the whole case, because he says: "I have two questions to decide: first, whether the lower Appellate Court had evidence for the finding that the agreement was genuine; secondly, whether it was right in upholding the award." After finding that the agreement was signed, he went into the question whether the award was to be upheld, and decided that the arbitrators had exceeded their authority in entering into the question of the plaintiff's chastity, and that the award was bad and on that ground he reversed the decision of the Additional Commissioner.

The question really now before their Lordships is, whether this award is binding upon the plaintiff? The submission was made by two agreements, one signed by Rani Chandan and the other by Rani Bhagoti, the elder widow. The one signed by Rani Chandan, the plaintiff in the suit, is in these terms: Agreement executed by younger Rani Chandan, widow of Rao Dhiraj Singh, late malguzar of Bilehra and Karabgaon, to Maharaj Singh (umpire), malguzar of mauza Nadia, Lala Jaget Singh (arbitrator), malguzar of mauza Bamhori, Mohanjo Chachandia (arbitrator), malguzar of mauza Kathangi, Thakur Aman Singh (arbitrator), thekedar of mauza Manakpur; and Raghu-nath Seth (arbitrator) of mauza Karabgaon; to the effect that there is a difference between me and the elder Rani about our respective rights; that I have appointed you as arbitrators, that I shall accept what you may give as the limit of my rights." The agreement signed by the Rani Bhagoti is precisely similar in its purport.

There is thus a general reference to the arbitrators to decide between the two widows upon their respective rights, and particularly with respect to Rani Chandan, the younger, what was the limit of her rights, raising the entire question, not merely [391] whether she was entitled to maintenance, but whether there were facts which would disentitle her to succeed to any portion of the estate of her deceased husband. The arbitrators, so far as appears, were gentlemen of some position in the neighbourhood, and apparently must have been well competent to decide such a question as this between the two widows. It may also be observed that probably it was the very best tribunal to which a dispute of this kind could be referred. They make their award, and they say "As you, both the Ranis, have appointed us as arbitrators and umpire with your own consent to settle the matter in difference between you about your respective rights, we have this day come to your place in order to give our decision. Inquiries being set on foot, Rani Chandan stated that she has been living separate, from the lifetime of the deceased Rao Sahib, that he, Rao Sahib, used to provide for her maintenance to the extent of her requirements, that she is not willing to accept that allowance now, and that some separate allowance for her should be fixed by the arbitrators according to their judgment, so as to avoid the possibility of her being driven to make constant demands against the elder Rani." Then "Question by Arbitrators—Why did the Rao Sahib keep you separate and fix a maintenance for you? Answer.—I do not know the reason." So they heard what Rani Chandan had to say. Then they appear to have heard what the other widow Rani Bhagoti, had to say, and she stated that "Rani Chandan has always been living separate, that she will pay what Rao Sahib used to pay her (Rani Chandan) as maintenance, that the reason why Rani Chandan has been living separate is this, that her character has been entirely bad, so much as that she cannot describe it, that she (Rani Chandan) is a woman of small intelligence, that for these reasons the Rao Sahib at first intended to turn her out, but refrained from doing so to avoid a scandal, and was constrained to keep her separate and to make provision for her as stated." Then the award says. "On hearing the statement of both the Ranis we inspected the order passed on the proceedings taken for mutation of names."

Those proceedings, it may be well to mention here, were proceedings which had been taken immediately upon the death of [392] Dhuraj, and which resulted in Rani Bhagoti being found to have been in possession since a date in the deceased's lifetime, and an order for the mutation being made in her favour. The award then goes on "In that order it is held as proved that the younger Rani Chandan has been living separate and receiving maintenance. The statement of the elder Rani was made the subject of full inquiries, and it is proved to be the whole truth and correct, *i.e.*, the old and young people of the village corroborate the elder Rani's statement word by word. The mutation proceedings terminated in Rani Bhagoti being put in possession of the estate, and the younger Rani being allowed a maintenance." That was correct. Thus it appears that these gentlemen did make inquiries into the allegation of Rani Bhagoti, and the ground which it was alleged disqualified Rani Chandan from inheriting any portion of her husband's property. They then go on: "This we opine is quite reasonable and just, and we the arbitrators hold that this maintenance is all that can be allowed, save that we consider that a money allowance of Rs. 600 per annum be allowed to the younger Rani Chandan for her maintenance, that she be allowed to keep her own jewels." They award her that 600 rupees per annum for maintenance.

Now, upon the face of this award they appear to have inquired into the matters which had to be inquired into to see what the rights of the two widows were, and especially the right of Rani Chandan. They decided against her, and there does not appear to be any ground for saying that they misconducted themselves, or made any mistake in conducting the inquiry. The only thing apparently that can be suggested arises from the evidence which one of them, Jagat Singh, gave, in which, when he was cross-examined, he seems to have said, in reply to some question which is not given, "How could we give her half when the Sirkar had not done so in the *dakhil kharij*?"—that is, in the mutation proceedings. He may have given that as some reason in answer to a question put to him, Why did you not give her half when you were making this award? But that is not a sufficient ground for saying there was anything like misconduct on the part of this gentleman, nor is there any other [393] ground upon which their Lordships can say that this award ought not to be held to be a binding award.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the Judicial Commissioner. Consequently the decision that the award is binding, which was come to by the lower Appellate Court, will stand, and the respondent will pay the costs of this appeal.

Decree reversed.

Solicitors for the Appellant. Messrs *Ashurst, Morris, Crisp, and Co.*

NOTES.

[A valid award is a bar to a suit on the original cause of action —11 Cal., 386, 19 Mad., 290, 23 Mad., 593, 23 All., 285; 23 All., 383, 33 Cal., 881, 11 Bom., L. R., 20, 1 I. C., 105; 15 I. C., 819, 5 S. L. R., 240.]

[11 Cal. 393]

APPELLATE CIVIL.

The 6th March, 1885.

PRESENT.

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Lalla Bhagun Pershad and others..... Judgment-debtors

versus

Holloway.....Decree-holder.*

Act XIV of 1882, ss. 232, proviso (b), and 244 (cl. c.)—Civil

• Procedure Code—Transferee of a money decree to one of several co-judgment-debtors—Execution.

Certain property was mortgaged by A to B. Subsequently, this property was purchased by C at a sale held in execution of a decree obtained by a third person against A; B then brought a suit on his mortgage-bond against A and C, and obtained a decree for the sale of

* Appeal from Appellate Order No. 364 of 1884, against the order of W. Verner, Esq., Judge of Bhagulpore, dated the 10th of July 1884, reversing the order of Baboo Dwarka Nath Mitter, Second Subordinate Judge of that district, dated the 14th April 1884.

the mortgaged properties, and also a personal decree against *A*; *B* assigned his rights under this decree to *C*, who applied for execution under s. 232 of the Code. *A* objected to execution issuing, relying on proviso (b) to s. 232.

Held, that proviso (b) to s. 232 applies only to decrees for money personally due by two or more persons; and that the decree obtained by *B* against *A* and *C* not being a personal decree against *C*, (he having been made a defendant only by reason that he had purchased the mortgaged property subject to the mortgage debt), *C*, as assignee of *B*, was entitled to take out execution.

A CERTAIN mouzah, Ruderpore Mehda, was mortgaged by Lalla Bhagun Pershad and others (hereafter called the mortgagors), to one Mani Singh. Subsequently to the mortgage this mouzah [394] was purchased by one Frederick Holloway at a sale held in execution of a decree obtained by a third person against the mortgagors. Mani Singh then brought a suit on his mortgage-bond against the mortgagors and Holloway as being the purchaser of the property, and in that suit obtained a decree for the sale of the mortgaged property, and, in default of the property being sufficient, a personal decree against the mortgagors. Before execution of this decree was taken out, Mani Singh assigned his rights under it to Holloway, who applied under s. 232 of the Code of Civil Procedure for execution against the mortgagors.

The judgment-debtors objected to the application, relying on proviso (b) of s. 232 of the Code of Civil Procedure.

The Subordinate Judge held that Holloway being one of the judgment-debtors (although not personally liable under the decree) could not as assignee of the decree execute it against his co-judgment-debtors.

Holloway appealed to the District Judge, who himself raised the question whether an appeal would lie; this point he, however, decided in favour of the appellant, holding that Holloway being admittedly the transferee of the decree, the Court had no power to refuse execution under the first clause of s. 232, the case being regarded as one falling within the meaning of cl. c of s. 244, proviso (b) of s. 232, being simply the *ratio decidendi* of the matter in dispute. On the other question he held that, although the decree was a money decree against the mortgagors, it was not a money decree against Holloway, he not being jointly hable with the mortgagors, the effect of the decree against Holloway being that it was a declaration that the property mortgaged was liable for the debt of the mortgagors, it being alleged that Holloway had purchased the property subject to that debt. He, therefore, set aside the order of the Subordinate Judge.

The judgment-debtors (the mortgagors) appealed to the High Court.

Baboo *Durgadas Dutt* for the Appellant contended that no appeal lay from the decision of the Subordinate Judge to the District Judge, and that Holloway had no right to take out execution of the decree, as the case was one falling under proviso (b) of s. 232 of the Code.

[395] Mr. *C. Gregory* for the Respondent.

Judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This is an appeal from an appellate order in the matter of the execution of a decree. The applicant for execution had been made a defendant in the original suit by reason of his having purchased the property mortgaged under

the bond on which the suit was brought, not because he was himself in any way personally liable for the debt. The petitioner, after the decree had been passed, purchased it and applied to the Court under s. 232 for execution against the principal defendant. The Subordinate Judge refused the application with reference to proviso (b) to s. 232, which is to this effect. "Where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others." The first Court was of opinion that this was a decree for money passed against the petitioner in common with other persons, and having been transferred by sale to the petitioner it could no longer be executed against the others. The lower Appellate Court reversed the order of the first Court, and against this order of reversal the present appeal is preferred.

Two points have been taken before us. first, that the lower Appellate Court's order was without jurisdiction, because no appeal lay to the District Judge from the order of the first Court, and, secondly, if an appeal did lie, the lower Appellate Court decided that appeal wrongly in point of law.

We think that the lower Appellate Court had jurisdiction to try the appeal. It seems that the petitioner, the assignee of the decree, had been legally placed on the record as decree-holder, and we think that the District Judge was right in the opinion he expressed that the matter in dispute between the petitioner and the other judgment-debtors was really one falling within the meaning of clause (c), s. 244, and that the proviso (b) to s. 232 was simply the *ratio decidendi* of the matter in dispute between the parties. We hold, therefore, that an appeal did lie to the District Judge, and on that ground the present appeal cannot be maintained.

Then as regards the construction of the law contained in proviso (b) to s. 232, we are of opinion that the lower Appellate Court [396] was right. As we read that proviso, we think that it refers to a decree for money personally due by two or more persons. It does not apply to such a case as the present, in which nothing was due from the assignee of the decree personally, he having been made a defendant only by reason that he had become the owner of the property mortgaged under the bond and subject to the mortgage. This view is in accordance with the decision of a Division Bench of this Court (not reported, but which has been laid before us) in miscellaneous appeal No. 266 of 1881, dated the 9th March 1883. Independently of that judgment, however, we feel no doubt as to the proper construction to be put upon this section.

We accordingly affirm the order of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

Sec. 232, cl. (b) C P. C. 1882 (C P. C. 1908, O. 21, r. 16), applies only to a decree against the defendants personally, 11 Cal., 393, *see* 31 Bom., 308. 9 Bom. L. R., 409, and the decree should be against the defendants jointly.—32 Bom., 195. *See also* 14 C. L. J., 639. 16 C. W. N., 132, 15 C. P. L. R., 69 (72), (1909) P. R., 37; 1 I. C. 732.]

[11 Cal 397]
APPELLATE CIVIL.

The 6th March, 1885.

PRESENT :

MR JUSTICE MITTER AND MR. JUSTICE TREVELYAN.

Koer Hasmat Rai and another.... Plaintiffs
versus

Sunder Das and others..... Defendants.

*Hindu Law—Mitakshara—Suit by sons to set aside alienation by father—
Necessity—Debt due by father—Purchase-money treated as debt due by
father—Refund of whole of purchase-money when necessary before
sons are entitled to have sale by father set aside—Objection
that whole of ancestral property is not subject-matter of
suit for partition is not a technical one.*

Under the Mitakshara law the son is bound to pay out of the ancestral property in his hands the debts contracted by his father, unless he can show that the debts were contracted for an immoral purpose.

When, therefore, *A* and *B*, sons of *C*, a family governed by the Mitakshara law, sued *C* and *D*, who had purchased some of the joint-family property from *C* during the minority of *A* and *B*, for a sum of Rs. 10,000, to recover possession of their shares in such property upon partition, and when in such suit *A* and *B* failed to prove that the purchase-money Rs. 10,000 had been obtained by *C* for immoral purposes.

Held, that they were not entitled to succeed without refunding the whole of the sum of Rs. 10,000 to *D*, inasmuch as, if the sale was set aside, *D* would be entitled to recover the purchase-money from *C*, and it would thus [397] become a debt due by *C*, the father, for which, under the circumstances, the whole of the joint-family property, including the property sold, would be liable in the hands of *A* and *B*, the sons.

In such a suit, if it be treated as one for partition, the objection that the whole of the joint-family property is not included in it, is by no means a technical one, inasmuch as it is open to the Court to hold that the property sold should fall entirely within the father's share, and to allot it to the purchaser accordingly.

ON the 14th April 1874, Raja Dunput Rai, one of the defendants in the case, sold certain mouzahs for a sum of Rs. 10,000 by a deed of sale to Beni Pershad, the father of Sunder Das, defendant No. 1, and Baijnath Sahai, defendant No. 2. The plaintiffs, who were minors at the date of the sale, and one of whom was still a minor, instituted this suit, claiming a 10-anna 8-pie share out of the mouzah, on the ground that the mouzahs were the ancestral property of the family, which was governed by the Mitakshara law, and that they were jointly entitled to them with their father. They alleged that the sale by Dunput Rai was not made through necessity, but solely for the purpose of providing for his own extravagant expenses, and they sought to recover possession of their shares on partition and for mesne profits during the period that had elapsed since the sale.

The first two defendants, the purchasers, contested the suit upon various grounds, the principal one affecting this appeal being that the sale was made by Dunput Rai, under circumstances which justified his alienating the joint-family property under the Mitakshara law.

* Appeal from Original Decree No. 77 of 1883, against the decree of Baboo Ram Pershad, Rai Bahadur, Subordinate Judge of Shahabad, dated the 30th of December 1882.

The lower Court dismissed the suit, holding upon the question of "necessity" that it was proved that at the time the sale was about to take place, Dunput Rai was about to perform the marriage ceremonies of his daughter, and that the plaintiff had failed to prove that the amount of the purchase-money was spent in paying illegal or unauthorised expenses.

The defendants, however, did not in their written statement allege that the occasion of the marriage of Dunput Rai's daughter was the reason for the sale being made; but they stated that the reason for the alienation was that the income derived from the property was very small and insufficient to [398] provide for the payment of the revenue in respect thereof and other necessary expenses, and that as Dunput Rai resided at a distance from the property, he had no chance of enhancing the *jumma*. Consequently that, as the consideration money was considerable in proportion to the amount of income derived from the property, Dunput Rai sold the property in order to invest the purchase-money in business, and obtain a better income than he got from the property.

This plea, however, they did not establish by the evidence.

The suit having been dismissed with costs, the plaintiff now preferred this appeal to the High Court.

Munshi *Serajul Islam* for the Appellant.—This being a case of a private alienation by a Mitakshara father, the onus lay upon the purchaser to prove that the transfer was binding upon the sons, and that there was legal necessity for the same. *Musli Junnuk Kishoree Koonwar v. Baboo Rughoonundun Singh* (S. D. A., 1861, p 213), *Luchmun Dass v. Gridhur Chowdhry* (I. L. R., 5 Cal., 855), *Pursid Narain Singh v. Honooman Sahay* (I. L. R., 5 Cal., 845), *Bheknarain Singh v. Januk Singh* (I. L. R., 2 Cal., 438). The position of a Mitakshara father is that of a manager, his power is a qualified and entrusted one—*Hunoomanpersaud Panday v. Mussumat Baboo Munraj Koonweree* (6 Moo. I. A., 393). Here the legal necessity attempted to be proved by the evidence is inconsistent with the case set up in the written statement.

Baboo *Mohesh Chunder Chowdhry* for the Respondent.—The suit for possession of a share is not maintainable—*Rajaram Tewaree v. Luchmun Pershad* (12 W. R., 478).

There could be no partition without including all the family properties in the suit, and at all events the sons could not recover without paying the debt of the father or showing that the debt was immoral and not binding on them—*Girdharee Lall v. Kantoo Lall* (L. R., 1 I. A., 321, 22 W. R., 56).

Munshi *Serajul Islam* in reply. The case of *Rajaram Tewaree v. Luchmun Pershad* (12 W. R., 478) has no application, as all [399] the parties, the father, the sons, and the purchaser were before the Court. A purchaser of the right of one co-sharer acquires a right to partition—*Deendyal Lal v. Jugdeep Narain Singh* (L. R., 4 I. A., 247).

And thus by analogy the sons can sue for the partition of their share with respect to the particular property purchased by the defendants. There was no question raised in the Court below as to including all the other properties, and as to the obligation of the sons to pay the debt of the father, no such obligation arises during the lifetime of the father—*Bheknarain Singh v. Januk Singh* (I. L. R., 2 Cal., 438).

It has been held by a Full Bench that a purchaser is not entitled to a refund of the purchase-money until he proves that the sale was justifiable—*Modhoo Dyal Singh v. Golbur Singh* (9 W. R., 511).

The Judgment of the Court (MITTER and TREVELYAN, JJ.) was delivered by

Mitter, J.—The plaintiffs in this case are the sons of Raja Dunput Rai. It appears that, on the 14th April 1874, Raja Dunput Rai sold the whole of the disputed mouzahs to one of the defendants, and the ancestor of the other defendants, for Rs. 10,000. One of the plaintiffs in this case is an adult, and the other plaintiff is still a minor. The present suit was brought on the 18th July 1881 to recover possession of a 10-anna 8-pie, that is, a two-thirds share of the mouzahs sold, on the allegation that there was no such valid necessity as would justify the sale of the family property by the father while the plaintiffs were minors. If this suit be treated as one for partition, the plaint was open to the objection that the whole of the family property was not included in it. This is not a mere technical objection because on partition of the whole of the joint family property the mouzahs in dispute might under certain circumstances fall entirely to the father's share. For example, if there be any other property belonging to the joint family, the value of which is equal to a 10 anna 8 pie share of the disputed mouzahs, a Court dealing with the question of partition might think it equitable to allot the whole of the [400] disputed mouzahs to the father's share, assigning the other property of equal value to the sons.

This objection, however, was not taken by the defendants in the written statement. The defendants defended the suit upon the ground that the sale was made under such circumstances as would justify the sale by the father under the Mitakshara law.

The lower Court dismissed the suit, finding in favour of the defendants' plea taken in the written statement. But upon the evidence adduced in the lower Court we are not satisfied that there was any valid necessity for the sale, and we are unable to agree in the lower Court's conclusion upon this point.

The main ground upon which we are of opinion that that conclusion is not correct is, that the case of necessity, which was attempted to be proved upon the evidence, was not the case which was put forward in the written statement. In the 11th paragraph the defendants said "The real cause of alienation is "that the income derived from the disputed properties was very small, and "that the revenue and other necessary expenses could not be paid out of the "same, and as the residence of the father of the plaintiffs was at a great "distance from this district, there was no hope of enhancing the *jumma* also. "The consideration money offered on behalf of your petitioners was very large, "considering the amount of income derived therefrom. He considered it to be "advantageous to invest that money in another business, and consequently sold "the said properties in lieu of Rs. 10,000 inclusive of all expenses." But upon the evidence the defendants attempted to prove that this money was required for meeting the expenses of celebrating the marriage of the vendor's daughter. This case of necessity was neither recited in the conveyance nor set up in the written statement in this case. Under these circumstances it seems to us that the evidence adduced by the defendants to establish it should not be accepted as true until its omission from the written statement is satisfactorily explained. No such explanation has been offered.

But although we are unable to agree in the opinion of the lower Court upon this point, still we think upon another ground the decree made in the case is correct.

[401] In this case there is no dispute that Rs. 10,000 was paid by the vendor for the property in suit to the plaintiff's father, and supposing that that sale is not binding upon them, under the circumstances of this case, they, in our opinion, cannot recover the property without refunding the purchase-money to the defendants.

The learned vakeel for the plaintiffs, appellants, cited on this point the Full Bench decision in *Modhoo Dyal Singh v. Golbur Singh* (9 W. R., 511),

but it seems to us that this Full Bench Ruling has been virtually overruled by the Judicial Committee of the Privy Council in *Girdharee Lall v. Kanto Lall* (L. R., 1 I. A., 321). It was laid down in that case that under the Mitakshara law the son is bound to pay out of the ancestral property in his hand the debts contracted by his father, unless he can show that these debts were contracted for immoral purposes mentioned in the Hindu *shastras*. Now, if the sale be set aside in this case, it is clear that the purchaser would be entitled to recover the purchase-money from Raja Dunput Rai, the father of the plaintiffs. It would be, therefore, their father's debt, and unless they show that it was contracted for immoral purposes mentioned in the Hindu *shasters* the whole of the joint family property, including the disputed mouzahs in their hands, would be liable for it.

It follows, therefore, that the plaintiffs in this case cannot recover the whole or any portion of the property sold without refunding the whole of the purchase-money to the purchasers, defendants, unless they show that this money was raised by the father for immoral purposes. Upon this point they adduced some evidence in the lower Court, and we agree with that Court that it is not reliable.

The plaintiffs, through their vakeel, intimated that they were willing to take a decree for the whole of the disputed mouzahs on the condition of their refunding the purchase-money, but the suit being not for the whole of the property sold, we cannot award a decree in their favour for it. In this suit they are entitled to a decree for the share claimed if they would agree to pay the [402] whole of the purchase-money to the defendant purchasers. But the learned vakeel who appeared for them informed us that his clients were unwilling to take a decree upon this condition.

We are, therefore, of opinion that the plaintiffs' suit should be dismissed. Although we do not agree with the lower Court in the reasons given in the judgment, we think that upon the ground mentioned above the suit was rightly dismissed,

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[As regards the equity of the purchaser to be restituted on the alienation being set aside, see our notes to 12 B. L. R., 90; and 18 Cal., 157 in the LAW REPORTS REPRINTS

See also 27 Mad., 368, 11 M.L.J., 14, 29 All., 331, (1908) 30 All., 352 5 A. L. J., 339 (1908) A.W.N., 143]

[11 Cal. 403]
APPELLATE CIVIL.

The 19th March 1885.

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY.

Guru Churn Chuckerbutty and others..... Defendants

versus

Kali Kissen Tagore.Plaintiff

Guardian ad litem, Appointment of—Act XIV of 1882, ss 443, 464—Act XL of 1858, s. 3—Minors, Suit against, improperly framed.

In a suit intended to be brought against some minors, the defendants were set out in the heading of the plaint as " Sharoda Sunderi Debya, widow of Chundra Kanta Chuckerbutty, deceased, mother and guardian of the minors " (setting out their names) At the filing of the plaint, the plaintiff applied for and obtained an order, making Sharoda guardian of the minors for the purposes of the suit. She was not, however, guardian of the property and persons of the minors under Act XL of 1858

Held, that the minors were not parties to the suit, that the order making Sharoda guardian *ad litem* was not made in a suit in which the minors were defendants, and that the suit must be dismissed as against the minors

Held also, that neither the Code of Civil Procedure nor the proviso of s. 3† of Act XL of 1858 give a plaintiff any power to institute a suit against a person named by himself as guardian *ad litem* on behalf of a minor, nor do they give to the Court the power of transferring by a mere order made *ex parte* an irregular proceeding such as the one above mentioned into a suit against the minor

THIS was a suit brought by a zamindar against the holders of a certain *howlah* which had been granted in 1268 to two brothers, Anund Chunder Rai and Poorna Chunder Rai, and had been sold by them to the defendants. The object of the suit was to obtain *khas* possession of certain land which had accreted to a certain *chur*, as being in excess of the land originally leased.

[403] The *pottah* and *kabuliat* interchanged on the creation of the *howlah*, amongst other things, stipulated that upon new land accreting to the *chur*, mouzah Halai Puttee, the lessor, should be entitled to measure the whole *chur* by the standard pole of the *pergunnah* in the month of Kartic of the year following the accretion, and upon the area being found to be greater than the quantity leased, the lessor should have the right to take *khas* possession of the excess.

* Appeal from Original Decree No 192 of 1883, against the decree of Baboo Jagat Durlay Mazumdar, Rai Bahadur, Subordinate Judge of Furrigpore, dated the 16th of June 1883.

What persons claiming to have charge of property in trust for a minor may apply for a certificate of administration

No person competent to institute or defend a suit without such certificate.

Proviso.

†[Sec 3.—Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate. Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.]

The plaint, as framed, was headed "Kali Krishna Tagore, plaintiff v. (1) Guru Churn Chuckerbutty, (2) Sharoda Sunderi Debya, widow of Chunder Kanta Chuckerbutty, deceased, mother and guardian of Probol Chunder Chuckerbutty, Aukhil Chunder Chuckerbutty, Ananto Coomar Chuckerbutty, minors, and Nishi Kanta Chuckerbutty, etc., defendants;" and on the filing of the plaint, the plaintiffs applied for and obtained an order making Sharoda Sunderi Debya the guardian of the infants. It did not, however, anywhere appear that Sharoda had ever been appointed guardian of the infants under Act XL of 1858, and no relief was asked for personally as against her. The defendants put in a written statement setting out various defences which are immaterial for the purposes of this report, they, however, took no exception to the form of the suit, although an issue was raised to the following effect (which may or may not have been intended to raise the question) viz, "whether or not the plaint is obscure and incomplete, and the subject-matter of dispute uncertain. If so, then, is the suit unmaintainable by reason thereof."

The Subordinate Judge found that the plaintiff was entitled to recover possession of a certain quantity of land proved to be, after measurement, in excess of the quantity originally leased, and gave him a decree for possession thereof against all the defendants, he, however, as regards the issue set out above, merely stated that it was not argued, and that he decided it in favour of the plaintiff.

The defendants appealed to the High Court. In the heading of the grounds of appeal the appellants were set out as being (1) Guru Churn Chuckerbutty, (2) Probol Chunder Chuckerbutty, Aukhil Chunder Chuckerbutty, and Nishi Kanta Chuckerbutty, [404] minors, by their mother and next friend Sharoda Sunderi Debya, and amongst the grounds taken was the following.—"For that the minor defendants Probol Chunder, Aukhil Chunder, Ananto Coomar and Nishi Kanta Chuckerbutty not having been properly represented and described in the plaint, the Court below should have dismissed the suit as against them"

Baboo Srinath Doss, Baboo Kashi Kant Sen, and Baboo Grish Chunder Chowdhry for the Appellants

Baboo Kali Mohun Doss, Baboo Durga Mohun Doss, and Baboo Ram Sokha Ghose for the Respondents.

The Court (PIGOT and O'KINEALY, JJ.), after setting out the facts, found that the defendant was holding certain lands in excess of the quantity leased, and that the plaintiff was entitled to obtain possession of such lands, and gave him a decree against Guru Churn Chuckerbutty, but dismissed the suit as against the minors, inasmuch as the suit had not been properly framed as against them. The portion of the Court's judgment relating to the frame of the suit was as follows.—

Another question still remains for our decision, namely, whether the plaintiff has in this case properly sued the minor sons of Chandra Kanta Chuckerbutty. They are described in the plaint in the following words: "No. 2, Sharoda Sunderi Debya, widow of Chundra Kant Chuckerbutty, deceased, mother and guardian of Probol Chunder Chuckerbutty, Aukhil Chunder Chuckerbutty, Ananto Coomar Chuckerbutty, and Nishi Kanta Chuckerbutty, minors, inhabitants of Rudrakar, pergunnah Idilpore, station Palung, zillah Furridpore."

In the case of *Sreenarain Mitter v. Sreemuti Kishen Soondery Dassee* [11 B. L. R., 171 (190 and 191)], their Lordships of the Privy Council declared that

a suit against a father in his own right, and as guardian of his minor son was not a suit against the minor.

So far back as 1873, in the case of *Mongata Dossee v. Sharoda Dossee* (20 W. R., 48), a similar decision was arrived at in this Court.

In this case the suit was originally framed as it now stands, the defendants being described as No. 1, Guru Churn Chucker-[405]butty, son of Tiluk Chunder Chuckerbutty, deceased, No. 2, Sharoda Sunderi Debya, widow and mother and guardian of the minors, setting out their names

The plaint is dated June 30th. On that day the plaintiff applied to have the mother Sharoda made guardian, and an order appointing her was made on July 30th, on which day the suit was instituted and summons in the suit issued.

We think that, under these circumstances, the minors are not parties to this suit. Sharoda was not, and is not, so far as appears from the record, guardian of the person and property of the minors under Act XL of 1858. The provisions of Chapter 31 of the Civil Procedure Code, therefore, apply to this case (section 464). The order making Sharoda guardian *ad litem* was not made in a suit in which the minors were defendants it was made *ex parte* in a proceeding to which they were strangers, no suit being at the time in existence.

Section 443 of the Code directs the Court to appoint a guardian *ad litem* when the defendant to a suit is a minor.

We think that before it is competent for the Court under this section to appoint a guardian *ad litem*, there must be a suit in which the minor is a defendant in existence. This is not a mere matter of form. It involves the necessity of service of the summons in the suit, so that the minor, or those in whose charge he is, may come in, and so have an opportunity of defending his interests in the matter of the selection of a guardian *ad litem*.

Neither the Code nor, as we construe it, the proviso of s. 3 of Act XL of 1858 gives to a plaintiff the power of instituting a suit against a person named by himself as guardian *ad litem* on behalf of the minor. nor do they give to the Court the power of transforming an irregular proceeding of this sort into a suit against the minor by its mere order made *ex parte*.

Probably, in the present case, the mother of the minors has no interest adverse to them, and is the person who would have been properly made their guardian *ad litem*. Probably the case has been conducted with as much regard to their interests as it would have been had it been regularly constituted

[406] But, however this may be, we are not able on this ground to hold that they are parties to the suit.

Section 464 of the Code makes the provisions of sections 442 to 462 not applicable, where a guardian of person or property has been appointed under a local law. the local law in this case is, of course, Act XL of 1858. The proviso of s. 3 of that Act does not relate to a case where a guardian of person or property has been appointed, and if it be not repealed by the Code, it must, at any rate, be read with it. We think that this section also contemplates that a suit shall be instituted before a guardian *ad litem* is appointed, and that the summary appointment of such a guardian which, in the special circumstances, contemplated by the section, the Court is empowered to make, should be made in that suit. We do not here deal with a case in which a properly appointed guardian is alone placed upon the record as guardian of the minor defendants. That form of suit is highly incorrect, and should not be adopted. The proper form, where a minor having a guardian is to be sued is, to sue the minor (naming him) by A B his guardian.

This Court has, however, in more than one case overlooked the defects of form when satisfied, or holding itself justified in inferring that the minor defendant was substantially represented by a properly appointed guardian.

Such a course was taken by the Court in *Komul Chunder Sen v. Surbessur Doss Goopto* (21 W. R., 298), in *Grish Chunder Mookerjee v. Miller* (3 C. L. R., 19) and by the Allahabad High Court in *Janki v. Dharam Chand* (I.L.R. 4 All., 170).

In this case, however, we can make no such inference. we have the facts relating to the institution of the suit distinctly before us, and we hold upon them that the minors never have been represented in this suit, and are not bound by any proceedings taken in it. We think, therefore, that this objection is one that must be allowed, and that the suit, so far as the defendant No. 2, namely, Sharoda Sunderi Dehya, who was not sued in her personal capacity, and the minors mentioned in that paragraph are concerned, must be dismissed.

Appeal allowed in part.

NOTES.

[See *infra* 11 Cal. 509, also 14 Cal. 754 at 756]

[407] APPELLATE CIVIL.

The 30th March, 1885.

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE McDONELL.

Mahomed Mahmood. Plaintiff

versus

Safar Ali.....Defendant.^a

*Issues, Frame of—Collection papers—Road Cess papers—Evidence—Act XIV
of 1882, s 147.*

A Court, in framing issues, is not bound down to the language of the plaint and written statement, but may frame them not only from the pleadings, but also from the statements of the parties and their pleaders made before the Court.

* Appeal under s 15 of the Letters Patent, against the decree of Mr Justice FIELD, one of the Judges of this Court, dated the 7th of March 1884, in Appeal from appellate Decree No. 2097 of 1882, against the decree of Baboo Uma Charan Kastagiri, First Subordinate Judge of Tipperah, dated the 28th of June 1882, varying the decree of Baboo Jadupati Banerji, First Subordinate Munsiff of that district, dated the 21st of November 1881.

THIS was a suit for rent for the year 1290 F. S. ; the plaintiff claimed rent at Rs. 11-1-6, alleging that the defendant in 1288 F. S. had entered into a *kabuliat* for the term of one year, and that after the expiration of that term he had continued to hold possession of the land on the footing of the terms of the *kabuliat*.

The defendant denied execution of the *kabuliat*, but stated that he held the land at a rental of Rs. 5-6 per year. The Munsiff framed the following issue :—"What is the amount of the *jumma* held by the defendant?"—and found that the plaintiff had failed to prove both the *kabuliat* and the *jumma* rate at which he claimed, but inasmuch as the defendant had admitted the rate to be Rs. 5-6, he gave the plaintiff a decree for that amount. The plaintiff appealed to the Subordinate Judge, who found on the strength of certain collection papers, dated previously to 1288, that the rent of the land in question was Rs. 10-12-1, and on this, coupled with the evidence of certain witnesses who stated that rent had been paid at that rate for previous years, and the corroboration of these statements by the road cess papers, he gave the plaintiff a decree for Rs. 10-12-1.

The defendant appealed to the High Court. Mr. Justice FIELD was of opinion that the issue fixed by the Munsiff was too indefinite, and that the proper issue in the case was "Is the rent [408] of the defendant Rs. 11-1-6 as alleged by the plaintiff?" And considered that the issue should be taken to mean, "with reference to the allegation of the parties, what is the amount of the *jumma* held by the defendant, was it Rs. 11-1-6 as alleged by the plaintiff, or Rs. 5-6 as alleged by the defendant?" And holding that the Subordinate Judge was wrong in admitting the road cess and collection papers as evidence against the defendant, and in deciding the case, not according to the allegations of the parties in the pleadings, but according to the statement of a witness, allowed the appeal.

The plaintiff appealed under s. 15 of the Letters Patent.

Baboo Aukhil Chunder Sen for the Appellant contended, amongst other matters, that it was open to the Munsif to frame issues upon points on which the parties were at variance, and that in so doing he was not restricted to the allegation contained in the plaint and written statement.

Munshi Serajul Islam for the Respondent contended that the Subordinate Judge had wrongfully received in evidence against the defendant the road cess and collection papers.

Judgment of the Court was delivered by

Garth, C.J. (MCDONELL, J., *concurring*).—In this suit the plaintiff claimed to recover from the defendant under a *kabuliat* at a *jumma* of Rs. 11-1-6.

The defendant's case, on the other hand, was that the *jumma* was only Rs. 5-6.

The issue fixed by the Munsiff was, "what is the amount of the *jumma* held by the defendant?"

The Munsiff found that the *kabuliat* was not proved. He also found that the plaintiff had not proved the *jumma* rate, which he claimed, but as the defendant admitted the amount to be Rs. 5-6, he gave the plaintiff a decree for that sum.

The case was then appealed to the Subordinate Judge, and upon going into the evidence he found that the proper amount of the *jumma* was Rs. 10-12-1. In arriving at that conclusion, he appears to have taken into consideration three items of evidence :--

First, he says that certain collection papers for the period prior [409] to 1288 had been filed, that it did not appear that the first Court rejected these papers as being false, and that the *jumma* mentioned in them in respect of the *jote* in question was Rs. 10-12-1.

Secondly, he says there is evidence to show that that amount had been realized, and that it had been proved by witnesses for the plaintiff that the defendant had paid rent for previous years at that rate

And, lastly, he says, that the road cess papers filed before the District Judge, although not binding on the tenant, also go to show what the witnesses have proved.

On appeal to this Court it has been contended by the defendant that the Subordinate Judge, has taken into consideration evidence that was not admissible.

It is said that the collection papers are no evidence *per se*, and can only be used when they are produced by a person who has collected rent in accordance with them, and who merely uses them for the purpose of refreshing his memory

Then again it is said that the road cess papers are not admissible against the defendant either as substantive evidence or as corroborative evidence; in fact, that the plaintiff had no right to use them against the defendant at all.

The learned Judge of this Court considers both these objections to be well founded, and in this we concur. But he has also raised another point, upon which we cannot agree with him

He says the proper issue in the first Court was not " what was the amount of the *jumma* held by the defendant," but whether the defendant's rent was Rs. 11-1-6, as the plaintiff said it was, or Rs. 5-6-0 as the defendant said it was? He says that it was not competent for the Munsif to raise any other issue or for the Subordinate Judge, having regard to the pleadings, to find that any intermediate sum was the correct *jumma*.

We cannot agree with this view of the matter. It does not appear what materials the Munsiff had before him at the time when he framed the issue; and, so far as we can see, that issue was probably better calculated than any other to ascertain what was the proper amount of the *jumma*, and to do justice between the parties. It might be that the plaintiff had overstated the [410] *jumma*, or that the defendant had understated it; and if both parties were mistaken, it was surely right that the proper *jumma* should be ascertained in this suit, rather than that the delay and expense of another suit should be incurred. Under the present Code a Court is by no means bound, in framing the issues, by the language of the plaint and written statement. By s. 147 of the Code the issues may be framed, not only from the pleadings, but from the statements of the parties and their pleaders, when they come before the Judge; and it seems to us that the issue framed in this case was perfectly unobjectionable, and probably best adopted to do justice between the parties.

As to the other points, we think they afford ground, not for restoring the judgment of the Munsiff, but for sending the case back to the lower Appellate Court, in order that the proper amount of rent may be ascertained, without reference to the collection papers, and the road cess papers, which are not evidence against the defendant.

The Judge must decide the issue upon the other evidence in the case.

The costs of both hearings in this Court and of the lower Appellate Court will abide the result.

Case remanded.

NOTES.

[See 6 I.C., 369 (Cal.), where JENKINS, C. J., distinguished this case from 28 Bom., 294 ; also see 17 C.W.N., 774.]

[11 Cal. 410]

APPELLATE CRIMINAL.

The 25th March, 1885.

PRESENT :

MR. JUSTICE FIELD AND MR JUSTICE BEVERLEY.

Netai Luskar.....Appellant

versus

Queen-Empress. Respondent.

*Charge of murder, Statement by the accused in answer to—Penal Code, ss. 302
300, exc. 1 and Expl.—Plea of guilty—Act X of 1882, ss. 271,
299—Criminal Procedure Code.*

An accused person in answer to a charge of murder stated that he had killed his wife ; but that he had done so in consequence of his having discovered her in an act of adultery on the previous day. *Held*, that such a statement did not amount to a plea of guilty on the charge, and that it was the duty of the Court to try whether the provocation, therein disclosed, was sufficiently grave and sudden to reduce the offence

[411] ONE Netai Luskar was committed to the Sessions Court on a charge of murder under s. 302 of the Indian Penal Code. After hearing the charge read the accused made the following statement "I did kill my wife. I did not kill her willingly. Finding her in the act of adultery, and being wholly unable to restrain myself I killed her. I intended to kill her ; my caste was gone ; I resolved to kill her and then commit suicide. I detected her in adultery on Friday. I did not kill her then. On Saturday, I took her into Madun Roy's garden, and then killed her. On Friday, after seeing the adultery, I was in fever and did not eat. I vowed I would not eat until I had killed her. I told Goberdhone what I intended to do, he advised me to desist. I said I could never desist because I was disgraced, and it was better to die than submit to such disgrace. I murdered the woman with this *haswa*. I concealed it in a tank and showed it to the Police afterwards. Goberdhone got it out of the water. I am glad I killed my wife. I bathed myself in her blood. I confessed what I have done with pleasure."

* Criminal Reference No 11 of 1885, and appeal No. 187 of 1885, against the order of C. B. Garrett, Esq., Additional Sessions Judge of 21-Peigunnahs, dated the 5th of March 1885

Upon this statement the Judge recorded a plea of guilty on the charge of murder, and sentenced the accused to be hanged. The prisoner appealed to the High Court and a reference was also made for confirmation of the sentence.

No one appeared for either party.

The **Judgment** of the Court (**FIELD** and **BEVERLEY, JJ.**) was delivered by

Field, J.—This case has been referred to us under the provisions of s. 374 for confirmation of the sentence of death passed on the accused by the Additional Sessions Judge of the 24-Pergunnahs.

The accused is said to have pleaded guilty, and he has been sentenced (not convicted) by the Judge on that plea. There is no finding on the record.

The accused has also appealed to this Court.

* In the Sessions Court the accused made the following statement as recorded by the Sessions Judge: "I did kill my wife I did not kill her willingly. Finding her in the act of adultery with another person, and being wholly unable to restrain myself, I killed [412] her. I intended to kill her; my caste was gone, I resolved to kill her and then commit suicide. I detected her in adultery on Friday I did not kill her then On Saturday, I took her into Madun Roy's garden and there killed her On Friday, after seeing the adultery, I was in fever and did not eat I vowed that I would not eat until I had killed her. I told Goberdhone what I intended to do. he advised me to desist. I said I could never desist because I was disgraced, and it was better to die than submit to such disgrace. I murdered the woman with this *haswa*. I concealed it in a tank and showed it to the Police afterwards. Goberdhone got it out of the water I am glad I killed my wife I bathed myself in her blood. I confessed what I had done with pleasure"

This statement no doubt contains an admission that the accused killed his wife; but this admission is coupled with an explanatory statement which is in effect a plea that he killed her under grave and sudden provocation. We think the whole statement must be taken together; and being so taken it certainly is not equivalent to a plea of guilty upon the charge of murder under s. 302 of the Penal Code. The explanation to the first exception in s. 300 of the Indian Penal Code states that the question "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact," and by s. 299 of the Code of Criminal Procedure "it is the duty of the jury to decide all questions which, according to law, are to be deemed questions of fact." We think, then, that this case should have been tried out, and the verdict of the jury taken on the plea raised by the accused. We accordingly set aside the sentence passed by the Sessions Judge, and direct that the accused Netai Luskar be tried on the charges on which he was committed to the Court of Sessions.

Sentence set aside.

NOTES.

[See 9 Mad., 61 where this case is explained]

[413] CRIMINAL REFERENCE.

The 24th March, 1885.

PRESENT.

MR. JUSTICE FIELD AND MR. JUSTICE BEVERLEY.

Pramatha Bhusana Deb Roy.Petitioner

versus

Doorga Churn Bhattacharji and others.....Opposite Parties.

Dispute as to the right to collect rents—Criminal Procedure Code, Act X of 1882, s. 145—Tangible immoveable property—Act X of 1872, s. 530.

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Code of Criminal Procedure

A CERTAIN tenure, known as Taraf Sachani, comprising 28 mouzahs, was sold for arrears of rent on the 1st September 1884, and purchased by the decree-holder, Kumar Pramatha Bhusana Deb, Rai Bahadur, of Naldanga. On the 21st December the Nazir of the Civil Court delivered possession to the auction-purchaser of the village of Dighulgram, one of the 28 mouzahs aforesaid. The Kumar's party thereupon began collecting such rents as they could from the tenants of the village. They, however, were opposed by one Doorga Churn Bhattacharji, who claimed the village as his under-tenure, and alleged that he had been in peaceful possession of it for upwards of thirty years. The Deputy Magistrate of Magoora being satisfied upon the report of the sub-inspector of police that a dispute likely to cause a breach of the peace existed concerning mouzah Dighulgram, which lay within his jurisdiction, issued an order calling upon the rival parties to appear and file written statements of their respective claims to the mouzah. Upon a review of all the circumstances of the case, the Deputy Magistrate held that the Bhattacharji's party were in possession of the mouzah, and were entitled to retain possession thereof, until evicted in due course of law. Against that order the Kumar applied to the High Court and obtained the rule set out in the judgment of FIELD, J. On the rule coming up for argument, it was contended on behalf of the petitioner that the Court below had no jurisdiction, because the dispute related only to the right to collect rents

[414] Mr. Pugh and Baboo Rashbehari Ghose for the Petitioner.

The Advocate-General (Mr. G. C. Paul) and Baboo Srinath Doss for the Opposite Party.

The Order of the Court was as follows:—

Field, J. (BEVERLEY, J., *concurring*).—In this case a rule was granted in order to have a question decided, which has arisen upon the construction of s. 145 of the Code of Criminal Procedure. The rule is in the following language: "Let a rule issue on the opposite party to show cause why the order of the Deputy Magistrate, so far as regards the land other than the *khamar* land, should not be set aside, on the ground that it is bad in law, because it concerns merely the right to collect rents from tenants which is not 'tangible immoveable property' within the meaning of s. 145 of the Code of Criminal

* Criminal Revision No. 90 of 1885, against the order of Baboo Pearl Mohun Banerji, Deputy Magistrate of Magoorah, dated the 23rd of February 1885.

"Procedure." Under the Code which was in force before Act X of 1882 was passed, there can be no doubt that, according to the decisions of this Court, the right to collect rents from ryots did come within the purview of the corresponding section (530) of the former Code. This was decided in several cases, to two of which we may refer, *Sutherland v. Crowdy* (18 W. R., Cr. 11 ; 9 B. L. R., 229) and *Harak Narain Singh v. Luchmi Bux Roy* (5C L. R., 287). At the same time it was held that the provisions of s. 530 did not apply when there were tenureholders intermediate between the zamindar and the ryots. This latter point was decided in *Empress v. Thacoor Dyal Singh* (I. L. R., 3 Cal., 320). The present case is not, however, on all fours with this last case. A different view was taken by the Madras High Court, and what we have to consider on the present occasion is, whether it was the intention of the Legislature to alter the law as settled by the decisions of this Court, and to adopt in preference the view taken by the Madras Court.

In order to determine this point, we must examine the language of s. 530 of the old Code, and compare it with the language of s. 145 of the present Code. The section of the old Code was as follows : "Whenever the Magistrate of the district, &c., is satisfied that a dispute likely to induce a breach of the peace, [415] exists concerning any land or the boundaries of any land, or concerning any houses, water, fisheries, crops or other produce of land, within the limits of his jurisdiction, such Magistrate shall record a proceeding, stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute. Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to enquire and decide which party is in possession of the subject of dispute."

The language of the present law is as follows : "Whenever a District Magistrate, etc., is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any tangible immoveable property or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court, in person or by pleader, within a time to be fixed by such Magistrate and to put in written statements of their respective claims as respects the facts of actual possession of the subject of dispute. The Magistrate shall then, without reference to the merits of the claims of any such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties is then in such possession of the said subject."

It has been argued that the introduction of the word "such" before "possession" in the last clause of the section just quoted indicates an intention on the part of the Legislature to alter the law. We are not able to accede to this argument. We think that both under the old law and under the new law parties were required to plead as to actual possession, and the decision of the Magistrate was to be upon this same possession. Under the present law, this is clear because the words "such possession" [416] refer to actual possession. Under the old law it is not so clear because the word "such" does not come before "possession", but we think that, inasmuch as the old law required parties to plead as to actual possession, it was intended that the decision of the

Magistrate should deal with the same possession, that is, actual possession. It is more difficult to deal with the alteration in the language of the Legislature introduced by the term "tangible" before "immoveable property." If the word "tangible" had been introduced before "possession," it would have been clear that the intention of the Legislature was to alter the law as laid down by the decision in the case of *Sutherland v. Crowdy*, and the other similar cases; but the use of the word "tangible" not in connection with "possession," but in connection with the words "immoveable property," does not in our view indicate a similar intention. It is, we think, quite explainable without assuming any intention on the part of the Legislature to alter the law as laid down by the decisions of this Court. Under the old Code the dispute was a dispute "*concerning any land or the boundaries of any land or concerning any houses, water, fisheries, crops or other produce of land.*" Now, this dispute was certainly, so far as regards fisheries, a dispute concerning an incorporeal right, and an incorporeal right is intangible property. The dispute which the present Code speaks of is a dispute concerning *any tangible immoveable property*, the word "fisheries" and other words have been omitted. It is clear that a dispute concerning an incorporeal right would not come within the purview of the section in the present Code. We think, therefore, that the alteration in the language by the introduction of the word "*tangible*" is explainable by the exclusion from the section of the present Code of words descriptive of incorporeal or intangible right or property. Under the old law it was held that a dispute between rival zamindars as to the right to collect rents was a *dispute concerning land*. We think it impossible to say that a similar dispute is not, within the meaning of the present law, a *dispute concerning tangible immoveable property*. The use of the word "concerning" in the definition seems to make this wide construction possible, and this word is retained in the present Code.

[417] Speaking for myself, I may say that I would gladly have come to a different conclusion, because I think that disputes between zamindars as to the right to collect rents ought not to be brought into the inferior Criminal Courts in this country. But applying the ordinary rules of construction, I do not see how we can arrive at any other conclusion than that the Legislature has not had the intention of altering the law as settled by the decisions of this Court. The rule must be discharged.

Rule discharged.

NOTES.

[THE MEANING OF "TANGIBLE IMMOVEABLE PROPERTY" IN S. 145 OF ACT X OF 1882—

It includes a temple (Weir, II 99, 110, 112), Rents (11 Cal., 413; 12 M. 88; 16 C., 513; 5 A. W. N., 299, 15 C., 527; 126, 539), Crops (15 A. 394). Now the law is made clear by the addition of cl. (2) which clearly defines what the term *land or water* (the expression used in the new Code of 1898 for the older expression (*tangible immoveable property*) includes. The explanation given supersedes the decision in cases reported in 12 C., 539 and 13 C. 179 (fishery right) as the present section applies equally to rights in fishery]

[11 Cal. 417]
ORIGINAL CIVIL.

The 8th April, 1885.

PRESENT.

MR. JUSTICE NORRIS.

Bhutnath Dey and another.....Plaintiffs
versus

Ahmed Hosain and others.....Defendants.

*Mahomedan law—Guardian—Minor—Infant—Guardian of property—
Mortgage—Co-heirs—Infants' liability.*

In May 1881, certain co-heirs of a deceased Mahomedan mortgaged a portion of the property which had descended to them in common with others, then infants, as heirs of the deceased. The mortgage was raised for the purpose of paying off arrears of rent of a *putni taluk* which was a part of the property inherited from the deceased. There was no evidence to show that there were any other necessary expenses connected with the deceased's estate which had to be met, nor what that estate consisted of, nor whether the arrears of rent could or could not have been paid without having recourse to the mortgage. According to the Mahomedan law the mortgagors were not the guardian of the property of the infants.

Held that the shares taken by the infants as heirs of the deceased were not bound by the mortgage.

THIS was a suit on a mortgage of certain lands and premises situated partly in Calcutta and partly in the district of the 24-Pergunnahs. The property in question formerly belonged to one Sheik Ahmed Ally Ostagur, a Mahomedan of the Sunni sect, who died in August 1879, leaving him surviving his mother Ameenah Bibee, two sisters Sahuran Bibee and Surjein Bibee, his first wife Arzu Bibee, three children by his first wife, namely, Ahmed Hosain, Rahimunessa Bibee and Banni Jan Bibee, and one son, Palk Jan, by his second wife who predeceased him.

[418] The mortgage in question was executed on the 12th of May 1881, in favour of the plaintiff by Arzu Bibee, Ahmed Hosain and Rahimunessa to secure the repayment of Rs. 2,000, and interest at 12 per cent. per annum. It was alleged in the plaint that the Rs. 2,000, was borrowed for the purpose of paying the rent of a *putni taluk* situate in the district of Jessore, which had formerly belonged to Sheik Ahmed Ally Ostagur and which descended at his death to his heirs. The only question at issue in this suit was as to the liability of Banni Bibee and Palk Jan, both of whom were infants at the institution of the suit.

Mr. Douglas White for the Plaintiff.

Mr. Henderson for the Defendant Banni Bibee.

Mr. Sale for the Defendant Palk Jan.

The Judgment of the Court was as follows:—

Norris, J.—This was a mortgage suit, and the facts of the case were as follows:—

One Sheik Ahmed Ally Ostagur died in August 1879, leaving him surviving as his heirs, heiresses and legal representatives according to Mahomedan law, his widow Arzu Bibee, his three children by her, viz., the defendants Ahmed

Hosain, Rahimunessa Bibee and Banni Jan Bibee, his son by a wife who had predeceased him, viz., the defendant Palk Jan and his mother Ameenah Bibee.

On the 12th May 1881, Arzu Bibee, Ahmed Hosain, and Rahimunessa Bibee mortgaged three plots of land in the 24-Pergunnahs, and one plot in Calcutta to the plaintiffs to secure the repayment of Rs 2,000, with interest at 12 per cent.

The plot of land in Calcutta formed part of the estate of Sheik Ahmed Ally Ostagur, the plots in the 24-Pergunnahs belonged to Arzu Bibee. Subsequently to the mortgage Arzu Bibee conveyed her interest in one of the plots in the 24-Pergunnahs to Ameenah Bibee, who died in February or March 1882, leaving her surviving as her heirs and heiresses, according to Mahomedan law, the defendants Ahmed Hosain, Rahimunessa Bibee, Banni Jan Bibee and Palk Jan.

[419] Arzu Bibee died in May 1883, leaving her surviving as her heirs and heiresses, and legal personal representatives her three children, the defendants Ahmed Hosain, Rahimunessa Bibee, Banni Jan Bibee, and her mother, the defendant, Chand Bibee.

The mortgage of 12th May 1881, purported to be executed for the purpose of raising money to pay the arrears of rent then due in respect of a certain zamindari belonging to the estate of Sheikh Ahmed Ally Ostagur, situate in Jessore, for the recovery of which the zamindar had put in force the provisions of Regulation VIII of 1819, for the sale of the tenure under which notice of sale had been published, and the day for sale fixed, and for other necessary expenses connected with the said estate. There was a wicked attempt on the part of the defendant Ahmed Hosain to set up as a defence to the suit that the mortgage of 12th May 1881 was not a genuine transaction but a *benami* one, he denied having received any of the consideration money himself, denied that it was paid to his sisters in his presence, he denied that the money was advanced for the purpose of saving the *putni taluk* at Jessore. I was satisfied at the time that the man knew he was swearing falsely, and I directed his prosecution for perjury.

I am satisfied from the evidence of Golam Hosain that the money was raised for the purpose of paying the arrears of rent due in respect of the *putni* holding at Jessore, but there is no evidence that there were any other necessary expenses connected with Sheikh Ahmed Ally Ostagur's estate that had to be met, nor is there any evidence as to what that estate consisted of, nor is there any evidence as to whether the arrears of rent could or could not have been paid without having recourse to the mortgage.

The defendants Palk Jan and Banni Jan Bibee are infants.

The plaintiffs contended that the mortgage was binding upon them, as it was in reality made for their benefit as heirs and heiresses of their father, the executants, or some one of them being their natural guardians.

Mr. Sale, for the Defendant Palk Jan, argued that neither of the executants of the mortgage could, according to Mahomedan law, be guardians of his client; that the executants had signed only on their own behalf; and that even if either of the [420] executants had authority to bind the infant's estate, there was not such an urgent necessity as to warrant them in doing so.

Mr. Henderson for the infant Defendant Banni Jan Bibee followed the same line of argument. I am of opinion that, as far as Mr. Sale's client is concerned, these contentions must prevail. In *Shama Churn Sircar's* Tagore

Law Lectures for 1873 at p. 477 it is laid down that "guardians are natural, testamentary and appointed; and guardianship over a minor is for the purpose of matrimony, care of his person, and management of his property. The guardianship of a minor for the management and preservation of his property devolves first on his or her father, then on the father's executors—next on the paternal grandfather, then on his executors, then on the executors of such executors, next on the ruling power or his representative, the *kazi* or judge. In default of a father, father's father and their executors as above, all of whom are termed near guardians, it rests in the Government, or its representative, to appoint a guardian of an infant's property."

In *Macnaghten's Principles of Mahomedan Law*, 5th Ed., page 304, it is laid down that, "in law, guardianship over minors is of two descriptions—the one for the purpose of matrimony, the other for the care of property. The care of property legally devolves, first on the father and his executor, next on the paternal grandfather and his executor, next the right of nomination rests in the ruling power and its administration, that is to say, any person whom the Government may please to appoint to the custody of the infant's property is a legal guardian, according to the authority (*The Virgaya*) above quoted. First, his father, or the executor of the father, is his guardian, then the paternal grandfather or his executor, then the magistrate or his executor." It is clear from these authorities that neither of the executants of the mortgage had power to bind the infant, neither of them was in the position of a guardian having any power as such over the property of the minor. The suit against Palk Jan must be dismissed with costs on scale No. 2. I shall, however, allow the plaintiffs to add these costs to the mortgage debt.

The case against Mr. *Henderson's* client is different to the [421] one against Sheik Palk Jan. She is interested in the mortgaged premises not only as heiress to her father, but also as heiress to her mother this latter interest is bound, but not the former. I am further of opinion that even if any one of the executants of the mortgage had been in the position of near guardian to the infants, there is no sufficient evidence to warrant me in coming to the conclusion that it was absolutely necessary to charge their shares of their father's property.

There will be the usual mortgage decree with the necessary declarations; costs on scale No. 2 against the defendants other than Palk Jan. Costs of the guardian *ad litem* to Banni Jan Bibee to be paid by the defendants on scale No. 2, and the amount added to the mortgage debt.

Suit decreed.

NOTES.

[THE POWERS OF A DE FACTO GUARDIAN UNDER MAHOMEDAN LAW—

Mother. A mother is not a natural guardian; if she deals with the estate of the minors without being specially authorized by the Judge or father, her acts should be treated as null and void, but if they are to the manifest advantage of the children they should be upheld; if not they should be set aside (*Ameer Ali Mahomedan Law*, vol II, page 590). See 29 Cal. 473, where it was held that an alienation by a mother is absolutely void.

On the other hand, see 26 All., 22, 30 Mad., 197.

The same applies to acts of other relatives such as a brother, sister or uncle, 11 Cal 417 (co-heirs), 12 W. R. 337; 6 Bom. 467; 18 All., 373; 34 Cal 36 (40); see 34 All. 213 where all the authorities on the subject were cited. It was held there that "it is difficult to see how the situation of an unauthorised guardian is bettered by describing him as *de facto* guardian: He may by his *de facto* guardianship assume important responsibilities in relation to the minor's property but he cannot thereby clothe himself with legal power to sell it." This was a case of an alienation by an elder brother. The question whether a sale by a *de facto* guardian, if made for necessity, or for the payment of an ancestral debt affecting the minor's property and if beneficial to the minor is altogether void or only voidable was left open as it was unnecessary to decide it in that case. See 34 Cal., 36; 34 Cal., 65; 26 All., 22; 1 All., 533; 30 Bom., 199; 3 B. L. R., A. C. 423.]

[11 Cal. 424]
APPELLATE CIVIL.

The 1st April, 1885

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Bussunteram Marwary.....(Plaintiff) Appellant

versus

Kamaluddin Ahmed and others.....(Defendants) Respondents.

Mahomedan law—Succession—Liability of one of several heirs to pay ancestors' debt, when but for his own action debt would be barred by limitation—Justice, equity and good conscience, Application of principle of Act VI of 1871, s 24.

A, a Hindu, and a creditor of *B*, a deceased Mahomedan, sued *C*, *D*, *E* and *F*, his heirs, to recover a sum of money alleged to be due on a *roka*, alleging that they were in possession of *B*'s estate, and praying for a decree against the estate upon that footing. It was not disputed that the debt would have been barred by limitation, but for a part payment made by *C*, and endorsed by him on the back of the *roka*. *D*, *E* and *F* were no parties to such payment, and it was found not to have been made with their consent. The first Court, considering that collusion existed between *A* and *C*, and having regard to the fact that *C* did not dispute his liability, gave *A* a decree for the full amount of the debt against *C* without finding whether the *roka* was genuine or not, and held that the shares of *D*, *E* and *F* in *B*'s estate were not liable for any portion of the debt. *A* [422] accepted this decision and did not appeal. *C* appealed on the ground that he could only, under the Mahomedan law, be held liable for a part of the debt in proportion to the amount of *B*'s estate which had come into his hands. The lower Appellate Court decided in *C*'s favour, and varied the decree by directing that *A* was only entitled to recover two-fifths of the debt from *C*, that being the amount of *C*'s share. *D*, *E* and *F* were not made parties to that appeal.

A then specially appealed to the High Court, making *D*, *E* and *F* parties.

Held, that under the circumstances of the case, and having regard to the rule of Mahomedan law, *A* was not entitled to a decree against *C* for more than two-fifths of the debt.

Held, further, that, applying the principles of justice, equity and good conscience to the case, inasmuch as *A* was a Hindu, it would not, under the circumstances of the case, be equitable to hold *C* liable for the whole of the debt.

THIS was a suit for the recovery of a sum of Rs. 1,758-12-8 due upon a *roka* said to have been executed by one Furzund Ali, the grandfather of the defendants, who had died since its execution. The plaintiff sued the defendants as heirs of Furzund Ali, alleging that they were in possession of the estate, and asked for a decree against the estate of Furzund Ali, their ancestor. It was not disputed that but for a payment said to have been made by Kamaluddin, and endorsed by him on the back of the *roka*, the debt would have been barred, and it was contended on behalf of the other defendants that no such payment was ever made, and that the plaintiff and Kamaluddin were acting in collusion to defraud them, and, even if the payment was made, they were not bound by it.

* Appeal from Appellate Decree No. 368 of 1884, against the decree of W. Verner, Esq., Judge of Bhagulpore, dated the 18th of December 1883, modifying the decree of Hafez Abdul Karim, Khan Bahadur, Subordinate Judge of that district, dated the 31st of May 1882.

The finding of the lower Courts, together with the nature of the evidence adduced, is sufficiently stated in the judgment of the High Court.

Mr. *Amir Ali* and Moulvie *Seraful Islam* for the Appellant.

Munshi *Mahomed Yusoof* and Mr. *M. L. Sandel* for the Respondents.

Mr. *Amir Ali* for the Appellant.—Under the Mahomedan law the debts of the deceased are a first charge on the estate, and the heirs are bound to pay them before they distribute the estate amongst themselves, and, as the suit was properly [423] framed against the defendants as representing the estate of the deceased, the plaintiff was entitled to a decree in full to be satisfied out of the estate. The question, therefore, in this case is, whether Kamaluddin is not liable for the whole debt. By the evidence Kamaluddin was shown to have been in possession of the whole of the estate, and that he made all the collections and the disbursements, and, therefore, inasmuch as the suit is in the nature of an administration suit, the whole estate in Kamaluddin's hands is liable for the debts of the deceased. The principle that the heirs of the deceased are liable for their share of the debt of the estate in proportion to the share of the estate they have received is inapplicable to this case, as Kamaluddin was in possession of the whole estate, and in any event it was competent to him to make the payment at the time he did as manager of the estate, and the other defendants would be bound by his actions—*Assamatthem Nessa Babee v Roy Lutchemput Singh* (1 L. R., 4 Cal., 142), *Muttygan v. Ahmed Ally* (I. L. R., 8 Cal., 370), *Hamir Singh v Mussamat Zakia* (I. L. R., 1 All., 57), and *Macnaghten's Mahomedan Law*, p. 88.

Munshi *Mahomed Yusoof* for the Defendant Kamaluddin —The suit is not an administration suit, and the principle that a creditor is only entitled to recover from each heir his share of the debt in proportion to his share in the estate would certainly apply if the Mahomedan law is held to apply at all, seeing that one party is a Hindu. In any event, the plaintiff had his remedy in his hands, and did not choose to avail himself of it, as he did not appeal against the decree of the first Court, which held that the shares of the estate in the hands of the other defendants were not liable, and that being so, it would now be inequitable to allow him to saddle Kamaluddin with the whole liability—*Sudaburt Pershad Sahoo v Lotf Ali Khan* (14 W. R., 339), *Hedaya*, book XX, ch. IV, *Grady*, p. 349.

Mr. *Amir Ali* in reply.

The **Judgment** of the Court (TOTTENHAM and GHOSE, JJ.) was as follows.—

This was a suit brought by the plaintiff, one Bussunteram Marwary, against Sheikh Kamaluddin, the grandson, and three [424] ladies, being the grand-daughters of, and heirs to, the estate left by one Furzund Ali. There was also another defendant in the suit, viz., one Azeezunissa; but we think we may discard her from our consideration, because, as disclosed in the judgment of the Court of First Instance, her husband, Yusoof Ali, the son of the said Furzund Ali, predeceased his father, and therefore she (Azeezunissa) could not rank as an heir.

The suit was instituted for recovery of a sum of Rs. 1,758-12-8 due upon a *roka* said to have been executed by the said Furzund Ali, and the plaintiff alleged that, "after his death, the defendants, his 'heirs,' were in possession of his estate," and asked that judgment might be given for the money "against the estate of Furzund Ali, ancestor of the defendants."

The defendant No. 1, Kamaluddin, raised no other defence than that the account given in the plaint was not correct, and that the plaintiff was not entitled to recover the whole amount claimed.

Among the female defendants, Osikunnissa and Ohidunnissa defended the suit upon the ground that the *roka* in question was not true, and that it was barred by limitation, and that the suit itself was the result of collusion between the plaintiff and Kamaluddin.

It appears that the plaintiff relied upon an endorsement said to have been made by Kamaluddin on the back of the *roka*, showing that before the *roka* was barred by limitation, Kamaluddin had paid a certain sum of money as part payment of the principal, and he (the plaintiff) therefore contended that the suit was within time. Kamaluddin was examined about this matter, and he admitted the said endorsement and payment, and alleged in the course of his evidence that the collections from the entire estate were in his charge, and that he had not as yet paid his sisters anything from the collections.

The Court of First Instance, while suspecting that there was collusion between the plaintiff and Kamaluddin, and that the alleged part payment of the principal was not true, held that there was no authority in Kamaluddin to pay any money on behalf of the other heirs, and that the claim as against them was barred by limitation, but that the suit should be decreed against Kamaluddin, because he did not oppose the claim, and because [425] he admitted having made the said payment, which had the effect of saving the claim from being barred. The Court then found that Rs. 1,729-12-9 was due to the plaintiff, and gave him a decree for the whole amount as against Kamaluddin, and declared that the decree should be realized from, and by the share of, that person alone, and that the shares of the other heirs should be exempted.

Against this decree of the first Court the plaintiff preferred no appeal, but the appeal that was made was by the defendant Kamaluddin, complaining that the decree as passed against him was erroneous. The District Judge has held that the claim as against Kamaluddin is not barred by limitation, though it is barred against the other heirs, but that under the Mahomedan law no more than an amount proportionate and equal to his legal share, which was two-fifths, in the estate left by Furzund Ali, could be decreed against him. The Judge accordingly decreed the claim for a two-fifth share of the money due under the *roka*.

Dissatisfied with this judgment, the plaintiff has appealed to this Court, and in this appeal he has enlisted, not only Kamaluddin as a respondent, but also the other heirs, who were not parties in the lower Appellate Court. His counsel has urged the following points before us —

First.—That under the Mahomedan law the debts of the deceased, being a prior charge, the heirs cannot take the estate before the said debts are paid, and therefore a decree should have been awarded for the amount due to the plaintiff against the whole estate of Furzund Ali.

Second.—That this being an administration suit, and Kamaluddin being shown to be in possession of the whole estate in his representative capacity, a decree should be awarded charging the whole of the assets in his hands.

Third.—That, at any rate, a decree should be passed for the whole amount as against the share of Kamaluddin.

There can be no doubt that, according to the Mahomedan law, next to the duty of meeting the funeral expenses of the deceased, it is incumbent upon the heirs to discharge his debts, and that the whole estate is answerable for the same. If in this case the [426] claim under the *roka* was not barred by the law of limitation as against the other heirs, a decree might have been properly given charging the whole estate. But the Munsif held, and there was no appeal against his decision by the plaintiff, that the claim was barred against

those persons, and accordingly exempted their shares from liability. If the plaintiff was desirous of obtaining a decree against the whole estate, he should have appealed to the higher Court; and we hold that it is not now open to him to ask that the claim should be adjudged against the estate generally. We may also observe that, as a matter of fact, although the question was raised by the said defendants, no decision was come to by the first Court upon the question whether the *roka* itself was genuine. That Court simply proceeded upon the admission of Kamaluddin in decreeing the claim as against him. But before any decree could be awarded, binding the other heirs and the whole estate, the debt should have been proved and found to be true—[see *Hedaya*, Bk. XXXIX, ch. I, and *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh* (I. L. R., 4 Cal., 142)].

Mr. *Amir Ali*, however, contends that Kamaluddin being shown to be in possession of the whole estate, he must be taken to be in such possession in his representative character, and therefore he should be called upon to account for the assets in his hands, and a decree passed accordingly against such assets. But it must be remembered that the suit of the plaintiff as laid in the plaint was not of that character. The plaintiff in his plaint distinctly alleged that all the heirs were in possession of the estate, and asked for a decree against the estate upon that footing. It was not even suggested that Kamaluddin was in possession in his representative capacity, and no prayer was made to call for an account from him. It is indeed true that Kamaluddin in the course of his evidence said that the entire collections of the property were in his charge; but, in the first place, this was no part of the plaintiff's case, and, in the second place, neither the first nor the second Court accepted that statement, and found that this was so, but on the contrary the Munsif suspected that there was collusion between the plaintiff and Kamaluddin, and that [427] the payment of Rs. 200, said to have been made by Kamaluddin, if made at all, was not made on behalf of the other heirs.

In this state of things we are unable to treat the case as an administration suit brought against Kamaluddin, in his representative character, and to give the plaintiff relief as against the whole estate, three-fifths of which was, as a matter of fact, exempted from the plaintiff's claim by the decree of the first Court, and in which decree the plaintiff acquiesced.

The next question that arises is, whether, failing to obtain a decree against the whole estate, is the plaintiff entitled to charge the share of Kamaluddin alone for the entire amount of his claim. This question is not free from difficulty; but, on considering the matter in all its bearings, we are of opinion that he is not so entitled. Under the Mahomedan law (*vide Hedaya*, Bk. XX, ch. IV), each of the heirs is bound to pay his own share of the debt; and it is only in the event of one of them being in possession of all the effects that the creditor is entitled to have recourse to him. And it also appears that if the estate be completely overwhelmed with debt, neither composition nor division among the heirs is lawful, but if the estate is not so completely involved, such a composition or division prior to discharge of the debts is allowable—(*Hedaya*, Bk. XXVI, ch. III). Now, in the present case, it is not the plaintiff's case that Kamaluddin is in possession of the whole property; and although there may not have been any division, properly so called, among the heirs, the plaintiff admits that they were in possession of the estate, and this must be taken to be a possession of their respective shares according to the Mahomedan law. The Allahabad High Court in two cases, in following the tenets of the Mahomedan law alluded to above, distributed the liability among the several heirs, and adjudged to the creditor a proportionate share of the debt—*Hamir Singh v.*

Mussammât Zakia (I. L. R., 1 All., 57) ; and *Pirthipal Singh v. Husaini Jan* (I. L. R., 4 All., 361) , and we agree with that Court in thinking that this was the proper course to adopt. In one of those cases—*Pirthipal Singh v. Husaini Jan* (I. L. R., 4 All., 361)—the facts were somewhat similar to those we have before us. It may be said that the Allahabad High Court proceeded upon the principle of the debt being small [428] in amount, and that the debt in the present case is not small, but of considerable amount. But it is not shown what is the extent and value of the estate left by Furzund Ali. What the Mahomedan law says is that it is only when the estate is completely involved that the heirs cannot take the estate and a division amongst them cannot be allowed before the debts are discharged. We, therefore, hold that in the circumstances of the present case the plaintiff, under the Mahomedan law, can only obtain as against the two-fifths share of Kamaluddin a proportionate share of the money due to him.

We propose, in the next place, to deal with the question of Kamaluddin's liability according to the principles of justice, equity and good conscience ; for that is the rule of law laid down, when both the parties to the suit (as it is here) are not Mahomedans, in s. 24, Act VI of 1871 (the Bengal Civil Courts' Act), and it may be doubtful whether the questions involved in the present appeal are questions falling within the first paragraph of that section, under which the Mahomedan or Hindu law, as the case may be, is to be administered.

Now, it appears to us that the position of the parties is this. The judgment of the Court of First Instance—a judgment which was not questioned on appeal by the plaintiff—declared, as we have already mentioned, that the claim of the plaintiff was barred by limitation as against the other heirs, save and except Kamaluddin, and that the shares of those heirs should be exempted from liability. This judgment is final, and the plaintiff is not now entitled to touch any of those shares. The only share now in the hands of Kamaluddin is that which has devolved upon him according to the Mahomedan law, and which might be answerable for the plaintiff's demand. The debt due to the plaintiff is indeed an indivisible one, and the plaintiff would, under ordinary circumstances, be entitled to realize his dues from the whole estate, or from any portion of it as he might choose. But the circumstances that have occurred in the present instance are such that it would be inequitable to insist that Kamaluddin's share should bear the whole of the debt. The claim of the plaintiff as against the other heirs is now barred by the law of limitation, and their shares having been exempted [429] Kamaluddin would not be entitled to demand contribution from them in the event of the whole of the debt being realized from him or from his share. That being the case, it would not be just or equitable to hold the share of Kamaluddin answerable for the whole claim. If Kamaluddin had not helped the plaintiff in keeping alive his claim by payment of a certain sum of money, he (the plaintiff) would not be in a position to get any decree at all. And we think that it would be unjust to hold that Kamaluddin by his acts and conduct (which the first Court suspected to be the result of collusion between the plaintiff and Kamaluddin) not only kept the claim alive, but made his share answerable for the whole demand. If Kamaluddin was in a position to call upon the other heirs for contribution, there would be no difficulty in decreeing the whole claim as against his share. But, in the circumstances of this case, we are of opinion that the plaintiff is not entitled to charge the share of Kamaluddin with any more than a proportionate share of his dues.

We therefore see no ground for disturbing the judgment of the Court below, and dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[I. JUSTICE, EQUITY AND GOOD CONSCIENCE—

See also the following cases .—6 Cal 794 , 7 All 775 , 11 Cal. 421.

II. LEGAL POSITION OF HEIRS AS REPRESENTATIVES—

See Mr. Tyabji's Mahomedan Law (1913) pp 501—521, sec 5, where there is an attempt to collect the cases and analyse the results , also 19 Bom. 273]

[11 Cal. 429]

APPELLATE CIVIL.

The 1st April, 1885

PRESENT

MR. JUSTICE TOTTENHAM AND MR JUSTICE GHOSE.

Nitye Gopal SircarObjector

versus

Nagendra Nath Mitter MozumdarPetitioner :

Will, Attestation of—Witness—Signature—Mark—Indian Succession Act
(X of 1865), s. 50.

The direction contained in s. 50, cl 3, of the Indian Succession Act as to each of the witnesses signing the will is not satisfied by the witnesses affixing their marks, and it is necessary for the validity of a will that the signature, as distinguished from a mere mark of at least two witnesses, should appear on the will *Fernandez v. Alves* (I L R , 3 Bom., 382) followed ; *In the goods of Wynne* (13 B L R., 392) dissented from

If a testator on presenting his will for registration admits a signature on the will to be his before a Registrar, and is identified before him by a witness, and both the Registrar and the identifier sign their names on the will as witnesses to the admission of the testator, such attestation is sufficient [430] to satisfy the requirements of cl. 3 of s. 50 of Act X of 1865. *In the matter of Hurro Sundari Dabra* (I. L R., 6 Cal., 17) followed.

* Appeal from Original Decree No. 86 of 1884, against the decree of T. D. Beighton, Esq., Judge of Burdwan, dated the 20th of February 1884

THIS appeal arose out of an application for letters of administration in respect of a will. The application had been granted by the Court below, and the objector now appealed.

The facts of the case appear sufficiently from the judgment of the High Court.

Baboo *Trailokya Nath Mitter* for the Appellant.

Baboo *Sharoda Charan Mitter* for the Respondent.

The **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ) was as follows :—

This appeal arises out of an application made by one Nagendra Nath for letters of administration in respect of the will said to have been executed by one Madhusudan Sircar on the 16th of Srabun 1279. The application was opposed by one Nitye Gopal Sircar, who contended that the said will was not duly executed by the said Madhusudan. The Court below has held that the document is genuine, and that it was executed according to the formalities prescribed by law, and, being of that opinion, has granted letters of administration to Nagendra Nath.

The objector has appealed to this Court. There were two main questions raised by the learned vakeel who appeared for the appellant—first, that the will was not genuine; and, second, that none of the attesting witnesses having signed the document, but having simply put their marks against their names written by somebody else, there was no sufficient compliance with the rules prescribed by s. 50 of the Succession Act, and that the will was not therefore a valid document.

Upon the first question we agree with the lower Court in holding that the will is genuine, and that it was executed by the late Madhusudan. The second question raised by the appellant's vakeel is one which is not free from difficulty, and we may confess that it is with some hesitation that we pronounce our decision in the matter

[431] The rules laid down in s. 50 of the Succession Act as to the execution of a will are :—

1st.—“The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.”

2nd.—“The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.”

3rd.—“The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

Now, it will be observed that, while speaking of the action of the testator, the Legislature uses the expressions, “shall sign or affix his mark,” “signature or mark.” But in speaking of the witnesses, the section does not use any alternative expressions, but simply says “the witnesses *must* sign.” And this distinction, which we may state to be a marked distinction, occurs prominently in the third rule. That being the case, we cannot help thinking that the Legislature advisedly drew a distinction between the action of the testator and that

of the witnesses as regards the mode of their respective signatures. This may certainly lead in certain cases in this country to a great deal of inconvenience, and in some instances the due execution of the will may be impracticable; for it may happen, as it does happen now and then, that the will is executed at a very critical moment, and witnesses, who are able to *sign* their names, are not available. But whatever the inconvenience or difficulty may be in the proper working of the said rules, we cannot ignore the distinction which the Legislature has drawn. Mr. Justice PONTIFEX, [432] in the case *In the goods of Wynne* (13 R. L. R., 392), observed that he was "inclined to think that a signature by mark would be a sufficient "signature by a witness even under the Indian Act, as it would undoubtedly "be under the English Act." But it will be observed that the point was not actually decided by him, nor was it necessary for him to come to any decision upon the matter in that case. We have examined the English Wills Act, and some of the decisions in England bearing upon the matter, but we are unable to come to the same opinion which Mr. Justice PONTIFEX expressed. Section 9 of the said Act (1 Vic., c. 26) runs as follows — "And be it further enacted that "no will shall be valid unless it shall be in writing and executed in manner "hereinafter mentioned. that is to say, it shall be signed at the foot or end "thereof by the testator, or by some other person in his presence and by his "direction, and such signature shall be made or acknowledged by the testator "in the presence of two or more witnesses present at the same time, and each "witness shall attest and subscribe the will in the presence of the testator "but no form of attestation shall be necessary."

The cases bearing upon the said section show that in regard to the action of the testator a signature by mark is sufficient, and in the case of witnesses the subscription needs to be a subscription either of the name of the witness, or of some mark intended to represent it. But it will be observed, in the first place, that the said section of the English Wills Act does not lay down, as it is in the Indian Succession Act, the distinction between a signature and a mark, and, in the second place, the words used in the English Wills Act, with reference to witnesses, are "shall attest and subscribe," and not "must sign," as they are in the Indian Succession Act. That being the case, we are unable to follow the construction which has been put upon s. 9 of the English Wills Act in holding that the word "sign" in clause 3 of s. 50 of the Indian Succession Act includes a mark-signature

In this view of the matter, we are of opinion that the second contention raised by the appellant against the will is correct, and we may observe that our view of the question is in accord with [433] that expressed by the Bombay High Court in *Fernandez v. Alves* (I. L. R., 3 Bom., 382).

But then we find that the will was presented by the testator for registration before the Sub-Registrar; and his signature was taken down before the said official on the back of the deed as admitting execution of it, and the writer of the deed, one Bepinbehari Bistu, who identified the testator before the Sub-Registrar, subscribed his name next to that of the testator, and that was followed by the signature of the Sub-Registrar himself. The said Bepinbehari in his evidence attests his own signature, and swears that he saw the testator sign his name to the will both before the Sub-Registrar, and also at the time of the execution of the deed, and we think that we may accept the certificate of the Sub-Registrar and the endorsements made by him, as also the evidence of Bepinbehari, as clearly showing that the document was presented to that authority by Madhusudan as his will; and that his signature having been taken, both Bepinbehari and the Sub-Registrar signed their respective names. We have,

therefore, two persons who actually signed their names to the document after the testator had admitted it to be his will and put his signature on it. And we think that these persons may be properly taken to be witnesses within the meaning of s. 50, and that what was done before the Sub-Registrar would be a sufficient compliance with the requirements of the third clause of s. 50; and we should have been prepared to uphold the will as a valid document had it not been for this, that neither the evidence of the said Bepinbehari, nor the endorsements by the Sub-Registrar, shows that the said witnesses, viz., Bepin and the Sub-Registrar, signed the will "in the presence of the testator." Although, perhaps, there can be little doubt in the matter, yet we think that the evidence ought to be clear upon the point, and we deem it right to take the same course which another Divisional Bench of this Court took—*In the matter of the petition of Hurro Sundari Dabia* (I. L. R., 6 Cal., 17)—in remanding the case to the lower Court, with directions that Bepinbehari may be recalled, and that the parties be allowed to adduce fresh evidence in this matter. [434] If the District Judge be of opinion, after taking such fresh evidence, that the said two witnesses signed their respective names in the presence of the testator, the order already passed by him will stand good, otherwise the application for letters of administration will have to be refused.

Costs will abide the ultimate result.

Case remanded.

NOTES.

[WHAT IS ' ATTESTATION ' WITHIN THE MEANING OF SECTION 50 OF THE INDIAN SUCCESSION ACT—

. Each of the witnesses must sign. It is not sufficient that he should affix a mark — 11 Cal , 429 ; 3 Bom , 382 , 27 Cal , 169 The above authorities were doubted in 15 Mad. , 261, where it was also held that the whole signature was not necessary, the initials alone being held sufficient.

See (1904) 1 N. L. R. 14 (16) and 26 Cal , 246 (248), which are cases under the Transfer of Property Act and were on that ground distinguished from the present case which entirely turns upon the express wording of section 50 of the Succession Act.

See also (1912) 35 Mad. 607 P. C.]

FULL BENCH REFERENCE.

The 10th April, 1885.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE PRINSEP, MR. JUSTICE TOTTENHAM,
AND MR. JUSTICE PIGOT.

Hori Das Mal.....(Defendant) Appellant

versus

Mahomed Jakı and another.....(Plaintiffs) Respondents.*

Julkur rights in tidal navigable rivers, Grant of, by the Crown—Grant, where there is no title by prescription, must be proved—Evidence as to nature and extent of grant.

The exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals. Such a right must ordinarily be proved either by proof of a direct grant from the Crown, or by prescription.

In the absence of title by grant or prescription in persons alleging themselves to be the holders of a *julkur* under an *ıyara*, the mere payment of rent by fishermen to former *ıyaradars* does not estop such fishermen from disputing the rights of the alleged holders, but such payment for the use of the *julkur* right is strong evidence of the rights of the alleged holders of the *ıyara*, and of acquiescence in their title

In the case of a grant of a *julkur*, in ascertaining what the boundaries of the *julkur* are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in tidal navigable rivers or not, the Courts should be guided by the same rules of evidence as would be applicable for the purpose of determining the nature and extent of any other grant.

Per PRINSEP and PIGOT, JJ.—Unless the boundaries given in a grant of a *julkur* clearly indicate to the contrary, a grant of a *julkur* would not ordinarily include the right of fishery in tidal navigable rivers.

THIS was one of five cases referred to a Full Bench by Mr. [435] Justice PRINSEP and Mr. Justice PIGOT on the 18th August 1884. The order referring these cases was as follows :—

These are suits for rent of a *julkur* described in the plaint by boundaries or limits therein set forth.

The plaintiffs state that they are holders of an 8-anna share in the *julkur*, under *ıyaras* from persons having title to certain shares in it.

They claim the money, the subject-matter of the suits, from the defendants, as rent payable by them for the use of the *julkur* the sum, Re. 1, being half the amount alleged by the plaintiffs to have been paid by the defendants to the *ıyaradars* who had *ıyaras* in the *julkur*, before the plaintiffs' *ıyaras* were granted to them. The plaintiffs have never received any payment from the defendants.

The defendants set up various defences on the facts on which there have been findings against them in the lower Courts.

* Full Bench References on Special Appeals Nos. 107 to 110 of 1883, against the decree of R. F. Rampin, Esq., Judge of Dacca, dated the 3rd October 1882, affirming the decree of Baboo Nilmani Nag, the Munsiff of Kaligunj, dated the 27th February 1882.

The defendants contend that the relation of landlord and tenant never existed between themselves and the plaintiffs.

The defendants further deny the right of the plaintiffs' grantors in the *julkur* as that *julkur* is claimed, that is to say, so far as it is alleged to include an exclusive right to the fishery in a tidal navigable river. They allege that the *julkur* claimed by the plaintiffs includes such a right in part of the waters of the Megna, a tidal navigable river or branch of the Bay of Bengal.

They deny that the plaintiffs, or those under whom they claim, ever had any right under any settlement or grant in respect of a *julkur* in the above-mentioned waters.

They further deny the right of Government to create, in favour of any individual, an exclusive right to a fishery in such waters, being the waters of a tidal navigable river, or of an arm of the sea.

The Courts below have held against the defendants upon these contentions.

No grant from Government has been put in, conferring in express terms, upon the plaintiffs' grantors, or upon those from whom they derive title, an exclusive right of fishery in the above-mentioned waters. But certain proceedings of the Collectors of Dacca and Tipperah (within whose jurisdictions the *julkur* [436] claimed extends) from which it would appear that those authorities recognised or sanctioned the boundaries of the *julkur*, nearly, or exactly, as those boundaries, are described in the plaint.

Those proceedings were taken in 1860 and 1863; and there can be no doubt that before that time a *julkur* corresponding, in name at least, with that mentioned in these proceedings (whatever may have been lawfully included in it) had been held by the plaintiffs' grantors or by those whom they represent; but held under grants or settlements made from time to time by the revenue officers for limited periods.

In second appeal the questions raised before us were, whether the lower Courts were justified in holding that the plaintiffs had established their exclusive rights, as against the defendants, in the waters included within the boundaries set out in the plaint, so far as they are waters of a tidal navigable river or arm of the sea, as the waters of the Megna at the place in question are admitted to be, and that they had proved the existence of the relation of landlord and tenant as between themselves and the defendants.

A question similar to the first was considered, under somewhat similar circumstances, (and also in second appeal) in *Prosunno Coomar Sircar v. Ram Coomar Parooey* (I. L. R., 4 Cal., 53) which is the last reported decision on the subject. There is also a judgment of the Sudder Dewany Adawlut for 1859, page 1357, to the same effect, and in the case of *Baban Mayacha v. Nagu Shrivacha* (I. L. R., 2 Bom., 19), where all the authorities up to that date are referred to by WESTROPP, C.J., that case is approved of. But it has been brought to our notice in the course of the argument that in a case of *Hamid Ali v. Kristo Mohun Jaha* heard before the Chief Justice and Mr. Justice MITTER, in May 1882, upon reference from the Small Cause Court at Bhola, this Court appears to have arrived at a conclusion, not entirely in accordance with the opinion expressed by MARKBY, J., in the above case.

The second question raised seems closely connected with the first.

[437] We desire, therefore, to refer these cases to a Full Bench, and to submit the following questions:—

Whether exclusive rights of fishery in tidal navigable rivers can be granted to private individuals, or to certain classes of persons by the Crown?

Whether, in the absence of proof of title by prescription, the rights to such a fishery can be established without proof of a direct grant from Government?

Whether when a *julkur* is granted which, in the boundaries assigned to it in the grant, includes waters which are not, and waters which are, part of an arm of the sea or of a tidal navigable river, such grant should not be held to include the former only, unless it be expressly stated in the grant that the latter also are included?

Whether, in the absence of title by grant or prescription in the plaintiffs, payments by the defendants to the former claimants of the *julkur*, or to the plaintiffs, for leave to fish in the above-mentioned tidal navigable waters, should be held to preclude them, either as tenants, or in any other manner, from disputing the plaintiffs' rights therein?

Mr. Doss (with him Baboo Koloda Kinkur Roy) for the Appellants.—There being no law on the subject, the Court should be guided by Roman law which is founded on equity and good conscience. The Institutes of Justinian, Liber II, ch. I, lay down that all rivers, ports, etc., are public property. I contend that the Crown cannot grant such a right, because it would amount to a monopoly; and all monopolies are against the fundamental laws of the British Crown—Coke's Institutes, Part III, ch. 85, p. 181. The case of *Gureeb Hossein Chowdhree v. Lamb* (S. D. A., 1859, p. 1357), lays down that the bed of a navigable river where the tide ebbs and flows must be *prima facie* regarded as vested in the State, and the fishery in it as open to the public, the Government being merely a trustee for the public. In commenting on the case the Chief Justice of Bombay in *Baban Mayacha v. Nagu Shrawacha* [I. L. R., 2 Bom., 19 (40)] says "that decision is conformable to English law, and is, I think, sound as Indian law." Evidently being of opinion that there is some principle of law which is [438] applicable to both countries, and that principle I submit was the principle of monopoly. [Mr. Evans, as *amicus curiæ*, stated that the Isle of Bombay was granted to Charles II under a marriage settlement, and by Charles II to the East India Company as part of the Manor of Greenwich. See the Charter of 1669.] The case of *Chunder Jaleah v. Ram Churn Mookerjee* (15 W. R., 212) has no application to the present case, as a distinction was then drawn by GLOVER, J., between navigable rivers and rivers in which the tide ebbs and flows. In *Bagram v. The Collector of Bullooa* (W. R., 1864, p. 243), although the plaintiff established his right to a private fishery in certain tidal and navigable rivers, the principles laid down in *Chunder Jaleah v. Ram Churn Mookerjee* (15 W. R., 212) and *Doe d. Seebkristo v. E. I. Company* (6 Moo. I. A., 267), were adopted and approved.

In *Reg. v. Kastya Rama* [8 Bom. H. C., 63 (87)], WEST, J., in speaking of the prerogatives of the Crown in India with regard to this question, said: "I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea." In *Prosunno Coomar Sircar v. Ram Coomar Parooey* (I. L. R., 4 Cal., 53) MARKBY, J., doubted the power of the Government to make such a grant. As regards the other points referred, I submit the mere use of the word *julkur* in the *robokari* of the Revenue Commissioner would not give the plaintiff the exclusive right of fishery in tidal navigable rivers. The word may be perfectly satisfied by applying it to the right to fish within enclosed waters, and the presumption would be against any such private right. The boundaries given in the plaint do not tally with the boundaries given in the report of the Record-keeper. Nor are there any boundaries given of the disputed *julkur* in the grant, and no specific mention of the *julkur* in the river Megna, the exclusive right of fishing

in tidal rivers should not be extended. In the case of the *Collector of Jessore v. Beckwith* (5 W. R., 175), it was held a settlement *Dol* includes all that ordinarily passes as assets of the settlement but not what is exclusively reserved as the right of the State, e.g., the right to the *julkur* of large navigable rivers which, [439] according to clause 2, s. 4, Reg. XI of 1825, never passed to private individuals with whom Government made settlements.

The Advocate-General (Mr. Paul) with him Baboo *Durga Mohun Dass* and Baboo *Bussunt Coomar* for the Respondents.—Such a fishery is an incorporeal right—see *Baban Mâyacha v. Nagu Shrivacha* (I. L. R., 2 Bom., 19). The English Common law has not been extended to the *mofussil*, and the question is what is the territorial law in Bengal. The case of *Campbell v. Hall* (Cowp., 204), lays down “that the laws of a conquered country continue in force until they are altered by the conqueror.” So we must go back to the law of the Mahomedans. *Elphinstone v. Bedreechund* [1 Kn 329 (note)] shows that there is no distinction between the public and private property of an absolute monarch, and that he can dispose of it as he pleases.

The British Government succeeded to the laws of the Mahomedans, the Mahomedan criminal law was in force until the time of the Penal Code. From time out of mind the British Government have let out in settlement these *julkur* rights. The Crown used to grant such rights before the permanent settlement; and I have known of such rights being granted in navigable rivers.

[Garth, C. J.—If it was only in navigable rivers that these grants were made, it is no proof that the English law does not apply to tidal navigable rivers.] The case of *Bagram v. The Collector of Bullooa* (W. R., 1864, p. 243), shows that a right of fishery can be established in a tidal navigable river. Regulation XI of 1825 recognises the fact that beds of navigable rivers may be in individuals, and that private persons cannot prevent a person using a boat on such river. [PIGOT, J.—Section 5 prevents persons encroaching on such beds, and paragraph 3 of s. 4 indicates the circumstances under which the Government may step in.] The particular *julkur* in this case is found to be within the limits of my zamindari, and I have a right to fish therein, the public having no such right. [PIGOT, J.—Have you every right over your *julkur*, could not the Government grant the right of navigation over it?] In the Bombay case the Crown did not claim the right as against the subject, the suit was between two fishermen. The [440] case of *Chunder Jaleah v. Ram Churn Mookerjee* (15 W. R., 212), shows that the right to fish in a navigable river does not belong to the public. In these cases the Courts below have found that the grants are made out, and therefore no presumption arises against me. As to the authority in Coke—see *Hall v. Campbell* (Cowp, 204), and *Aristey's* speech in the report of *Ameer Khan's case*.

The area of the *julkur* granted to me includes waters which are, and waters which are not, navigable. [PIGOT, J.—When the right in tidal navigable waters is not expressly granted, do you say that right is granted?] I contend that, unless the right is excluded, it passes. [PIGOT, J.—But MARKBY, J., has held exactly to the contrary.] Here the grant is *julkur parah salam*, and the boundaries are given, and MARKBY, J., says that the boundaries being uncertain if you include the *bheels* and *jheels* that is sufficient, so that judgment does not apply. [GARTH, C.J.—In the case of *Gureeb Hosseyn Chowdhree v. Lamb* (S. D. A., 1859, p. 1357), the Court was of opinion that such a grant as the present could be made, it is in your favour so far.] Rents have also been paid to me, and FIELD, J., in *Gaur Hürri Mal v. Amirunnessa Khatoon* (11 C. L. R., 9), says that the payment of rent precludes the setting up of the defence that I never had any title at all. [PIGOT, J.—The rents were

paid to your lessors, the previous *ijaradars*.] I submit that the Crown has a right to make such a grant, and that Magna Charta does not prevent it; and I also say that the rule which applies to navigable rivers applies to navigable tidal rivers in this country.

Mr. Doss in reply contended that in the S. D. A. case, the question was whether the grant of exclusive right of fishing in the Megna was proved or not; and that that case did not decide the question whether the grant could be made.

The **Opinion** of the Full Bench was as follows.—

Garth, C J. (MITTER and TOTTENHAM, JJ., *concurring*).—This is a reference made to a Full Bench in five different suits, which have come up to this Court on second appeal from the decision of the District Judge of Dacca, affirming the decree of the Munsif of Kaligunj.

The suits are all brought by the same plaintiffs against different defendants for rent of a *julkur* in the river Megna, [441] and the plaintiffs' case is that they held the *julkur* in question as tenants from the proprietors under an *ijara* lease for the four years, 1287 to 1290, and that the defendants were their under-tenants of the fishery. The *julkur* is a *mehal* in the river Megna, a tidal navigable river, which is said to have been settled by the Government with the plaintiffs' lessors for a great many years past at a sudder rent of Rs. 287, and let out by them from time to time in *ijara*.

The first and principal question which is referred to us by the Division Bench is:—

(1) Whether exclusive rights of fishery in tidal navigable rivers can be granted to private individuals, or to certain classes of persons, by the Crown?

The Courts below have decided this question in the affirmative, but it has been contended here by the appellants, who are the defendants in the Court below, that this decision is wrong. They say that the Crown has no power in this country to grant such rights; and they found their contention mainly upon the proposition that the law in British India is the same in that respect as the law of England.

They rely also upon an order, which was made by the Bengal Board of Revenue, dated the 6th of November 1868, to the effect that the Government is a mere trustee on behalf of the public in respect of tidal rivers, and that the exclusive right of fishery in such rivers cannot be granted to private individuals.

It appears that this order of the Board of Revenue was confirmed by a Resolution of the Government of Bengal, dated the 29th of April 1869, which stated that it was impossible for the Government to make over the fishery in a tidal river to any individual to the exclusion of the public generally; and that the Government is to take care, as the guardian of the public interest, that it is not monopolised by any single individual or party.

These documents, although of course entitled to all due respect from this Court, can scarcely be regarded as of any judicial authority. We have enquired how they came to be passed, and have ascertained from a perusal of the papers that the order made by the Board of Revenue was founded upon an opinion [442] given by Mr. Cowie, the then Advocate-General of Bengal, upon a case submitted to him by the Government. Mr. Cowie seems to have assumed, in giving that opinion, that the law in British India, as regards the right of fishery in tidal navigable rivers, was the same as it is in England.

We have now, therefore, to consider the question, which is undoubtedly a very important one, whether this opinion is well founded.

It may of course be conceded that, by the law of England, the public have the right of fishing in all tidal navigable rivers, and that since the passing of Magna Charta, the Crown has no power to interfere with that right by making exclusive grants to private individuals in derogation of it—*Malcolmson v. O'Dea* [10 H. L., 593 (618)].

Lord Chief Justice HALE considers that this right of the public in England was in the nature of a common of piscary for all the King's subjects to fish in the sea, or in the creeks or arms thereof, as part of the Crown wastes. But whatever was the origin of the right, there is no doubt that it exists. The question which we have to decide is, whether the same law prevails in this country.

It seems to have been rather taken for granted by Sir MICHAEL WESTROPP, in the case of *Baban Mayacha v Nagu Shrivacha* (I. L. R., 2 Bom., 19) that the law of England upon the subject prevails in British India, but it was hardly necessary for the purposes of that case to determine the point, and it is worthy of remark that Mr. Justice HARIDAS NANABHAI, who was the other Judge of the Division Bench, expressed no opinion upon it.

That case related to the respective rights of two sets of fishermen with regard to nets laid two miles from land in the open sea, and neither the plaintiffs nor the defendants claimed any exclusive rights in the fishery.

In the case of *Prosunno Coomar Sirca v Ram Coomar Parooey* (I L. R., 4 Cal., 53), decided by MARKBY and PRINSEP, JJ, Mr Justice MARKBY expressed a doubt whether the Crown in this country had the power of granting rights of fishery in public navigable [443] rivers, but in that case also it was not necessary to decide the point, because the Court were of opinion that, even if such rights could exist at all, they should be clearly established, and that the evidence offered by the plaintiffs in that case was not sufficient for the purpose.

On the other hand, in the case of *Chunder Jaleah v Ram Churn Mookerjee* (15 W. R., 213), it was held that the right of fishing in navigable rivers did not belong to the public, and that the Government was not prohibited by any law from granting to individuals exclusive rights of fishing in such rivers.

In that case a ruling of the Sudder Court, *Gurceeb Hossein Chowdhree v. Lamb* (S. D. A., 1859, p. 1357), was referred to, as having decided that the right of fishing in navigable rivers is *prima facie* common to every person, and that if any individual claims an exclusive right in such waters, he must show that it has been acquired either by grant or prescription.

Regulation XI of 1825 was also referred to, but it is noteworthy that the case in the Sudder Court, as well as the Regulation of 1825, had reference apparently to navigable rivers which were not tidal, and so far as they are of any authority at all for our present purpose, they rather tend to show that exclusive rights of fishing in such rivers can be granted to individuals by the Crown.

The latest case upon the subject is one which came up before my brother MITTER and myself in a Small Cause Court Reference, No. 8 of 1882, *Hamid Ali v. Kristo Mohun Jalia*, in which the question which we have now to determine was directly raised.

We had not the advantage in that case of hearing Counsel on either side, and consequently our judgment was not reported. But as we knew that *julkur* rights in tidal navigable rivers had for a long series of years been constantly made the subject of settlement by the Government with private persons,

and as we were not aware of any law in this country which prevented the grant of such rights, we decided in favour of the grantee.

I believe that this present reference is the first occasion upon which the question now before us has been properly argued; and, having had the advantage of hearing Counsel on both sides, I am [444] of opinion that the Crown has power in this country to grant such rights.

I find no reason for believing that the English law upon the subject has been introduced here. That law, I conceive, *is a branch of the territorial law of England*, and it has been held here over and over again that the territorial law of England does not prevail in the Indian mofussil.

The view which I take of the question is this —

Whether the actual proprietary right in the soil of British India is vested in the Crown or not (a point upon which there seems some diversity of opinion), I take it to be clear that the Crown has the power of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands. And I can see no good reason why they should not have the same power of making settlements of *julkur* rights and of lands covered by water, as of lands not covered by water.

In either case the settlement is made for purposes of revenue, and for the benefit of the public; and undoubtedly the practice of settling these *julkurs*, even in tidal navigable rivers, has existed in several parts of Bengal for a great many years. I have ascertained this fact by a reference to certain papers for the perusal of which I am indebted to the courtesy of the Board of Revenue.

And it is also undoubtedly a fact that the grantees of these *julkur* rights have, for a long series of years, enjoyed the profits of them to the exclusion of the general public, and have been in the habit of sub-letting them by *ijara* and other leases.

It certainly seems to have been taken for granted in some of the authorities to which I have referred that, in the absence of such exclusive grants by the Crown, the public have always been allowed to fish in tidal navigable rivers without let or hindrance, and it is probable that this may be the case.

I have no doubt, also, that the policy which seems to have been pursued by the Government of Bengal since the year 1868 of making no further settlements of *julkurs* with private persons is a wise and beneficent policy.

But, on the other hand, it would seem very unjust to deprive zamindars of any rights which they may have previously acquired under such settlements.

[445] This first question, therefore, as it seems to me, should be answered in favour of the plaintiffs.

The second question referred to us is—

(2) Whether, in the absence of proof of title by prescription, the rights to such a fishery can be established without proof of a direct grant from the Government?

As to this question I think it sufficient to say that, in the generality of cases, and certainly in the particular cases with which we are now dealing, the right to the fishery cannot be established without proof of a grant from the Government.

The third question is—

(3) Whether, when a *julkur* is granted, which in the boundaries assigned to it in the grant includes waters which are not, and waters which are, part of

an arm of the sea or of a tidal navigable river, such grant should not be held to include the former only, unless it be expressly stated in the grant that the latter also are included?

As to this question it seems to me very difficult to attempt to lay down any such fixed rule as this question suggests.

The grant of a *julkur*, I consider, should be construed like any other grant. There are no special rules of construction, so far as I know, which are applicable to grants of *julkurs*, as distinguished from other grants, and in ascertaining what the boundaries of a *julkur* are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in a tidal navigable river or not, I think we must be guided by the same rules of evidence, which should guide us in ascertaining the nature and extent of any other grant.

Many of these grants of *julkurs* in tidal navigable rivers are very ancient; and, although at the time when the settlements were made, it is probable, that in each case a *potta* was granted by the Government, I believe there are few of such *pottas* in existence at the present time, and the usual mode of proving such grants in the generality of cases is by secondary evidence of the grant itself, and such proof as can be obtained of the user and extent of the rights which were conveyed by it

[446] (4) I think that any payment of rent by the defendants to former *iyaradars* of the fishery would certainly not estop them from disputing the plaintiffs' right. But former payments of rent either to the plaintiffs themselves, or to their predecessors in title, by persons in the defendants' position for the use of the *julkur* right which the plaintiffs claim, would certainly amount in my opinion to strong evidence against those persons of the existence of that right, and of their acquiescence in the plaintiffs' title.

It is now necessary, as the cases with which we are dealing are second appeals, that we should decide them upon this reference, and it seems to me, that we have no good reason for impugning the judgment of the Court below.

The plaintiffs claim to hold an 8-anna share of the *julkur* in question under an *iyara potta* for four years, from 1287 to 1290. This *potta* has been produced and proved.

Then the title of the zamindars to the *julkur* in question is proved to the satisfaction of the lower Courts by certain proceedings of the Collectors of Dacca and Tipperah, which were admitted without objection in the first Court, and which have satisfied both Courts that the *julkur* was settled by Government with the zamindars, and that it includes the waters, in respect of which the plaintiffs claim rent from the defendants. And, lastly, it is found that the defendants have paid rent to the plaintiffs' predecessors in title for the very right in respect of which the present claim is made.

It seems to me that the proceedings in the Collectorate were properly admitted as evidence in the Courts below. I think that any proceedings, showing the existence and the nature of the original grant of the *julkur*, which would be evidence as between the Crown and the zamindars, would also be evidence in these suits, because one main question between the parties to these suits is, what rights the Crown granted to the zamindars. And having regard also to the fact that the question with which we are now dealing is one which affects the right of the public, I consider that evidence of reputation is also admissible, and that the proceedings before the Collector are evidence of reputation

[447] Those proceedings seem to me to be evidence both under s. 13 and s. 42 of the Evidence Act.

The real ground, apparently, upon which these suits were defended in the Courts below, was the supposed disability of the Crown to make settlements of *julkurs* in tidal and navigable waters; and the order of the Board of Revenue of 1868, coupled with the Resolution of the Bengal Government, has been the means of inducing the defendants to contest the plaintiffs' title.

As the defendants have probably been misled by these documents, I think that, although they are wrong in their contention, the appeals should be dismissed without costs.

Prinsep, J. (PIGOT, J., *concurring*) —This reference relates to two sets of cases—one referred by Mr. Justice PIGOT and myself, the other* by Mr. Justice PIGOT and Mr. Justice BEVERLEY. The points submitted for decision are the same in all these cases, although the facts giving rise to them and the evidence are somewhat different.

We are all, I believe, agreed in the answers to be given to many of the questions put to us.

First, that exclusive rights of fishery in tidal navigable rivers can be granted to private individuals by the Crown. In fact, it is clear that this power has occasionally been exercised, and in my official experience I know that in 1859 this power was extensively exercised by the Government of Bengal, but the grants given were generally withdrawn in consequence of opposition made by various zamindars under the permanent settlement.

Second, that rights to such a fishery should be established by proof of a direct grant from Government or by prescription.

Third, that payments by the defendants to former claimants of the *julkur*, or to the plaintiffs for leave to fish in tidal navigable waters, do not preclude the defendants from disputing the plaintiffs' rights therein, but are merely evidence of the existence of such rights to be taken into consideration in determining those rights.

[448] As regards the other point referred, I am of opinion that a grant of a fishery in tidal navigable waters should be express in its terms, and that ordinarily the mere grant of a *julkur* would not be sufficient. From the character of such a grant, which is exceptional, I think that the term *julkur* would not ordinarily include it; for, as I understand that term in its usual acceptation, it is used to apply to inland waters, such as *jheels* or *bheels* or small streams not to arms of the sea, such as are in issue in the suits now before us. Unless, therefore, the boundaries clearly indicate the contrary, I should not be inclined, merely from the use of the term *julkur*, to hold that it included the rights of fishery in tidal navigable waters.

I am not disposed at this stage of the cases to consider the adequacy of evidence on the record to prove these rights. Probably, if objection had been raised at the proper time, the evidence, on which the cases have been decided in favour of the plaintiffs, would not have been admitted, but then the plaintiffs would have had an opportunity of adducing other and better evidence, such as the proceedings at the time of the permanent settlement to which some reference is made in one of the papers on the record. But no such objection was taken, and the cases have gone to trial on that evidence. If it were now held that the evidence was not admissible, and that the plaintiffs had consequently failed to prove the existence of any grant, I should consider that the cases should be re-tried in order that further evidence might be received.

In the case of *Prosunno Coomar Sircar v. Ram Coomar Parooey* (I. L. R., 4 Cal., 53) the judgment of the lower Court was affirmed, as Mr. Justice MARKBY and I agreed with it that the plaintiff has failed on somewhat similar

* Sp. Appr Nos. 54, 245 and 248 of 1883.

evidence to prove the rights of fishery claimed. In the present cases we are asked, under the special circumstances indicated by me, to hold that the evidence adduced is insufficient. I am not prepared to say that it is no evidence at all, although, if I were sitting as a Judge of fact, I should have much hesitation in accepting it as conclusive.

For these reasons I am of opinion that all these appeals should be dismissed.

Appeals dismissed.

NOTES.

[RIGHTS OF FISHERY—

In a Canadian appeal, *Attorney-General for British Columbia v Attorney-General for Canada* (1914) A. C. 183 (where the main question was concerned with the competence of the Provincial Legislature), the Privy Council fully discussed the general nature of such rights. "Fishing rights are the same as in the ordinary case of ownership of a lake or river-bed. The general principle is that fisheries are in their nature more profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum. A fishery may, of course, be severed from the solum, and it then becomes a profit *a prendre in alieno solo* and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription, the fishing rights go with the property in the solum. The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognise it as giving to the owners of lands on the foreshore or within an estuary or elsewhere where the tide flows and reflows, a title to fish in the water over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is *prima facie* in the public (167, 168) * * * The subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike (169) * * * Since the decision of the House of Lords in *Malcolmson v O'Dea*, 10 H. L. C., 593, it has been unquestioned law that since *Magna Charta* no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters can be taken away without competent legislation (an exception is rights from before *Magna Charta*). * * * It will of course be understood that in speaking of this public right of fishing in tidal waters, their Lordships do not refer in any way to fishing by kiddles, weirs or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public but must belong either to the Crown or to some private owner (p. 171, cf 2 Bom., 19)

"* * * So far as the waters are not tidal they are matters of private property. * * * The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and according to English law must have an owner and cannot be vested in the public generally."

The law in India—the provisions of the *Magna Charta* not applying—is that the Crown can grant private rights —(1885) 11 Cal., 434. (1885) 8 Mad., 467, (1894) 22 Cal., 252; (1911) 39 Cal., 53; as regards tidal but non-navigable rivers, see 17 C. W. N., 1108.

Private rights will be extinguished in portions which through change of course are severed from the main stream —12 C.W.N., 559. As regards evidence to establish a private right, see 33 Cal., 1849; 12 C.W.N., 334. In 27 Mad., 551 14 M.L.J., 248, this case was referred to on the point as to ownership of waste]

[449] CRIMINAL MOTION.

The 14th April, 1885.

PRESENT.

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY.

Kamruddin Dai and others.....Petitioners

versus

Sonatun Mandal.....Opposite Party.

*Criminal Procedure Code—Act X of 1882, ss. 367, 424, 426—Judgment,
Contents of.*

A Sessions Judge, after hearing an appeal, gave the following judgment: "It is urged that the evidence is quite untrustworthy, and that the decision should be reversed. The depositions have been gone through, and commented on at considerable length. The Court finds no grounds for interference. The appeal is dismissed." *Held*, that this was not a sufficient compliance with ss. 367 and 424 of Act X of 1882, and that the case should be re-tried.

FOUR persons, who were said to have been the dependants of one Kali Das Rai, were accused by one Sonatun Mandal, with having on the 21st November 1884, in company with some 150 others, unlawfully entered into his house, and with having taken away certain articles therefrom. The reason for the outrage was said to have been the refusal of Sonatun Mandal to give a *kabuhat* in favour of Kali Das Rai.

The accused were tried by the Deputy Magistrate of Narail, and were convicted of rioting under s 147 of the Penal Code, and sentenced to two months' rigorous imprisonment. The prisoners appealed to the Sessions Judge of Jessore on the following grounds:—That the evidence given by the prosecution was unreliable: (1) because nine witnesses were mentioned in the first information as having been eye-witnesses of the alleged occurrence and only one of these persons had been called to give evidence; (2) because the witnesses who were examined were all of them ryots or dependants of one Chunder Kant Rai with whom Kali Das Rai was at feud; and (3) because the alleged outrage was said to have been committed in sight of the bazaar, and at a time when people were going to the *hāt* and not one single independent witness was produced by the prosecution; (4) because [450] the complainant alleged that certain articles of property stolen from his house were found by the Police in the house of the accused, and no attempt was made to substantiate this statement by producing the articles said to have been stolen, (5) because there was no evidence save that of the complainant to show that the accused had ever been asked to give a *kabuhat*; and it had been proved that the complainant was not a ryot of Kali Das Rai; and (6)

* Criminal Motion No 107 of 1885, against the decision of J. McLaughlin, Esq., Sessions Judge of Jessore, dated the 18th March 1885, affirming the decision of Baboo Ananda Chunder Sen, Deputy Magistrate of Narail, dated the 13th February 1885.

because there had been great delay in giving information to the Police of the alleged outrage. The Sessions Judge heard the appeal and gave the following judgment:—

"It is urged that the evidence is quite untrustworthy, and that the decision should be reversed. The depositions have been gone through and commented on at considerable length. The Court finds no ground for interference. The appeal is dismissed."

The prisoners applied to the High Court under the revisional sections of the Code, contending that the Sessions Judge had given no decision, in accordance with ss. 367 and 424 of the Code, on any one of the grounds of appeal, and that for this reason the judgment should be set aside and the appeal re-heard.

Mr. *H. Bell* for the Petitioners.

The Court granted to the petitioners a rule *nisi* calling upon Sonatun Mandal to show cause why the judgment of the Sessions Judge should not be set aside, and why he should not be directed to re-hear the appeal.

When granting this rule, the Court, having regard to the fact that the prisoners were on bail up to the decision of the Sessions Judge, and considering that no proper decision had yet been come to by him, released the prisoners on bail pending the hearing of the rule.

The rule came on for hearing and no one appearing to show cause, Mr. *Bell* (with him Baboo *Jagut Chunder Banerjee*) on behalf of the petitioners, applied that the rule should be made absolute.

The Court (**Pigot** and **O'Kinealy, JJ**) thereupon set aside the judgment of the Sessions Judge, ordered a re-hearing, and released the prisoners on bail pending such re-hearing.

Rule absolute.

NOTES.

[As regards what a judgment should contain, see 19 All., 506; 35 Cal., 138. The following cases contain instances of judgments deemed to be not in accordance with law.—11 Cal., 449; 13 Cal., 110, 15 Bom., 11, 1 Bom., I. R., 225; 22 Cal., 241, 23 Cal., 420, 8 All., 514; 20 Cal., 353.]

[451] ORIGINAL CIVIL.

The 8th April, 1885.

PRESENT :

MR. JUSTICE WILSON AND MR JUSTICE NORRIS.

In the matter of William Hastie, an Insolvent.

Insolvent judgment-debtor—Civil Procedure Code—Act XIV of 1882, ss. 336, 339, 344, 345, 349, 350, 351, 359—Arrest, imprisonment, Meaning of—11 & 12 Vic., c. 21, s. 24—Undue preference—Procedure where two methods of protection are open to the debtor.

A judgment-debtor arrested in execution of a decree for money, who has not, on his committal to jail, expressed his intention of applying to be declared an insolvent under chapter XX of the Code of Civil Procedure, is nevertheless entitled during his imprisonment to make an application for that purpose, and the Court may, under s. 349, pending the hearing of such application, release him on his finding security to appear when called upon.

The word "arrest" in s. 349 should be read as meaning "under detention" or "detained in custody."

In deciding whether or no a payment made to a particular creditor amounts to an unfair preference within the meaning of s. 351 of the Code, the Courts may fairly (where there is no other reason for impeaching the transaction as an unfair preference apart from the provisions of the Insolvent Act), refer to, and be guided by, the provisions of the Insolvent Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings.

Where the Legislature has provided two methods by which a debtor can obtain protection from arrest or other serious consequences, and if one of those methods, in any particular case, turns out to be more favourable to the debtor than the other, the Courts will not deprive him of that advantage.

ON the 12th February 1885, William Hastie was arrested in satisfaction of a decree, obtained against him on appeal by Mary Pigot, for damages and costs in a suit for libel, and on the same day (not having expressed any intention of applying under chapter XX of the Code of Civil Procedure to be declared an insolvent) was committed to the Presidency Jail in Calcutta. On the 9th March 1885, Hastie applied, under the provisions of chapter XX of Act XIV of 1882, (1) to be declared an insolvent, (2) that he might be released and discharged from custody, and (3) for a day to be fixed for the hearing of his application; and that pending such hearing he might be released on his furnishing sufficient security to appear when called upon.

[452] The amount for which he was arrested was Rs. 3,000 damages and Rs. 12,000 costs, and at the time of the above application he set out in his petition that he was possessed of a sum of Rs. 2,254, then in the hands of his agents in Scotland, and a sum of Rs. 500 in the possession of a friend in Calcutta and certain manuscripts and theological books; and stated that, according to an arrangement come to with certain members of his family he had, before coming out to India in 1878, arranged to contribute to the support of his mother and sisters, and had left instructions with his agents to make certain payments in accordance with this arrangement; that these payments were never made, and that on his return to Scotland in 1884, finding that nothing had been paid on his behalf, he had entered into a formal deed (after

consultation with his legal advisers) making over £300 to his mother and sisters. He further stated that his mother and sisters were willing to refund this money if required.

Besides Mary Pigot, there were four other creditors whose claims amounted in all to about Rs. 3,850.

On this application, Mr. Justice WILSON, on the 11th March, acting under s. 349 of the Code, directed Hastie to be released from custody (so far as regarded the commitment issued on the 12th February 1885) on his finding security for his appearance on the 18th March 1885 before the Judge presiding in Insolvency.

On the 18th March 1885, Mr. Pugh on behalf of Mary Pigot, applied before Mr. Justice NORRIS, sitting as Insolvent Commissioner, for an order adjudicating Hastie to have committed an act of insolvency according to the provisions of 11 & 12 Vic., c. 21. Mr. Hill thereupon mentioned to the Court the order of Mr. Justice WILSON, dated the 11th March, which directed Hastie's application under Chapter XX of the Code to be heard before the Judge presiding in the Insolvent Court, and contended that this application ought to be disposed of before that made by Mr. Pugh. Mr. Justice NORRIS, however, considered that it would be better that both the application under the Insolvent Act made by Mr. Pugh, and the application under Chapter XX of the Code, should be heard together before Mr. Justice WILSON and himself on the 25th March, and passed an order to that effect.

[463] On the 20th March Mr. Pugh obtained a rule in the Ordinary Original Civil side of the Court, calling upon Hastie to show cause why the order of the 11th March (so far as it directed his release on his giving security to the satisfaction of the Registrar of the Court) should not be set aside. This rule, and the two other matters ordered on the 18th March to be heard together, came up before Mr. Justice WILSON and Mr. Justice NORRIS on the 25th March; and after some discussion as to the order in which these several matters should be taken, it was decided that the application under chapter XX of the Code should be first heard.

Mr. Hill for the Applicant—The words "a decree for money" in s. 344* of the Code covers a decree for damages for libel, s. 254 refers to decrees for "compensation"; and the marginal note to that section is "decree for money." In this country, where the marginal notes to the sections of an Act are considered and framed by the member who has charge of the Bill, such marginal notes form part of the Act, and may be looked at for the purpose of interpreting it—*Venour v. Sellon* (L. R., 2 Ch. D., 522), *Attorney-General v. The Great Eastern Railway Company* (L. R., 11 Ch. D., 449). [WILSON, J.—A suit for compensation for trespass is shown by illustration (e) of s. 111 of the Code to be considered as a suit for the recovery of money, and therefore the words "a decree for money" will cover one for compensation for libel.] In making Chapter XX of the Civil Procedure Code applicable to the High Court, notwithstanding a special insolvency jurisdiction was already vested in that Court, the Legislature evidently intended to afford further relief to insolvent debtors subject to the special jurisdiction, and the possibility of a

* [Sec. 344.—Any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has

Power to apply for declaration of insolvency. been made in execution of such a decree, may apply in writing to be declared an insolvent.

Any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent.

Every such application shall be made to the District Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody.]

conflict of jurisdiction can afford no ground for refusing an insolvent his discharge under the Code provided he has complied with its requirements. So far as the Code and the Insolvent Act are in *pari materia*, an insolvent is entitled to relief under that Act which gives him the easiest terms, on the general principle that the interpretation of all statutes should be favourable to personal liberty—*Henderson v. Sherborne* [(2 M., & W. 236 (239))]. The distinction between bankrupt-traders and non-trading insolvents has never been abolished, and arguments based on the construction of the bankruptcy laws have no application to statutes for the relief of insolvent debtors. The former were passed for the protection of trade, and were therefore construed for the benefit of creditors and to suppress fraud, the bankrupt being regarded in the light of a criminal. Insolvent Acts on the contrary were for the relief of the individual who was considered to be the victim of misfortune, and they have always been liberally construed in favour of insolvents.

The Acts for relief of insolvent debtors were of three descriptions: the Lords Act, 32 Geo 2, c 28, and its amendments, the Small Debtors Act, 48 Geo. 3, c. 123, and the General Insolvent Act. Under the Lords Act, s 13, a creditor might insist upon a prisoner's detention on agreeing by note under his signature to allow the debtor two shillings and six pence per week, but any irregularity in the agreement entitled the debtor to his discharge—*Rex v. Wilkinson* (7 T. R., 156), *Constantine v. Pugh* (3 B. & P., 184). The Small Debtors Act, 48 Geo. 3, c. 123, provides for the discharge of debtors from imprisonment for small debts on compliance with specified conditions. As to the discharge being compulsory on the Court, notwithstanding that the creditor has on the same day duly brought up the defendant under the compulsory clause of the Lords Act, see *ex parte Kusac* (unrep.) cited in Chitty's Statutes, 1st edition, 589, note (b), *Langdon v. Rossiter* (13 Price, 186), *Wood v. Kelmerdine* (2 Y. & J., 10). Under 1 & 2 Vic., c. 110, (an Act for abolishing arrest on mesne process) the Court had power to refuse to discharge prisoners in certain cases for a specific time. It was no ground for refusing a discharge that a vesting order had been obtained under 1 & 2 Vic., c. 110, s. 36, with which the prisoner had refused to comply, and had in consequence been committed for contempt—*Fuge v. Rogers* (1 D & L., 713); *Chew v. Lye* (5 M. & W., 389); *Hopkins v. Pledger* (1 D. & L., 119), this last is a strong case as showing the construction the Court places on these Acts. It is no objection to a prisoner's discharge under 48 Geo 3, c. 123, that he has been remanded [455] by the Insolvent Court—*Clapperton v. Monteith* (6 M. & G., 909); *Davis v. Curties* [3 Bing. (N. C.) 259]. The superior Courts will not regulate their proceedings as to discharge of insolvents by what has passed in the Insolvent Debtors Court, and therefore it is no ground for opposing his discharge that he had been remanded in that Court for fraud—*Nicholls v. Neilson* (6 Taun., 493). Our application is prior in point of time to the application under the Insolvent Act. The Court is bound to grant a prisoner his discharge unless he is guilty of one of the acts of misconduct specified in s. 351 of the Code—see *Salamat Ali v. Mnaahan* (I. L. R., 4 All., 337).

Mr. Pugh (*contra*)—Under the Small Debtors Act it was incumbent on the Court to discharge the debtor; but the question here is, whether the administration of Hastie's estate is to be taken under the Insolvent Act or the Code. I submit that the last paragraph of s 638 of the Code shows that the jurisdiction of the Insolvent Commissioner is intended to remain unimpaired. Supposing even the two Courts had concurrent jurisdiction, I submit that the Judge in the Insolvent Court has no discretion to decline to exercise his powers.

[WILSON, J.—The words of the other Act are equally obligatory on the Court to act.] Yes; but it is impossible for the two procedures to go on together.

As to whether marginal notes are to be considered part of an Act, see *Sutton v. Sutton* [L. R., 22 Ch. D., 511 (513)], which questions *Venou v. Sellon* (L. R., 2 Ch. D., 522). [WILSON, J.—I don't think it can be argued that in England anything but the Act itself can be considered, the marginal notes and headings to chapters are not to be referred to as part of an Act except where the Act expressly states that the Act is to be divided into heads, then by such enacting words they may be read.] The Legislature had no power to make the provision for insolvent debtors in the Code of Civil Procedure. [WILSON, J.—The *Queen v. Burah* (I. L. R., 4 Cal., 172) decided that the Government of India had power to alter the jurisdiction granted by the English Legislature.]

[456] Mr *Hill* then showed cause against the rule of the 20th March. Under the order of the 11th of March the debtor was released on a condition, and, if the order was beyond the power of the Court, the condition fails, but the fact of his release remains, and has the Court any power, after having once released the debtor, to recommit him? [WILSON, J.—He has never been discharged, it would be analogous to an escape. Section 344 of the Code refers to two matters. (1) a judgment-debtor in arrest, (2), a judgment-debtor imprisoned. Section 349 refers only to the first portion of s. 344.] Any judgment-debtor who is "in custody" is entitled to relief under chapter XX of the Code, whether such custody be that of a gaoler or of a sheriff's officer, no reason can be assigned for limiting the relief under s. 349 to cases in which the custody is of the latter description.

Mr. *Pugh* in support of the rule.—Arrest and imprisonment are two separate matters. Arrest is preliminary to the imprisonment, the words are not interchangeable. The words used in ss 273 and 274 of Act VIII of 1859 are very similar to the words of the present Act, but those sections confine the right to obtain a discharge to a judgment-debtor who has been arrested, the word imprisoned is not used [WILSON, J.—Under s. 336 of Act X of 1882, a judgment-debtor may be arrested and brought up for committal, and if at that stage he elects to give security and undertakes to apply to become an insolvent, he is entitled to his release, therefore, if he does so at that stage, s. 349 would be wholly unnecessary.] I submit that s 349 does not relate to the time when the judgment-debtor has been committed to jail. Section 349 provides for the only three courses which the Court can adopt. the first two of these are not provided for by s. 336, and can only apply when he is under arrest.

The construction which I wish to place upon the section is favoured by a case under the Procedure Code of 1859, viz., in *Smith v. Boggs* (5 B. L. R., App., 21).

Even supposing the order made to be a valid one, the debtor is not entitled to his discharge, as the payment of £300 to his family under the circumstance in which it was made, amounts to an unfair preference to some of his creditors under s. 351 of the Code.

[457] On the 8th April the following **Judgments** were delivered:—

Norris, J.—The facts of this case are as follows:—On the 12th February 1885, the defendant was arrested under a warrant to satisfy the plaintiff in the sum of Rs. 3,000 as damages, and Rs. 12,000 costs under a decree dated 16th April 1884.

The defendant was brought before a Judge on his arrest when, in compliance with the provisions of s. 336 of the Code of Civil Procedure, he was

informed that he might apply under Chapter XX of the Civil Procedure Code to be declared an insolvent, he did not express his intention so to do, and was, therefore, committed to prison.

On the 11th of March, the defendant, being still in prison, presented a petition to be declared an insolvent under Chapter XX. The petition complied with all the requirements of ss. 344, 345, and 346, and, at the conclusion thereof, the defendant prayed that, pending the hearing of the petition, he might be released from custody on his furnishing proper and sufficient security to the satisfaction of the Registrar to appear when called upon. Upon this petition an order was made for the defendant's release from custody upon his giving security, in a sum equal to the amount of the debt and costs payable under the decree, to the satisfaction of the Registrar for his appearance before the Judge presiding in the Insolvency Court on the 18th March, and on any other day when called upon. A rule was subsequently obtained, calling upon the defendant to show cause why the order of the 11th March, so far as it directed his release on his giving security to the satisfaction of the Registrar, should not be set aside.

The rule was argued on 25th March before WILSON, J., and myself, Mr. Hill showing cause, and Mr. Pugh supporting it, and at the conclusion of the arguments we took time to consider our judgment. Upon the best consideration I have been able to give to the case, I am of opinion that the rule should be discharged. The order of 11th March purported to be made under s. 349 of the Civil Procedure Code, which says "Where the judgment-debtor is under arrest, the Court may, pending the hearing under s. 350, order him to be immediately committed to jail, or leave him in the custody of the officer to whom the [458] service of the warrant was entrusted, or release him on his furnishing sufficient security that he will appear when called upon."

The question to be determined is, was the defendant under arrest within the meaning of s. 349 when the order was made? I am of opinion that he was.

It is very difficult to define with any exactness the distinction between arrest and imprisonment.

Arrest is defined in Wharton's Law Lexicon as "the restraining of the liberty of a man's person in order to compel obedience to the order of a Court of Justice, or to prevent the commission of a crime, or to ensure that a person charged or suspected of a crime, may be forthcoming to answer it."

"Imprisonment" is defined as "the restraint of man's liberty under the custody of another."

No doubt the words "arrest" and "imprisonment" are not used as interchangeable in the Code. Chapter XIX is headed "of the execution of decrees," and consists of eight parts or divisions, the last of which is (I) and is headed "of arrest and imprisonment." Section 336 says, "A judgment-debtor may be arrested in execution of a decree at any hour and upon any day, and shall, as soon as practicable, be brought before the Court, and his imprisonment," which I take to mean is imprisonment under s. 342, "may be," in a certain jail. Sub-section (a) of s. 336 lays certain limitations on the officer making the "arrest." Sub-section (b) directs the officer making the "arrest" to release the judgment-debtor if he pays the amount of the decree and the costs of the arrest, and directs that the Court before whom the judgment-debtor is brought shall release him from arrest if he expresses his intention to apply under chapter XX to be declared an insolvent, and furnishes sufficient security to appear when called upon, and to make such application within one month.

Section 337 says: "Any warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed." In s. 339 the distinction between arrest

and imprisonment is very clearly recognized. It provides that "no judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such a sum, as having regard to the [459] scale so fixed, the Judge thinks sufficient for the subsistence of the judgment-debtor from his arrest until he can be brought before the Court; when a judgment-debtor is committed to jail in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to." In these sections the arrest is treated as preliminary to the imprisonment, the imprisonment as the result of the arrest.

I do not think, however, that we ought to place so limited a construction upon the word "arrest" in s 349. I think the words "under arrest" should be read as meaning "under detention," or "detained in custody"

The consequences of not so reading them would be most extraordinary. It would follow that, whilst a judgment-debtor who, upon being brought before a Judge, expresses his intention to apply to be declared an insolvent under Chapter XX, and furnishes the necessary security, shall be entitled to his release as a matter of right under s 336, and, whilst a judgment-debtor who, in the interval between his arrest and his being brought before the Court, has prepared an application as provided by ss 344, 345 and 346, may be released upon his furnishing sufficient security to appear when called upon, a judgment-debtor once committed to prison must remain there until discharged upon the happening of one of the cases provided for under s. 341. I cannot believe that it was the intention of the Legislature to say to a judgment-debtor: "If you do not express your intention to apply to be made an insolvent under Chapter XX when you are first brought up, or if you do not make your application in the prescribed manner when you are so brought up, and if you afterwards change your mind, and are desirous of taking the benefit of the Act, you shall pay as penalty for your obstinacy a residence in jail until you are declared an insolvent."

Wilson, J.—I am of the same opinion, and I have very little to add.

The question is as to the meaning of the words "under arrest" in s 349.

Undoubtedly, in this part of the Code the words arrest and imprisonment are used several times to express different things, though, in itself, the word arrest is quite wide enough to cover [460] all that imprisonment covers. Again, of the three alternatives mentioned in s. 349, some at least are only applicable to the case of a man not yet committed, though effect may perhaps be given to the whole of the section by holding that such of those alternatives as may be applicable under the circumstances of each case should be adopted.

These are the considerations in favour of the narrower construction of the words under arrest; but there are many considerations in favour of the wider construction.

In the first place, according to the narrower construction, the section can apply at one stage only, when a man has been arrested and is brought up for committal, but has not yet been committed. Such was held to be the construction of the former Act in the case of *Smith v Boggs* (5 B. L. R., App., 21). But that decision was under an Act, which in plain terms declared the law to be as there laid down. In the present Act, that plain language has been abandoned, and only the words "under arrest" substituted.

In the second place, if the narrower construction be adopted, and the section expresses only the power of the Court before which a prisoner is brought up to be committed, then the provision is out of place, it ought to occur in the previous chapter of the Code.

Thirdly, according to this construction, the subject has already been dealt with, and completely dealt with in s. 336.

In the fourth place, if the provision in question applies only where a prisoner has been brought up, but is not yet committed, it can obviously be exercised only by the committing Court.

But the power given by the section is part of the insolvency jurisdiction conferred only upon High Courts and District Courts. The section, therefore, applies only in cases of committals by one or other of these latter Courts, so that in the large majority of cases it is inoperative. This is plain, because in every case of a person brought up before any Court other than those mentioned, that Court must either commit him or release him, so that he can never afterwards before the Insolvency Court be under arrest in the narrower sense of the term.

Lastly, no possible reason has been suggested which could have [461] led the Legislature intentionally to limit the scope of the section in the way contended for.

The result is, that in my judgment the construction of the section is at least doubtful, and that the arguments in favour of the wider construction are as strong as those in favour of the narrower. That being so, and the section being found in a chapter for the relief of insolvent debtors, I think it clear, in accordance with the settled rules of construction, that we are bound to adopt that interpretation which is in most favour of liberty.

On these grounds I agree in discharging the rule.

There remains the principal matter to be dealt with. This is an application under Chapter XX of the Civil Procedure Code by Mr. Hastie, in which he asks to be declared an insolvent. His petition has complied with all the requirements of the Act, and only one ground has been suggested upon which we could be asked to deny him the privilege he claims.

One of the circumstances mentioned in s. 351¹ about which the Court must be satisfied, is this: that the debtor has not given unfair preference to any of his creditors. The applicant in his petition shows that during last summer, when in Scotland, he paid certain sums of money, not very considerable in amount, to certain members of his family, who, he states, were his creditors.

It is suggested that that was an unfair preference within the meaning of s. 351. In deciding whether or not it was an unfair preference for the purposes of the present application, we may fairly refer to the provisions of the Insolvent Act, as affording some guide in the present Code. That Act treats a transaction as an undue preference only when it has occurred within a limited time before the insolvency proceedings. The payment in question was made

* [Sec. 351 —If the Court is satisfied—(a) that the statements in the application are substantially true,

Declaration of insolvency and appointment of receiver. (b) that the judgment-debtor has not, with intent to defraud his creditors, concealed, transferred or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time;

(c) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property;

(d) that he has not committed any other act of bad faith regarding the matter of the application, the Court may declare him to be an insolvent, and may also, if it thinks fit, make an order appointing a receiver of his property, or if it does not appoint such receiver, may discharge the insolvent

If the Court is not so satisfied, it shall make an order rejecting the application.]

before the time limited by the Insolvent Act, so that there has been no undue preference if we are to follow the Insolvent Act.

Then, is there any reason why this transaction should be impeached as an unfair preference, apart from the provisions of the insolvent Act? I think not.

Looking at the place where the insolvent was at the time, and the circumstances of the case, I think it would be straining [462] matters very much to say that, at the time Mr Hastie made these payments, he contemplated insolvency.

Therefore, I do not think there is in this circumstance any reason why we should deny him the benefit of the insolvency provisions of the Act.

Then it is said that, even if his case were such as to entitle him *prima facie* to the benefit of those provisions, we should stay our hand and deny him that benefit, because one of his creditors has applied to the Insolvent Court, and obtained an order of adjudication. I do not think that is so.

If the Legislature has provided two methods by which the debtor can obtain protection from arrest and other serious consequences; and if one of those methods, in any particular case, turns out to be more favourable to the debtor than the other, we have no right to deprive him of that advantage. I think, therefore, that Mr. Hastie is entitled to be declared an insolvent under the provisions of Chapter XX of the Civil Procedure Code, and we accordingly declare him an insolvent and appoint the Official Assignee, the Receiver of his estate. The security given for Mr Hastie's appearance will, of course, remain in force till the matter is disposed.

Norris, J.— I am of the same opinion. I think that if the payments to the ladies really amount to unfair preference, the Official Assignee may bring an action, if so advised, for the £300.

Application allowed and rule discharged.

Attorney for Hastie · Bahoo G C Chunder.

Attorney for Mary Pigot Bahoo M. Sen & Co.

NOTES.

[A different view was held as regards the meaning of the word 'arrest' in 12 Bom. 46 (48), the terms of the Provincial Insolvency Act, 1907, are now wide enough to include such a case as this

As regards the possession of the insolvent this case was distinguished in (1911) 22 M. L. J. 441 11 M. L. T. 203 15 I. C. 371. The only right the lender reserved to himself was a right of keeping the keys at night when the premises were shut up and he had not even then any right to intermeddle with the stock until the happening of a breach. This was held by WALLIS, J. to be not a real but a sham possession.]

[463] PRIVY COUNCIL.

The 2nd, 4th, 5th, 9th, and 10th December, 1884, and the 14th February, 1885.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE.

Fanindra Deb Raikat.....Plaintiff

versus

Rajeswar Das and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Custom—Adoption—Construction of gift—Burden of proof—Custom
not allowing adoption, governing a family not subject to Hindu
law—Invalidity of gift made to a person as being the
adopted son of donor, where the adoption failed.*

A family in Bengal, affecting to be Hindu, but not Hindu by descent and origin, may be governed by customs at variance with Hindu law. A family took its origin in a tribe not Hindu, and its customs differed from Hindu customs. The question having arisen whether succession in virtue of adoption was consistent with, or was contrary to, the customs of the family,

Held, first, that, with regard to the origin and history of the family, the point for inquiry was not whether the general Hindu law was, in this case, modified by a family custom forbidding adoption, but was whether, with respect to inheritance, the family was governed by Hindu law, or by customs not allowing an adopted son to inherit; secondly, upon the evidence that this family had retained, and was governed by, customs at variance with Hindu law, and that, whatever Hindu customs might have been introduced into it, the custom of succession upon adoption had not. Whether, if the family had been shown to be Hindu, out and out, save only special customs, the evidence would have been sufficient to prove a special custom was not the question.

Held, also, in reference to the burden of proof that, in a suit brought to maintain the plaintiff's title as heir against a defendant, who relied upon an adoption as defeating the title of the plaintiff, the burden of proving the adoption to be permitted by the family custom was upon those who alleged it to be so, whereas, if the family had been generally governed by Hindu law, the onus would have been on those who alleged the exclusion of the right to adopt. *Rajah Bishnath Singh v Ram Charn Majmoadar* (S. D. A., 1850, p. 20) referred to, as showing that even in a Hindu family there might be a custom which barred inheritance by adoption.

Held, upon the true construction of an *angikar-patro*, whereby an estate was given to the donee in virtue of his being "adopted son" of the donor, that the gift did not take effect, inasmuch as the adoption was invalid.

[463] The distinction between what is description only, and what is the reason or motive for a gift or bequest, may often be fine: but it must be drawn from a consideration of the language and the surrounding circumstances. *Nidhoomoni Debja v. Saroda Pershad Mookerjee* (L. R. 3 I. A. 253) distinguished.

APPEAL from a decree (24th June 1881) of the High Court, reversing a decree (11th November 1879) of the District Judge of Rangpur.

The decree of the District Judge in the suit out of which this appeal arose, declared the appellant to be entitled to the estate of the Raikat of Baikantpur, also termed in the record the Raj, and the Raji, of Jalpigori; and awarded him

possession with mesne profits from the death of Jogendra Deb Raikat, who died in 1878. The reversal of this decree by the High Court led to the present appeal.

The Baikantpur family, the head of which bore the title of Raikat, belonged originally to the Koch tribe on the north-east frontier of Bengal (where the Rangpur district borders upon independent territory), and was not of Hindu origin. At the commencement of this century, upon the death of Jainti Deb, who is said to have been the twelfth Raikat of Baikantpur, his son and brother disputed the succession, to which, in the end, Sarbha Deb, the son, was declared by the Sadr Diwani Adalat, on the 19th January 1818, to be entitled. Upon the death of Sarbha Deb in 1848, disputes arose among his sons, of whom the present appellant was one, resulting in a decision of the same Sadr Court, dated 8th February 1853, declaring the right of Makarand Deb, as the eldest of the legitimate sons then claiming the family estates, to succeed according to family custom.

After the death of Makarand Deb, whose two sons, Chandra Sekhar Deb and Jogendra Deb, successively obtained the inheritance, the present appellant, in 1866, sued Jogendra Deb, his nephew, claiming the succession on the ground that he was born of a superior wife, married by Sarbha Deb in the *Brahma* form. This suit, after an order of remand by the High Court, had been affirmed by the Privy Council on the 9th December 1871, was dismissed in 1874, the conclusion being that both parties were the offspring of marriages termed *gandharba*. In March [466] 1878 Jogendra Deb Raikat died without issue. After his death the question arose, which was the principal one on this appeal, whether he had made a valid adoption of the minor respondent, Rajeswar Das, also called Jogendra Deb Raikat, the half-brother by birth of Rani Jagdeswari, one of the wives of Jogendra Deb, deceased, who represented the minor on this record.

The plaintiff set forth his title by descent from Sarbha Deb Raikat, and alleged the adoption to be invalid by the custom of the Baikantpur family, and the *shastras*. He also denied the authority of the deceased Raikat to alienate the family estate. In their written statement the defendants denied the plaintiff's right, asserting that there were no customs of the family rendering invalid the adoption of a son, and maintaining the rights of Rajeswar Das, as duly adopted, and as having received the estates by the effect of the *angikar-patro*. They alleged that the adoption had taken place in May 1873, had been made public on 7th November 1877, and had been followed by the usual ceremonies, the *angikar-patro*, executed in 1877, operating as a testamentary instrument.

The District Judge, Mr. H. Beveridge, made a decree in the appellant's favour to the effect above stated. He found that the Baikantpur family were not originally Hindus; that they had gradually adopted Hindu customs; and that, even in 1848, the then Raikat could not properly be called a Hindu, or the general Hindu law be taken as furnishing the rule regulating the succession to the estates of the family which had many usages and habits inconsistent therewith, that adoption was contrary to those usages, that, irrespectively of the question of custom, as affecting the alleged adoption of Rajeswar Das, it was established upon the evidence that the respondent, Rajeswar Das, was the only son of his natural father; that he was not given in adoption by his father in 1280, as had been alleged on his behalf; and that in 1284, when Jogendra Deb Raikat proclaimed him as his adopted son, he was an orphan whom no one had authority to give in adoption. Having found that the adoption was invalid, the Judge found and held that by family custom the estates appurtenant to the Raj were inalienable, and that, even if alienable, there had been no

alienation to the respondent [466] Rajeswar independently of his adoption, and consequently that the adoption failing, all the dispositions dependent thereon fell with it.

On appeal a decree of a Divisional Bench of the High Court (MORRIS and TOTTENHAM, JJ.) set aside the decree of the District Judge and dismissed the appellant's suit.

In their judgment the Judges of the High Court observed that, if the plaintiff had succeeded in proving the custom which he set up, whereby adoption was prohibited in the family, he, as being admittedly the next legal heir to Jogendra Deb Raikat, would have been entitled to a decree for the estate without further inquiry into the merits of the adoption. Also, if, without proving the custom, he could show that the adoption of the defendant was otherwise invalid, he would be entitled to a decree. Both these propositions were, however, subject to this—that the defendant should not be found entitled to retain possession under the *angikar-patro*. The Judges then proceeded to consider the evidence which had been adduced in support of the custom prohibiting adoption, and decided that the plaintiff had failed to prove that there was in the family any custom, which the Court could recognize, by which a Raikat of Baikantpur was prohibited from adopting a son. The Judges next took up the question, irrespectively of family custom prohibiting adoption, whether the adoption had been validly made as an adoption, and having observed as follows.—

“If the matter had to be determined merely upon the oral evidence and upon our belief or disbelief of the statements made on particular points, we should have much hesitation in coming to a conclusion opposite to that of the Court which had the witnesses before it, and which has manifestly taken very great pains to determine on which side the truth lay.” They then proceeded to state certain matters which, in their opinion, “leaving aside the details of the evidence,” satisfied them that the adoption was not invalid on either of the grounds urged against its validity irrespectively of family customs and continued by adverting to part of the evidence which had affected the question whether the adoption was, or was not, ineffective, by reason of Rajeswar Das being, or not being, the only son of his natural father, Rangu Barua, and on this the Judges said :—

“[467] We find no reason to disbelieve the broad fact that Rangu Barua had more than one son, though we do not accept as true all that has been put forward in support of that fact. As to the giving of the boy by his father in 1280, his having done so may, apart from any direct evidence, be assumed from the undoubted fact that the boy was brought to the *raj-bari* in that year, and remained there, and whether there was any formal gift or not at that time, we are quite satisfied that in 1284 the boy's mother did give him; and the gift by her, after her husband's death, would, we believe, be valid according to Hindu law. See *Dattaka Chandrika*, s. I, para. 31.

“Our findings, therefore, are that adoption is not forbidden by any valid custom prevailing in this family, and that the adoption of the minor defendant was a valid one by law, and these findings are sufficient to dispose of the case.

“It is, therefore, not absolutely necessary that we should deal with the question whether the Raikats are incompetent to alienate the estate by will, and whether, apart from his adoption, the defendant would be entitled to take the estate by virtue of the *angikar-patro* executed by Jogendra Deb. But we think it right to express our opinion on these matters also. The family being, as we have seen, governed by Hindu law, the power to dispose of the estate by will must admittedly exist, unless it is stopped by a valid custom. The

"lower Court held that the same evidence which, in its opinion, established the alleged custom against adoption, equally prevailed against the power to alienate. In our opinion that evidence fails equally in regard to both the alleged customs, and therefore the power to alienate must be held to exist. As to the *angikar-patro* it has been contended that is not a testamentary deed, but inasmuch as probate has been granted in respect of it, such a contention cannot be maintained until the probate is withdrawn. We must hold that this document operates as a will, and we have no doubt that the defendant is clearly designated therein as the person whom Jogendra Deb deliberately intended to appoint as his successor to the estate

"We reverse the judgment of the lower Court, and dismiss the suit with costs of both Courts."

[468] On this appeal—

Mr. T. H. Cowie, Q.C., and Mr. J. T. Woodroffe, for the Appellant, contended that the High Court should have maintained the decision of the District Judge. They referred, for an account of the tribal origin and history of the family, to "A Statistical Account of Bengal," by W. W. Hunter, Vol. X, pp. 402 *et seq.* Although the Baikantpur family had nominally come under Brahminism, they had, at the same time, retained customs inconsistent with their being classed as Hindus, not being Hindus by race, and some of their customs were at variance with Hindu institutions. Among the customs of the family, either admitted or proved, were (1) the impartibility of the family estate; (2) the existence of forms of marriage—one, the *Brahma*, a superior marriage, and the other, the *gandharba*, an inferior form of marriage, (3) the customary regulation of the succession to the family estate, where there were sons of equal rank sprung from marriages of equal degree, the elder alone succeeding, (4) failing sons, the eldest male agnate in the senior male line succeeded, females being, by custom, excluded by collateral males, as also were males deriving heirship through females. It was also contended that among the customs relating to inheritance in this family was one to the effect that adoption gave no title to succeed. And with regard to the position of this family outside the Hindu system, the burden of proving that the Hindu law of adoption had been accepted by them, so as to enable a sonless Raikat to defeat the claim of the nearest male agnate, was laid upon the respondents—a burden which they had not discharged. In *Pertaub Deb v. Surrup Deb Raikat* (2 Sel. Rep., S. D. A., 246) the Sadr Diwani Adalat referred to the usage of the family as establishing the right of Sarbha Deb, father of the present appellant, coupled with the consent of Pertaub Deb. Upon the whole evidence, including the statement of Sarbha Deb in that suit, the custom of the family to exclude adoptions, and also testamentary dispositions of the family estate, was established. This custom was established, even on the assumption (which, however, could only be made for the sake of argument) that the burden of proof was upon [469] the plaintiff to prove that the Raikat's inheritance would not, by the law of succession customary in this family, devolve upon an adopted son. The evidence showed that the nearest male agnate could not, by the act of the Raikat for the time being, be deprived of his right to succeed. It was, however, for the defence, when once customs inconsistent with the existence of a right to alter the line of succession by means of an adoption had been shown to prevail in this family, to show that adoption and its consequent effects were permitted by the family customs.

The defence had in no way displaced the plaintiff's case.

It was also contended that the adoption had not been shown to be valid and effective as an adoption, assuming that in this family there could be one. A mere agreement, between the adoptive father and the natural mother of the

* See Menu (Sir W. Jones' translation), Chap. III, paras. 26 and 32.

boy to be adopted, would not constitute an adoption. There was evidence, moreover, that Rajeswar was an only son at the date of the alleged adoption, so that any giving of him in adoption would have been invalid by Hindu law.

As to this *Raja Upendra Lal Roy v. Srimati Rani Prasannamayee* (1 B. L. R., 221) was cited. [It was admitted, for the respondent, that the adoption of an only son would, according to the Bengal authorities, be contrary to the Hindu law.]

Lastly, the *angikar-patro*, relied on by the respondents, was inoperative, and proved to be so, upon the establishment of the custom which showed that Rajeswar Das was not in the character of an adopted son. It did not purport to confer the right to the estate upon him irrespectively of his having been adopted. There was no gift, or bequest, to him, except so far as he filled the character of an adopted son. The adoption having failed, with it also failed all that had been alleged to constitute the title of Rajeswar Das.

By their Lordships' direction, counsel for the respondent addressed their argument to the two following questions, viz. : 1st, whether, by any law or usage governing this family, the respondent could have been validly adopted, and have become entitled to succeed in preference to the appellant; 2ndly, if there [470] were no such law or usage, whether the *angikar-patro* operated so as to affect the succession.

Mr. J. F. Leith, Q.C., and Mr. R. V. Doyne, for the Respondents, contended that the onus of showing that no power to adopt existed in this family was upon the plaintiff, and had not been discharged by him. The family had come under the system of Hindu law and usage, which did not exclude the operation of family custom or *kulachar*, but required proof of it in the particular case, the onus being on those who alleged such a family custom to prove its existence. This family had been independent of Mahomedan rule on the border in times before the authority of the East India Company was established, when possession had probably been less a matter of law than of the stronger arm. Afterwards the family came alike under the influence of the Brahminical law and under the jurisdiction of the Courts established by the British Power. Thenceforward the course of descent had, like that of many other ancient zamindari, been regulated by the general principles, though not by the special texts of Hindu law, which admitted the force and effect of special customs. The latter were part of the Hindu system.

In the absence, however, of distinct proof of a custom negating the rights of an adopted son, it was to be understood that adoption, as an essential part of Hindu law, must prevail. That it should not prevail was, in itself, contrary to Hinduism. It was not uncommon in the case of an impartible zamindari that the law of primogeniture, modified by the preference accorded to the sons of a noble wife, married by the *Brahma* form, or modified by some other customary rule, should prevail. That would not afford evidence of a family being outside Hinduism; and the judgment in *Pertab Deb v. Surrup Deb Raikat* (2 Sel. Rep., S. D. A., 249), did no more than indicate such customs as could be recognized, consistently with the general application of Hindu law. This family, moreover, had shown an intention to abide by the Hindu law. Reference was made to the judgment in *Abraham v. Abraham* (9 Moo. I. A., 195). The result that followed was that the Hindu law regulated [471] the family, so far that it was to be presumed that the right of adoption, as a recognized part of that law, existed, until proof of the contrary, in other words, until proof of the special custom was given.

Whether or not the adoption had been in all respects completed (and it was argued that for all purposes it was sufficiently effected), the respondent was, at all events, entitled to take the estate under the terms of the *angikar-patro*, which had been duly executed under the general testamentary powers of a Hindu proprietor. In connection with this, reference was made to *Nadhoomoni Debya v. Saroda Pershad Mookerjee* (L. R., 3 I. A., 253), *Boddington v. Clariat* (L. R., 22 Ch. D., 597). Reference was also made, on the question as to the proof of custom, to *Sudder Board of Revenue v. Sahib Perhlad Sein* (S. D. A. Rep. 1846, p. 334), *Rajah Bishnath Sing v. Ram Charn Majmoadar* (S. D. A. Rep. 1850, p. 20); *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (14 Moo. I. A., 570); *Narain Khootia v. Lokenath Khootia* (I. L. R., 7 Cal., 461); *Itaja Udaya Aditya Deb v. Jadub Lal Aditya Deb* (I. L. R., 8 Cal., 199).

Counsel for the appellant were not called upon to reply.

Their Lordships' **Judgment** was delivered on a subsequent day (February 14th) by

Sir R. Couch.—The suit which is the subject of this appeal was brought to recover a large estate called Baikantpur, situated on the north-east frontier of Bengal, in the district of Jalpigori. The largest landed estates in this district are those of Patgram and Boda, belonging to the Raja of Kuch Behar, and this estate, which became the property of a branch of the Kuch Behar family. It is not included in any Sarkar or Muhammadan division of the country, having been only added to Bengal since the British assumed the government of the country. From Dr. W. W. Hunter's Statistical Account of Bengal, it appears that Raja Nilambhur of Kamatapur (now a ruin within the present State of Kuch Behar) was the last independent Hindu ruler of the country, and that after his defeat and capture by Husain Shah, one of the Afghan Kings of Gaur in the beginning of the six-
[472]teenth century, anarchy prevailed for several years, and the land was overrun by wild tribes from the north-east. Among these the Koch came to the front, and founded the Kuch Behar dynasty. Of the Kochs, Dr. Hunter says, in the Statistical Account of Darjiling "This aboriginal tribe first rose into power about the close of the fifteenth or the commencement of the sixteenth century under one Hajo, who founded the Koch kingdom on the ruins of the ancient Hindu kingdom of Kamrup. . . . The Koch raj extended from 88° to 93½° east longitude, and from 25° to 27° north latitude, Kuch Behar being its metropolis, and its limits being co-equal with the famous yet obscure Kamrup of the Tantras. Brahmanism was introduced among the Kochs in the time of Visu, Hajo's grandson, who, together with his officers and all the people of condition, apostatized to Hinduism. A divine ancestry for the Chief was manufactured by the Brahmins. The converts abandoned the despised name of Koch and took that of Rajbansi, literally, 'of the royal kindred,' and the name of the country was altered to Behar." From the account of their manners and customs given by Dr. Hunter, it appears that they differ from their Hindu neighbours in various respects. Of the Baikantpur family, Dr. Hunter says that "Sisu, grandson in the female line of Hajo, is the original ancestor of the family. It is generally asserted that he was the son of Jira, the daughter of Hajo, but the family themselves allege that he, as well as Visu (another grandson of Hajo, and the first of the Kuch Behar Rajas who was converted to Hinduism), was not the son of Jira, but of her sister Hira, and that his father was the god Siva, on which account all the members of the family assume the name of Deo, and return no salute that is made to them by any person. Sisu, on the conversion of Visu to Hinduism, took the title of Sib-kumar, or young

"Siva He was appointed hereditary Raikat, or the second person of rank in the Koch kingdom, and received the Baikantpur estate as an appanage."

The plaint of the appellant (the plaintiff in the suit) states that Jogendra Deb Raikat, the possessor of the estate, died on the 10th of March 1878, without leaving any son of his body, and "therefore, according to the immemorial family custom and [473] practice descending from generation to generation in our Raikat family of Baikantpur and the *shastras*, I have acquired an absolute title in all the properties left by him, and I am entitled to recover possession thereof." It then refers to a title by adoption and under a will and agreement (*angikar-patro*) made by Jogendra Deb, which had been set up on behalf of Rajeswar Das, who was then a minor, but has since become of age and is the respondent, by Rani Jagdeswari Debi, the widow of Jogendra Deb. She was sued as the guardian of Rajeswar and executrix. This is followed by a paragraph which says "According to the *kulachar* (family custom) and custom prevailing in our Raikat family from very ancient times and descending from generation to generation, no one among the Raikats is competent to adopt or to alter the line of succession thereby, or by will or any other deed to give away the kingdom and the *raj-guddi*. According to the said immemorial *kulachar*, no female also is competent to hold property and the *guddi*. Consequently the said Jogendra Deb Raikat is not, contrary to the above *kulachar* and custom, empowered to receive in adoption any one competent to hold the property, or to give or alienate the *raj* and the kingdom to the said adopted son or to any other person, either by will or agreement (*angikar patro*), or by any other deed. In fact, the above will and agreement (*angikar-patro*) are contrary to the prevailing family custom, the law, and the Hindu *shastras*, and are, indeed, not true." It was contended by the counsel for the respondent, in the argument of this appeal, that, by the references in the plaint to the *shastras*, the plaintiff admitted that the family was governed by the Hindu law except where it is modified by custom. Their Lordships do not so construe the plaint. They think the meaning is to insist upon the family custom as being allowed by the *shastras* to govern the family. The materiality of this contention will appear when the evidence and the judgments of the lower Courts come to be noticed.

Rani Jagdeswari Debi, the then defendant, as guardian, by her written statement, did not dispute the heirship of the plaintiff failing the adoption and the *angikar-patro*, but alleged that Jogendra Deb died after receiving Rajeswar in adoption, and [474] making over to him all the property, moveable and immoveable, which belonged to Jogendra, and were in his possession, by means of an *angikar-patro* (agreement) of the 23rd Kartick 1284 B S. (7th November 1877), and so according to the Hindu law in force and the clear purport of the *angikar-patro* the plaintiff had no right to the property claimed. The statement contained other matter in support of this contention, and also asserted that Jogendra Deb, on the 28th Chait 1278 (9th of April 1872), gave permission to his wives to adopt another son if Rajeswar was not living at the time of his death, and therefore the plaintiff's claim for possession ought to be dismissed.

The issues framed by the Court were.—

- (1) Is adoption contrary to the custom of the Jalpigori family?
- (2) Was Rajeswar's adoption valid, i.e., was he an only son or not?
- (3) Had Raja Jogendra power to make away the property of the *raj* by will, or deed, or gift?

(4) Can the power of adoption conferred by the Raja on his widows be exercised by them, and can a son adopted by virtue of that power succeed to the property ?

(5) Can the widows hold the property for the adopted son ?

(6) Is the *angikar-patro* of 22nd Kartick 1284 a valid document, and one which confers any right on Rajeswar ?

At the instance of the defendant this issue was added —

Can the plaintiff inherit during the lifetime of Jogendra's widows, and can he now sue ; also can plaintiff's claim take effect against Sharba Deb's self-acquired property ?

Subsequently, the Court added another issue, namely, if Rajeswar was adopted, was he adopted in 1280 or 1284 B.S. ? The Judge of Rungpur (Mr. Beveridge) before whom the suit came for trial in the first instance, and as on preliminary objections, decided the 4th, 5th, and 7th issues in the plaintiff's favour, and held that he as heir-at-law was entitled to succeed at Jogendra's death if his title were not defeated by the adoption of Rajeswar or by the *angikar-patro* in his favour. A quantity of evidence was then produced on both sides, and on the 11th September 1879, the Judge, in an able and well-considered [476] judgment in which all the material evidence is noticed, decided the 1st, 2nd, 3rd and 6th issues in the plaintiff's favour, and gave him a decree. This was on appeal reversed by the High Court at Calcutta, and the suit was dismissed with costs.

Their Lordships, after hearing the counsel for the appellant, desired the respondents' counsel to address them first upon the questions whether by the law or usage by which this family is governed, it was lawful for Jogendra Deb to adopt a son who would succeed to the estate in preference to the plaintiff ; and if it was not lawful, has the *angikar-patro* any effect upon the succession to the estate. Having heard these questions argued, they have come to a conclusion which makes it unnecessary for them to hear any argument upon the second issue, namely, whether the adoption of Rajeswar was valid.

The first of these questions was raised by the first issue, and the Judge of Rangpur thought that the burden of proof on that issue was upon the plaintiff. After some introductory matter, he says "The plaintiff contends that "there are two more customs, namely, one prohibiting adoption",—the other relates to the alienation of the estate. "The defendants deny the existence of "these two customs. With these remarks I proceed to decide the issue "about adoption, as to which of course the burden is wholly on the plaintiff. "The first mode in which the plaintiff has endeavoured to prove the existence "of the custom is by showing that there never has been an instance of adoption "in the family."

The High Court also thought that the onus was on the plaintiff to prove a custom which prohibited adoption. This appears from the following passages in their judgment. "The claim of the plaintiff rested on the allegation that "by a *kulachar* or old family custom, no adoption could be made by a member "of the Raikat family. . . . If, therefore, the plaintiff could succeed "in proving the custom which he set up by which adoption was prohibited in "the family, he, as being admittedly the next legal heir to Jogendra Deb Raikat, "would be entitled to a decree for the estate without further inquiry into the "merits of the adoption. . . . We find ourselves quite unable to agree "with the lower Court on the main questions raised in the suit viz., [476] "as to the existence of a family custom prohibitive of adoption, and as to "the insufficiency of the adoption made of the defendant." They said they had no doubt that the family is now governed by the Hindu law.

Looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu law is modified by a family custom forbidding adoption, but whether, with respect to inheritance, the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit. The onus of proving that the adoption was lawful was upon the defendant, who relied upon it to defeat the plaintiff's title. If the family was generally governed by Hindu law he might rely upon that, and then the onus of proving a family custom would be on the plaintiff.

The origin of the family has been already mentioned. The estate after twelve successions was, in 1809, in the possession of Sarbha Deb, who had succeeded his father Jayanta. His title was disputed by his uncle Pratap on the ground that, by the family usage, a brother succeeded a brother in preference to surviving sons. In 1811, Pratap brought a suit in the Provincial Court of Moorshedabad against Sarbha, by the name of Surrup Deb, which was decided in 1818 by the Sadr Diwani Adalat in favour of the latter. The case is reported in 2. S. D. A. Rep., 249 (*Pertaub Deb v. Surrup Deb Raikat*, 2 Sel. Rep., S. D. A., 249). The judgment states that the right of the respondent (Sarbha) to the estate was clearly established both by the family usage and by the consent of the appellant. The High Court has referred to this case as showing that the family was treated as one governed by Hindu law, quoting a passage at page 251—"the appellant, moreover, was unable to show by whom "the custom alleged by him so contrary to the *shastras* was introduced into "the family, at what time, and for what reasons," as the ground upon which the suit was dismissed. This passage immediately precedes the judgment, and seems to be part of the statement of the case. It may have been the contention of the respondent, but the ground of the decision is stated to be the family usage and consent of the appellant. In January 1848, Sarbha died and Dr. Campbell, the then Superintendent [477] of Darjiling, having on the 14th of January received information of his death from his two dewans, and that it was probable there would be a disturbance in the household among his sons, went to Jalpigori, arriving there on the 15th. In his report to the Government of Bengal, dated the 20th January 1848, which is in the evidence in this suit, he says:—

"I shall now record the information I have gained on the spot, under the most favourable circumstances for doing so, of the state of the Raja's family, etc. It may facilitate decisions regarding it, obviate litigation to the ruin of the family, and tend to early settlement of the mode of properly managing the estate—a point of very great consequence to the quiet of the frontier, and to the satisfactory performance of my own duties. The Raja's territory forms the northern part of Rangpur. It has a frontier along Bhutan of about 50 miles, and an equal extent with Sikkim. Of both borders I am in charge, and I have concurrent powers as Magistrate in the whole of it."

"The Raja could not properly be called a Hindu, although ambitious of being considered within the privileged pale. His family is of the Koch tribe, now however designated Rajbunisia, and affecting to be equal to Chhettris, although retaining many usages and habits quite irreconcilable to their pretensions. Probably Hindu law would not be the just medium for a decision on this succession, and I find that the election of the boy has the approval of many people here as a legitimate succession. This may have referred to some previous case in the family, but the formal installation, and the performance of the obsequies by the boy, are considered to raise his claims above all the others. Under the Hindu law I believe that all the sons would be considered illegitimate, in which case the senior Rani might secure a life-tenure of the *raj*."

The Raja left seven sons, and the boy referred to was Rajrajendra Deb, his sixth son. His title was disputed by Makarand, the second and favourite son of Sarbha Deb, who brought an action under Act XIX of 1849, and was put into possession by the Civil Court of Rangpur. This was followed by a long litigation, in which Rajendra claimed the property on the ground that Makarand was illegitimate. It ended in favour of Makarand, who remained in possession till his death in 1853, when he was succeeded by Chunder Shikhur, the elder of his two sons. He died in 1865, and was succeeded by his brother, Jogendra. The report of Dr. Campbell appears to their Lordships to be important evidence of the position of this family, and, in their [478] opinion, it shows that, although they affected to be Hindus, they had retained, and were governed by, family customs which, as regards some matters, were at variance with Hindu law. The evidence of Makarand, given when he was Raikat and was examined with reference to a dispute in another branch of the family, supports this view.

The question to be determined being, therefore, what was the custom of the family with respect to adoption, their Lordships will now notice the evidence upon which they have come to the conclusion, without regarding any burden of proof, that it is not lawful for the Raikat to adopt a son who would succeed to the estate. Before doing so it may be observed that in *Rajah Bishnath Singh v Ram Charn Maymoudar* (S. D. A., 1850, p. 20) the Sadar Court allowed that, even in a Hindu family, there might be a custom which barred inheritance by adoption, and remanded the case for further investigation on that question.

From the report in the 2 S. D. A. Reports, which has been referred to in the suit as containing a correct history of the family, it appears that, of twelve Raikats who successively had possession of the estate prior to Sarbha Deb, three were succeeded by a brother and one by a nephew. Two of them died leaving no sons, one had a son born after his death, and another had a son whose legitimacy was doubtful. Thus, there are two occasions on which, if it was allowed by the custom of the family, it is most probable there would have been an adoption, and one, the case of the posthumous son, where an authority would probably have been given to the widow or widows of the Raikat to adopt a son. There has been no adoption in this family until one which is said to have been made by Chunder Shikhur, who was succeeded by his brother Jogendra. A boy who was named Purno Deb appears to have been taken in adoption by Chunder Shikhur, but no ceremonies were performed. The explanation given by the plaintiff's witnesses is that Chunder Shikhur, who was educated at Calcutta under the care of the Court of Wards, did not know the family customs when he took the boy, but that he afterwards became acquainted with them. The succession of Jogendra is in the plaintiff's favour, whether Chunder Shikhur [479] desisted from completing the adoption, or Purno Deb was adopted and did not claim to succeed to the estate.

The next evidence is a statement by Sarbha Deb. Another branch of the family were the owners of the zamindari of Panga, and, some time before 1840, a suit was brought by Parbut Narain Koei against Karindra Narain and others in the Court of the Principal Sudder Amin of the district, to obtain possession of it. In that suit it was asserted by the plaintiff that adoption was contrary to the custom of the Panga family. Sarbha Deb was asked by the Court to submit a *kyfiut* (answer to questions) as to the customs in his branch of the family. The record of the suit in which the *kyfiut* was filed could not be found, and a copy of the *kyfiut* tendered by the plaintiff was rejected by the Judge of Rangpur on the objection of the defendant that it was a copy of a copy. The evidence of two witnesses of its contents was then received—

Parbati Nath Roy, who was at the time of its submission to the Court employed as assistant to the mokhtars of the Raikat, and Gungadhur Das Bukshi, who then served him as a mohurir. Their evidence was substantially the same. The former said he made a copy of the *kyfiut* before it was filed, to be kept in the mokhtar's *serishta*, which copy had been destroyed when the mokhtar's house was burnt. The latter, who called Sarbha the Raja of Jalpigori, said he wrote the draft at the dictation of the Raja, and a fair copy was made and signed and sealed by the Raja to be filed in Court. "The *kyfiut* was asked for to ascertain the family custom of the Rajas of Panga, Behar Bijni, and Baikantpur. There were ten or twelve questions in that *'parwana'*. I do not remember them all. The first question was this: 'Can a son be adopted or not?' The answer to this question was, 'In our family the custom of adopting a son does not prevail, a daughter's son cannot become the Raja, a woman is not an heir, the Raja cannot in his lifetime give away the *rajgi* to his son or to anybody else, on the death of the Raja the eldest of his sons, born of his wedded wives, succeeds to his *rajgi*, and in default of a son a uterine brother succeeds to it.' I remember these facts were written." Bijni was another branch of the family. The High Court has said the *kyfiut* must be dismissed [480] from consideration. Their Lordships have carefully considered the reasons which they have given for this opinion, and find themselves unable to agree in it.

A large part of the evidence of the witnesses relates to the adoption of Rajeswar. This it is not necessary to consider. Their Lordships will only refer to such of the evidence about the customs of the family as they think has any weight. Gungadhur Iswar, the son of a daughter of the paternal uncle of Sarbha Deb, said he had heard from Sarbha Deb and Anunt Deb that an adopted son does not succeed to the properties, that females cannot become heirs, and that the *raj* cannot be transferred by gift. Bhabendra Deb Koer, a great-great-grandson of Darpa Deb, a former Raikat, said the family custom was that an adopted son cannot inherit. He had heard of the family custom from his father's kinsman, Anunt Debi, and his paternal grandmother, Jasoda Debi. The Judge says he relied upon this witness partly because he was a near relative of the family, and because he seemed to be speaking the truth, and that it was also very important to notice that he acted upon his opinions. He was appointed by Jogendra, his chief executor by the last codicil, dated in December 1877, and declined to act on the ground that the adoption of Rajeswar was illegal. This, however, seems to have been because he thought Rajeswar had not been properly taken in adoption. Hari Pershad Dass, who married Hareswari, a daughter of Sarbha Deb, said he had heard from his father-in-law of the customs of the family, that if anyone of the Rajas of Jalpigori adopt a son, that adopted son does not succeed to the *raj*, nor does a female become heir, the Rajas cannot transfer by gift the *raj-guddi* or the *raj* to anybody. Hara Pershad Dass, who was a *jumma nuwis* in the family during the whole time that Makarand Deb was the Raikat, and succeeded his father in the office, said he was 23 or 24 years old when Sarbha Deb died, and used to read and write in the *serishta* for four or five years prior to his death, that there is a difference between a Rajbunsi and other Hindus. On the death of the Raja his eldest son, by his married wife, gets the *rajgi*, in default of a son by a married wife, the son by a wife married in the *gandharba* fashion succeeds to the *rajgi*, as, for instance, Makarand Deb got the [481] *rajgi* though the eldest son, Doorga Deb, was living. Doorga Deb was the son of a prostitute, an adopted son does not succeed to the *rajgi*; a wife cannot succeed as heir-at-law, he had heard of the existence of this family custom from Sarbha Deb Raikat. This witness is an honorary magistrate of Jalpigori. Nobindra Deb Koer, one of the defendant's witnesses, a son of

Doorga Deb, the eldest son of Sarbha, on cross-examination said that adoption was not made, nor were the properties obtained by the adopted son, nor is the custom of adoption prevalent, if the Raja wishes to make a gift of the *raj* he cannot do so; he can give something for maintenance, no female can succeed as heir. On re-examination, he said he had heard from his father that the adopted son does not succeed to the property. This evidence was not met by any on the part of the delendant. The High Court reversed the finding of the Judge on the ground that the family is now governed by Hindu law, and it lay upon the plaintiff to show that adoption was prohibited by the custom of the family, which they thought he had failed to do. They also, if their Lordships rightly understand their judgment, put out of their consideration, on the ground that it was hearsay evidence, all the statements as to the custom made by deceased members of the family to which the witnesses deposed. They refer to s. 32 of the Evidence Act, but not to s. 49. The latter section is applicable, and where an ancient family usage is to be proved, the statements of deceased members of the family are relevant facts. Their Lordships, are therefore unable to give to their judgment the weight which it would otherwise have deserved.

To sum up this part of the case then Lordships find that through sixteen devolutions of the estate there has been no instance of a succession by adoption, though in three instances the circumstances were such as usually move Hindus to make an adoption, that there has been one instance of an attempt at adoption, and that, whatever its exact issue may have been, it failed to carry away the succession from the collateral heir, that there is a considerable amount of family tradition against the practice, and that of counter-evidence there is absolutely none. Whether if the Baikantpur family were shown to have become Hindus [482] out and out, saving only special customs, such evidence would be sufficient to prove a special custom, need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that, whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced.

It is now to be determined whether the *angikar patro* has any effect upon the succession to the estate. The facts stated in the introductory part of it were disputed, and in their Lordships' opinion some of them were not proved, but for this purpose they may be taken as proved. It is dated the 23rd Kartick 1284 (11th November 1877), and is in these terms, Jagadindra Deb Kumar being the name given to Rajeswar on adoption --

"To Jagadindra Deb Kumar. This *angikar patro*, executed in the year 1284 (1877) by Jogendra Deb Rairat, zamindar of Pergunnah Baikantpur, &c., inhabitant of Awas station and zillah Jalpaiguri, sheweth --

"That your father, the late Rangu Barua, in his lifetime and in the presence of his agnatic relations, Nilkomul Barua and Nend Barua and my kinsman Budden Chunder Das Rajmata and others, and also in the presence of the late Kant Deb Surma, purohit, gave you away to me for adoption both verbally and under a written deed. I accepted the gift and duly received the son (in adoption), but I have not hitherto made this fact known to any person in the hope that a son may be born to me of my loins. I have in the meantime supported you and educated you. Besides, to provide against the contingency of my dying without leaving behind me any son born of my loins or taken by me in adoption, I, on Cheyt 1878 (9th April 1872), executed a will with permission for adoption, wherein I authorized Srimati Rani Jagdeswari Debi and Srimati Rani Jaganeswari Debi, and Srimati Rani Japeswari Debi, to take sons in adoption, each of these Ranis to exercise this right on the death of the other. Subsequently, on 10th Falgoun 1279 (20th February

1873), I executed a codicil to that will, and in that codicil I appointed the Ranis as principal executors, and I appointed other men assistant executors to assist the Ranis in the management and protection of the estate during the minority of any son who might be born to me, or of any son who may be received in adoption either by me or by the Ranis. At present I am suffering from many diseases, and to this day no son has been born to me of my loins. The body is frail; who can say what [ill] (which God forbid) may befall me. Wherefore I have thought it proper to disclose the fact of my having taken a son in adoption, and accordingly I have received you in adoption this day publicly, agreeably to the gift made by your father, and I made you over to Srimati Rani Jagdeswari Devi, who is [483] your sister by your former step-mother. I authorize you by this *angikar patro* to offer oblations of water and *pinda* to me and my ancestors after my death by virtue of your being my adopted son. Moreover, you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind, you shall become entitled to my *dena-parvni* (debts and dues), and you and your sons and grandsons shall enjoy and own them agreeably to the custom of the family. During your lifetime, and as long as son or grandson of yours is alive, the Ranis shall not be able to take any other son in adoption under the terms of the will. But should you die leaving behind you neither a son begotten of your loins nor an adopted son, and without leaving a permission for adoption (which God forbid), in that case the Ranis may take a son in adoption under the terms of the will, and shall thereby protect the estate."

It appears to have been the opinion of this Committee that such an estate as this of Baikantpur might by family custom be inalienable—*Anund Lal Sing Deo v. Maharaja Dheraj (Kurrood Narayun Deo)* (5 Moo. I A., 82), *Rajah Udaya Aditya Deb v. Jadub Lal Aditya Deb* (I. L. R., 8 I A., 248, I. L. R., 8 Cal., 199). There is some evidence in this case of a family custom forbidding alienation by gift, and consequently by will, but their Lordships do not propose to enter into the question whether there is sufficient proof of it, as they have come to the conclusion that, as Jogendra had no power to adopt a son who would succeed to the estate, it did not pass to Rajeswar by the *angikar patro*. Their Lordships feel no difficulty about Rajeswar being sufficiently designated as the object of the gift, although the adoption may not be valid. They think the question is whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it. The words are — "I authorize you by this *angikar patro* to offer oblations of water and *pinda* to me and my ancestors after my death by virtue of your being my adopted son. Moreover, you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my *dena-parvni* (debts and dues), and you and your sons and grandsons shall enjoy them agreeably to the custom of the family." He is to make the [484] offerings by virtue of being an adopted son, and, "moreover," he is to become the proprietor. This is to be the consequence of the adoption. In fact, the *angikar patro* only states what would have happened without it. The distinction between what is description only, and what is the reason or motive of a gift or bequest, may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. If a man makes a bequest to his "wife A. B.," believing the person named to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may

be considered to make no difference in the intention of the testator. It is difficult to suppose a case similar to the present coming before the English Courts. In *Wilkinson v. Joughin* (L. R., 2 Eq., 319), a testator bequeathed his real and personal estate to trustees, upon trust to permit his wife Adelaide to receive the net annual income thereof during her life, and after her death, if no child of his should attain twenty-one, or be married, in trust for his step-daughter Sarah Ward (the daughter of the supposed wife) for her absolute use.

The supposed wife and the testator went through the ceremony of marriage, she having represented herself to the testator as, and he having believed her to be, a widow, her husband being then alive. It was held by the Vice-Chancellor that the bequest to her was wholly void, but the bequest to the daughter was valid. This was apparently on the ground of the intention, the Vice-Chancellor saying: "In my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description."

In *Nidhoomoni Debya v Saroda Pershad Mookerjee* (L. R., 3 I. A., 253), a childless Hindu, by his will, directed as follows: "And as I am desirous of adopting a son, I declare that I have adopted Koibullo Pershad, third son of my eldest brother, Saroda Pershad. My wives shall perform the ceremonies according to [488] the *shastras*, and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property, moveable and immoveable, in my own name or *benami* left by me, also that adopted son. When he comes to maturity, the executors shall make over everything to him to his satisfaction." The ceremonies of adoption had been performed by one of the widows only, and the other brought a suit to recover half of the property. This Committee held that she could not do so, that there was a gift of his property by the testator to a designated person, and it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibullo to be entirely dependent on whether the wives chose, or did not choose, to perform the ceremonies. The intention of the testator appears to have been the ground of decision in this case also, but both the words of the instrument and the nature of the property were very different from the instrument and property now in question. In the present case, their Lordships are of opinion that it was Jogendra's intention to give his property to Rajeswar as his adopted son, capable of inheriting by virtue of the adoption, and the rule that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate is not applicable. As the adoption was contrary to the customs of the family and gave no right to inherit, the *angikar patro* had not any effect upon the property. It is, therefore, unnecessary to decide whether Rajeswar was an only son, or whether he was duly given in adoption, about which there was the usual conflict of evidence.

In their Lordships' opinion the decree of the Judge of Rangpur was right, and they will humbly advise Her Majesty to reverse the decree of the High Court, and to dismiss the appeal to that Court, with costs. They order the costs of this appeal to be paid by the respondent, Jagadindra Deb Raikat.

Appeal allowed.

Solicitor for the Appellant: Mr T. L. Wilson

Solicitors for the Respondents. Messrs. Barrow and Rogers.

NOTES.

[1. CUSTOM—

"Looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu law is modified by a family custom forbidding

adoption, but whether, with respect to inheritance, the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit. The onus of proving that the adoption was lawful was upon the defendant, who relied upon it to defeat the plaintiff's title. If the family was generally governed by Hindu law, he might rely upon that, and then the onus of proving a family custom would be on the plaintiff."—(1885) 11 Cal., 463 at 476.

In the case of persons governed generally by the Hindu law, the burden of proving a custom derogatory to that law lies upon the person who asserts it —21 All., 412 at 423; 24 All., 273; 11 Cal., 463 at 476; 19 Bom., 428, 21 Bom., 110.

In (1892) 20 Cal., 409 the parties were found to be Hindus observing Hindu ceremonies, and the only question being which school of law governed them, in the absence of anything to the contrary, they were held to be governed by the school prevalent in the locality where they resided

II. PERSONA DESIGNATA—DESCRIPTION—VALIDITY OF GIFTS—

They (Their Lordships) think the question is, whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift and indeed a condition of it."—(1885) 11 Cal., 463 at 483.

A bequest of property was made in these words, "I adopted my sister's son. He is my heir and will be the owner. If after this agreement, a son is born to me, half the property will be received by him and half by the adopted son. If more than one son are born to me the property will be equally divided among them, including the adopted son, as brothers." It was held by the Privy Council that the adoption being invalid, the bequest also failed, "The right of Murlī Dhar (the adopted son) to inherit is based entirely on the fact that he was an adopted son, adopted seven years previously in virtue of a special custom. This is not a similar case to that of *Bureswar Mookerji v. Ardha Chander Roy* (1892) 19 Cal., 452 19 I A 101 in which the Will was made prior to adoption and the bequest was to the lad by name, for reasons independent of adoption though likely to lead to it; nor does it come within the ruling of this Committee in the case of *Nadhoomoni Debbya v. Saroda Pershad Mookerjee* (1876) 3 I A., 253 26 W R., 91 in which it was held that there was a gift of his property by the testator to a designated person (the words being 'I declare that I give my property to Korbullo whom I have adopted', and that this gift was not dependent on the performance of certain ceremonies by his widows. In the present case, their Lordships are of opinion that it was the intention of Dhanraj (the testator) to give his property to Murlī Dhar as his adopted son capable of inheriting by virtue of the adoption, and that as the adoption was invalid according to the general Hindu law and not warranted by family custom, it gave no right to inherit, and the gift, therefore, had no effect upon the property." Their Lordships were apparently influenced by the fact that the scheme of the bequest was to give the son so adopted a right to share equally with natural born sons, upon a division of the property — (1906) 28 All., 488; 33 I.A. 97. 3 A.L.J. 415. 10 C.W.N., 730 3 C.L.J., 594 1 M.L.T. 171 reversing 24 All., 195

"In certain cases, it has been held that a gift fails with an adoption (11 Cal. 463, 19 Cal., 513, 23 Bom., 271). They are all based upon the principle that the validity of the adoption was regarded by the donor as a condition precedent to the validity of the gift. On the other hand, it has been held in a series of cases (3 I A., 253, 19 I A., 101, 26 I. A., 83; 27 I. A., 162) that where the validity of the adoption is not of the essence of the transaction, the gift may be operative even though the adoption fails," (1906) 11 C.W.N., 147. 4 C.L.J., 597 where the contractual obligations entered into on that footing were held binding

Where the Will was to dispose of the property so as to provide for the spiritual benefit of the testator, and with this object in view, it directed the adoption of a certain boy and there were bequests to him, and there were also directions for further adoption on his dying before the widow to whom a life-estate was given, it was held that the adoption was a condition

precedent to the boy so named taking the bequest ;—(1904) 9 C. W. N., 309 following (1898) 28 Bom., 271 on appeal from 20 Bom., 718

Where there was no mispprehension by the donor of his *act* though there might have been as to its effects, a reference to the character supposed or believed to be conferred by that act was held not to make the validity of the gift dependent on the validity of the act —(1910) 8 I. C., 517 ; 11 C. W. N., 147

Where a person gave a gift to one described as *aurasa* son, where the fact of his not being *aurasa* must have been within his knowledge, it was held that the description did not vitiate the gift .—(1899) 22 Mad , 383 on appeal from (1896) 20 Mad., 167

Gift to a certain person who was mentioned by name, and described as adopted son .— Gift valid though adoption held invalid —(1909) 31 All , 329

The following were similarly decided —(1912) 37 Bom., 116 (prostitute's adoption), (1902) 26 Bom , 491 , (1900) 24 Mad 214 , (1887) 11 Bom , 514 ; (1898) 23 Bom , 296

But in (1892) 16 Mad , 355 , (1887) 12 Bom , 185 , (1890) 15 Bom., 565 the description was held to be condition precedent

In (1892) 19 Cal., 513 (on appeal from 12 Cal , 686) where the gift was to persons to be adopted by the widows, it was held that the gift was to persons holding a particular character (*shebaitshy*) and as the adoptions were invalid the gift failed

It should be noted however that the condition should arise from a construction of the will “The rule that, where the identity of the legatee is certain, the legacy will not be avoided by an inaccuracy in the description given to him, will be destroyed, if the Court permits itself to speculate, without proof, upon what may have been the object of the testator in giving the legacy,” *per* Lord COTTENHAM in *Rishton v Cobb* (1839) 5 My & Cr , 145, 151 quoted with approval in *Anderson v. Berkley* 1902) 1 Ch , 936]

[436] APPELLATE CIVIL.

The 17th March, 1885.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE TREVELYAN.

Lala Himmat Sahai Singh.....Plaintiff

versus

Llewhellen.Defendant.*

Evidence—Admissibility of parol evidence to vary a written contract
—Oral evidence when admissible to prove that consideration money,
stated in contract to have been paid, has not been paid but
has been applied in a way agreed on between the
parties—Evidence Act (I of 1872), s. 92.

A deed of *putowa* contained a recital of the payment of the sum of Rs. 2,000 as bonus to the plaintiff by the defendant, the mode of payment being stated to be in cash in one lump sum. The plaintiff sued to recover the sum of Rs. 1,850 alleging that only Rs. 150 had been paid and not Rs. 2,000 as recited in the *putowa*. The defendant admitted that Rs. 850 was due, and as to the remaining Rs. 1,000, alleged that, at the time of the transaction, it was agreed that the sum of Rs. 1,000 was to be retained by him on account of a debt due by one of the plaintiff's relation to him. The plaintiff objected that the evidence to the agreement set up by the defendant was inadmissible.

Held, that, inasmuch as it was open to the plaintiff under proviso 1 of s. 92† of the Evidence Act to prove by oral evidence that the whole of the consideration money had not

* Appeal from Appellate Decree No 2832 of 1883, against the decree of J. F. Stevens, Esq., Judge of Sarun, dated the 21st of August 1883, modifying the decree of Baboo Kali Prasanna Mukherji, First Subordinate Judge of that district, dated the 24th of July 1882.

† [Sec. 92 —When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.]

Proviso (1)—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2)—The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies the Court shall have regard to the degree of formality of the document.

Proviso (3)—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4)—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5)—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved. Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6)—Any fact may be proved which shows in what manner the language of a document is related to existing facts.†

been paid, it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract.

Held, also, that the plea of the defendant substantially was that, although the consideration was fixed at Rs. 2,000, there was a separate oral agreement to the effect that out of that sum the plaintiff was to refund Rs. 1,000 on account of the debt due from his relative, and that on this ground the oral evidence tendered was admissible under proviso 2 of s. 92 of the Act, the stipulation as to the refund of the Rs. 1,000 not being inconsistent with the recital as to the consideration in the contract.

In this case the plaintiff was a part owner of certain mouzahs which had been let out to the defendant, an indigo planter, from 1281 to 1287 F. inclusive. After the commencement of the year 1288, and on the 29th April of 1881, a *putowa pottah* or [487] lease was executed by the plaintiff in favour of the defendant, and a *kabuliat* in similar terms was executed by the defendant to the plaintiff. Both documents were registered on the day on which they were executed, and it appeared from them that the lease was to be for twenty years at a yearly rent of Rs. 354-12-0 and a bonus of Rs. 2,000. In each was a receipt clause to the effect that the plaintiff had received payment of the Rs. 2,000 from the defendant. Neither the *pottah* nor the *kabuliat* had been handed over. each remained with the person who executed it.

The plaintiff stated that the Rs. 2,000 had not been paid by the defendant to the plaintiff, that the plaintiff had received only Rs. 150 on the day of the execution of the documents, and he prayed judgment for the balance of Rs. 1,850 with interest and costs.

The defendant, in his written statement, admitted that the Rs. 2,000 had not been paid, and he disputed his liability to pay it on the following grounds. For some years previous to the execution of the lease and the *kabuliat*, one Mohadeo Lal, a cousin of the plaintiff, had been in the defendant's indigo factory. On examining the accounts of the factory it was found that a large sum of money had been misappropriated. A *panchayet* was called which decided that Mohadeo Lal should pay up Rs. 1,000. The latter was unable to do this when called upon, and he took the plaintiff to the defendant's factory, when, after some discussion, the plaintiff offered to grant the lease referred to above at a rent of Rs. 364-12-0, and a bonus of Rs. 2,000, agreeing at the same time to allow the defendant to retain out of the Rs. 2,000 the Rs. 1,000 due to the defendant by Mohadeo Lal. The defendant accepted this offer, and when the *pottah* and *kabuliat* were about to be written out, proposed that a clause to this effect should be inserted in each, but to this neither the plaintiff nor Mohadeo Lal would agree, because of the injury which might thereby be done to Mohadeo Lal's reputation. The *pottah* and *kabuliat* were then drawn up without any such clause and registered, and Rs. 150 paid by the defendant to the plaintiff, who promised that he would come to the factory in a few days, for the remaining Rs. 850, and give a receipt in full for the Rs. 2,000. He neglected to do this, however, and up to the institution of the [488] suit the *pottah* remained with him, while the *kabuliat* remained with the defendant.

In the Court of First Instance, the Subordinate Judge fixed the following issues: "(1) whether there was a contract between the parties that the sum of Rs. 1,000 due to the defendant by Mohadeo Lal should be set off against the amount of Rs. 2,000, which the defendant had to pay to the plaintiff in respect of the *putowa*? Was Mohadeo Lal a relative of the plaintiff? (2) Can the defendant be made liable for interest? (3) What amount is recoverable

by the plaintiff from the defendant?" The Subordinate Judge found all the issues in the plaintiff's favour, and gave him a decree for the amount claimed by him. This decree was reversed on appeal by the District Judge, who overruled an objection taken by the plaintiff, that the defendant was precluded by s. 92 of the Evidence Act from giving in evidence the arrangement relied on by him. The plaintiff appealed to the High Court.

Mr. Gregory (Baboo Hari Mohun Chuckerbutty with him) for the Appellant.—The agreement relied on by the defendant is no defence to the suit, as it was an agreement, the object of which was to stifle a criminal prosecution, and, therefore, against public policy. [MITTER, J.—No The agreement regarded the payment of a debt which the *panchayat* found was due from Mohadeo Lal to the defendant] At all events, evidence of that agreement should not have been received. The defendant, in his written statement, admitted that only Rs. 150 out of the Rs 2,000 had been paid. It was on that footing the parties went to trial, and it was not competent to the defendant to seek to absolve himself from the consequences of his own admission by setting up an oral agreement contemporaneous with the written one contained in the *pottah* and *kabuliat*.

Mr. O'Kinealy for the Respondent.—The only written contract between the parties is that contained in the *pottah* and *kabuliat*, and that contract states that the Rs. 2,000 has been paid to the plaintiff. If, therefore, no evidence of the oral agreement is to be admitted, which is the contention on the other side, it would be a sufficient answer to the plaintiff's suit to have produced and put in evidence the [489] *pottah* executed by the plaintiff which states that the consideration has been paid, and this has been done. Either the suit is one which should be decided off the written documents alone, in which case the question is one of construction merely, and the plaintiff is out of Court, or it is one in which oral evidence should be admitted, and, in the latter case, it would be a gross fraud on us were we to be prevented from showing the true nature of the oral agreement. See *Hem Chunder Soor v. Kally Churn Das* (I. L. R., 9 Cal., 528).

Mr. Gregory in reply.

The Judgment of the Court was delivered by

Mitter, J.—This appeal arises out of a suit which was brought to recover the balance with interest of the consideration money due to the plaintiff under a deed of *putowa* executed by him in favour of the defendant. The *putowa* recites that the bonus fixed was Rs. 2,000, and it further recites that that amount had been paid to the plaintiff in cash in one lump sum. The plaintiff's case is that, although there is this recital, the whole of the consideration money was not actually paid but only Rs. 150, and the present suit is brought for the balance. The defence was that the plaintiff was not entitled to recover Rs. 1,820 but only Rs. 850, it having been agreed between the parties that the remaining Rs. 1,000 were to be set off against the debt due to the defendant from one Mohadeo Lal, a relation of the plaintiff.

The lower Courts have allowed oral evidence to be adduced to prove the allegation made in the written statement of the defendant. The Subordinate Judge upon that evidence came to the conclusion that the defendant's case was not made out. The District Judge upon the same evidence has come to the opposite conclusion. He is of opinion that the allegation in the written statement upon this point was substantiated. He has accordingly awarded a decree in favour of the plaintiff for only Rs. 850.

One of the questions raised before the lower Appellate Court was, whether, having regard to the provisions of s. 92 of the [490] Evidence Act, the defendant was competent to adduce oral evidence to vary the terms of the written

contract between the parties. The District Judge, with reference to this point, says: "Something has been said by the respondent's pleader as to the operation of s. 92 of the Evidence Act of 1872 in excluding oral evidence. If the stipulation as to payment in the deed had been that the amount of the consideration was to be paid in cash, I am disposed to think that oral evidence as to the contemporaneous contract for a set-off would have been inadmissible. The fact is, however, that the plaintiff has followed the prevailing custom of untruly reciting in the deed, with some emphasis of diction, that he has already received the consideration in full, and that nothing whatever remains due. In these circumstances he can scarcely, with advantage to himself, in suing for a portion of the consideration, insist on the Court confining itself within the four corners of the document."

The same objection has been taken before us, and that is the only question for decision in this second appeal. We agree with the District Judge that oral evidence was admissible to prove the defendant's allegation regarding the consideration money.

It seems to us that the plaintiff was allowed under proviso 1 of s. 92 to prove by oral evidence that the whole of the consideration money had not been paid, although it was recited in the *putowa pottah* that it had been paid. Under this proviso a party to a contract may prove a fact such as "want or failure of consideration", but then if a party to a contract under that proviso be allowed to prove want or failure of consideration, it seems to us that his opponent would not be bound by the recital in the contract, but would be competent, in answer to the case made by the other side, to adduce evidence in order to prove that the "consideration" was different from that recited in the contract. This principle is laid down in *Shah Makhantall v. Srikrishna Singh* [2 B. L. R. (P. C.) 44]. The passage to which we refer is to be found at page 48. That was a suit for redemption of a mortgage, and the rate of interest fixed in the mortgage deed was 9 per cent. per annum. The mortgagor insisted that an account should be taken upon the footing of 9 per cent being [491] the stipulated interest. The mortgagee, on the other hand, claimed 12 per cent. interest, and in support of that claim relied upon other transactions between the parties which he contended were part of the original mortgage transaction. The Sadr Dewan Adalat allowed interest only at the rate of 9 per cent. per annum, that is to say, the rate fixed in the contract. Their Lordships of the Judicial Committee, with reference to this point, say: "The rules of evidence and the law of estoppel forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own statutory protection, one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as, for instance, of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary."

Applying this principle to this case, it is quite clear that the plaintiff appellant cannot affirm that the recital in the contract is not correct, and at the same time prevent the defendant from showing the real character of the consideration that was fixed between the parties. If the plaintiff be allowed to show that notwithstanding the recital in the contract the consideration money had not been actually paid in, it would be open to the defendant, in answer to that case, to show that it was not paid, because the other side refused to abide by the real contract between them, which was that out of Rs. 2,000 the amount fixed in the contract, Rs. 1,000 were to be set off against the debt due to the defendant from one Mohadeo Lal, a relation of the plaintiff.

* The District Judge has overruled this objection virtually upon this ground, and we think that his decision upon this point is correct.

There is also another ground upon which we think that oral evidence in this case was admissible. What the defendant substantially stated was, yes; the consideration money was fixed at Rs. 2,000, and it was to be paid in cash, but there was another separate oral agreement to the effect that out of Rs. 2,000 con-[492]sideration money to be paid in cash, the plaintiff should refund to him, the defendant, Rs. 1,000, being the amount of a debt due from Mohadeo Lal, a relation of the plaintiff. If that was substantially the agreement set up by the defendant, it seems to us that it comes within proviso 2 to s. 92 of the Evidence Act, which is to the following effect.—

“The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved.” In this case the agreement would not be inconsistent with the terms of the written contract. The stipulation that out of Rs. 2,000 paid in cash the plaintiff was to refund Rs. 1,000 in liquidation of a debt from one Mohadeo Lal, is not in our opinion inconsistent with the recital as to the consideration in this contract.

Upon both these grounds, we are of opinion that the District Judge was right in overruling the objection taken before him by the plaintiff as to the inadmissibility of oral evidence to vary the terms of a written contract upon which the suit was brought. The appeal is dismissed with costs.

Appeal dismissed.

. NOTES.

[PAROL EVIDENCE RULE—

It may be shown that either there was no consideration or the consideration was something different from that recited —(1909) 10 C L J 27, *cutting* 3 Bom., 159; 5 Mad., 6; 11 Mad., 213; 11 Cal., 486, 18 All., 168, also 9 All., 392, 14 I C., 65, 21 I. C., 878.

But in one case it was held by AYLING and TYABJI, JJ., that it could not be shown that the amount of the consideration in a sale deed was a different sum.—25 M. L. J., 602 21 I. C., 458

A sale deed may be shown to be a deed of gift —8 A L J., 373, *contra*, 28 Cal., 70.

A term, orally agreed, not inconsistent with the written terms, may be proved.—(1910) 7 I C., 721 (reason for deducting rent); (1909) 11 C. L. J., 39 (mortgage, agreement to give possession and allow profits to be taken)

In 9 I.C., 340, a case very similar to this case of 11 Cal., 486, ABDUR RAHIM and AYLING, JJ., came to a different conclusion.

When one party to a document is entitled to let in oral evidence, the other is equally entitled to do so.—(1900) 5 C. W. N., 158 *cutting* 11 Cal., 486, 3 Bom., 159]

[11 Cal. 493]

APPELLATE CIVIL

The 27th March, 1885.

PRESENT :

MR. JUSTICE PIGOT AND MR. JUSTICE O'KINEALY

Brinda Chowdhrain.....Petitioner

*versus*Radhica Chowdhrain.Opposite party ^b*Hindu widow—Probate—Interest—Revocation of probate—Locus standi—**Probate and Administration Act—Act V of 1881, s. 50*

Where a will has been proved summarily, proof in solemn form *per testes* will not, as a rule, be required on the application of a person who had had notice, or had been aware of the previous proceedings before the grant of probate issued, and had then abstained from coming forward

The widow of a Hindu testator who has died leaving sons has sufficient *interest* to call upon the executor to prove the will in solemn form *per testes*

THIS was an appeal from an order of the Judge of the 24-Pergunnahs rejecting an application for revocation of probate. The order was as follows —
 “This is an application for revo-[493]cation of probate which was granted a year ago. The applicant is a widow of the deceased, and her case is that she had no notice of the proceedings. I do not believe this statement. I find that the case lasted some time before the Judge, that there was an objection which was disallowed. One of the witnesses to the will was a son-in-law of the deceased, and the Judge had no doubt that the will was genuine. Besides, it is clear that the widow, i.e., the present applicant, must have known of the application for probate and have ratified the proceedings, for she joined with the executrix in a petition to the Court of Wards. It seems doubtful if the widow has any interest which will enable her to support this application, for she admits there are two sons, and they do not apply, nor does she apply as their guardian. I reject the application.”

The applicant appealed to the High Court on the grounds (1) that there was just cause for revocation, (2) that the original proceedings were summary, and that neither general nor special citations were issued, (3) that the applicant should have been allowed to prove by evidence that she had no notice of the previous proceedings, and on other grounds not material to this report. It was stated in one of the grounds of appeal that the objection referred to by the Court below, as having been disallowed, was so disallowed on the ground that the objector had no *locus standi* to interfere in the probate proceedings.

Mr. Evans and Baboo Kali Kissen Sen for the Appellant.

Mr. Phillips, Baboo Bhobany Churn Dutt and Baboo Kash Behary Ghose for the Respondent.

The Judgment of the Court was delivered by

Pigot, J.—This was an application for revocation of probate of an alleged will of the deceased husband of the applicant. The deceased left two sons.

* Appeal from Order No. 325 of 1884, against the order of H. Beveridge, Esq., Officiating Judge of 24-Pergunnahs, dated the 13th of September 1884.

The application was made on three grounds: (1) that the applicant was not cited and had no notice of the proceedings; (2) that the will was a forgery; (3) that the executrix to whom the grant had been made was (as we understand by reason of her great age) imbecile.

[494] The District Judge refused the application. first, he disbelieved that the applicant had had no notice on the ground that the proceedings taken when probate was granted had lasted some time before the Judge, and must have been known to the applicant; that she had by her conduct ratified the proceedings; as she did, after the grant of probate, join the executrix in an application to the Court of Wards to take over charge of the estate. He further intimated his opinion that her interest (and therefore her right to intervene) was doubtful as her deceased husband left two sons.

If it appeared that the applicant had had notice, or had been aware of the former proceedings before the grant of probate issued, and had abstained then from coming forward, this would constitute a ground for refusing to allow her to intervene—see *Ratcliffe v. Barnes* (2 S. & T., 486), *re Pitamber Girdhar* (I. L. R., 5 Bom., 638)—unless perhaps it were made out that the circumstances leading her to believe that the will was not genuine had not come to her knowledge until after the grant of probate.

We do not, however, think that notice or knowledge of the proceedings before the grant was issued is so brought home to her on the face of the proceedings before us, as to justify a refusal of her application on that ground. Nor do we think that the fact of her having, after probate had been granted, joined in the application to the Court of Wards, with the object of getting the estate out of the hands of the executrix (who is, as she alleges, incapable of managing it), is enough to preclude her from being heard on this application, whatever effect that fact may have upon the enquiry into the genuineness of the will.

Upon the question of interest it appears to us that the widow, although there are sons living, has yet an interest in the estate such as to entitle her to come in under s. 50 of the Act. She is entitled to maintenance, and, if she pleases, to institute a suit, to have her maintenance made a charge upon the estate of her deceased husband. She is not entitled, no doubt, to claim a partition; but she is entitled, if the heirs of her husband make a partition, to claim a share: there is some authority for holding that this latter right is one of which she may be [495] deprived by express words in her husband's will—see *Comulmonee v. Joygopaul* (Mac. Cons. of Hindu Law, 90, Morley on Part. 26). The widow having an interest, comes in and alleges matter which is, under s. 50, ground for revocation, and coupling that section with s. 83, must, if her application be granted, put the party propounding the will to proof of it, leaving it to her, when he has made his proof, to negative it, if she can, by such proof as she can give of the matter which she sets up.

No doubt her petition is drawn in a wholly erroneous fashion, and she sets up allegations which are only appropriate to a suit against an executrix, for an account, for the appointment of a Receiver and for the like relief. These, of course, must be disregarded; but she does also set up a case under s. 50, and that case, we think, ought to be heard.

We may add that, as we understand from the record before us, the proceedings which took place when the grant was made related to the right of the person who objected to the will to be heard, and that his right being negatived, he was not heard in opposition to the grant of probate.

We agree in the view expressed by MARKBY, J., as to the object of s. 234 of the Succession Act, which is the same as s. 50 of the Probate and Adminis-

tration Act. There is no doubt a discretion vested in the Court in determining whether or not to act under that section, but it must be remembered that probate once granted in common form is final unless it be challenged in proceedings taken under this section. We agree with what is said by MARKBY, J., in the case before referred to at page 364, "if there has been no previous contention, and the will has only been proved summarily, or in what is called common form in *England*, that is without any opposition and merely *ex-parte* to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family," then he ought in all ordinary cases to have the will regularly proved afresh so as to give the objector an opportunity of testing the evidence in support of the will before being called upon to produce his own evidence to impeach it.

[496] We, therefore reverse the order of the District Judge, and order that the case be set down and heard before him under ss. 50 and 83 of the Probate and Administration Act. Costs to follow the result.

Appeal allowed.

NOTES

[Proof of will in solemn form cannot be demanded by one who had notice or was aware of the summary proceedings; but it is otherwise if the same came to his knowledge after the grant of probate —11 Cal., 492; 5 Bom., 638, 4 C. W. N., 757, 27 Cal., 927, see also 19 Bom., 571; 18 Cal., 45.]

As to who can be said to have an interest to apply for revocation of probate, see 10 Cal., 19 *supra*.

Where the interest shown by the applicant for revocation of probate was her right of maintenance, the Court looked at the provisions of the will, and finding that it did not affect that right disallowed the application —(1900) 4 C. W. N., 602, approved in (1908) 8 C. L. J., 489 · 12 C. W. N., 808.

A reversioner has sufficient interest —(1909) 10 C. L. J., 263, likewise, an heir —(1912) 40 Cal., 82. As regards the form of decree in such a proceeding, see (1909) 10 C. L. J., 263, at 274.]

[11 Cal. 496]

APPELLATE CIVIL.

The 31st March, 1885

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE,

Kartick Nath Pandey.... One of the Defendants

versus

Padmanund Singh and another. Plaintiffs.*

Receiver—Power of Court to appoint a Receiver—Suit for arrears of rent and ejectment—Bengal Act VIII of 1869, ss. 23, 34, 52—Civil Procedure Code (Act XIV of 1882), ss. 503, 505.

Although having regard to the provisions of ss. 23 and 52 of Bengal Act VIII of 1869, s. 503 of the Civil Procedure Code would not apply to a suit brought under Bengal Act VIII

* Appeals from Original Orders Nos 376 and 377 of 1884, against the orders of Baboo Dwarkanath Mitter, Second Subordinate Judge of Bhagulpore, dated the 18th of November 1884.

of 1869, merely for arrears of rent ; there is no provision in that Act which excludes the operation of s. 503, when a suit is brought for recovery of the tenure itself. When, therefore, a suit was brought under Bengal Act VIII of 1869 for arrears of rent and for ejectment of the defendant,

Held, that a Receiver of the rents and profits of the tenure might properly be appointed under the provision of s. 503 of the Civil Procedure Code

IN these cases the plaintiff sued for the sum of Rs. 36,000, as arrears of rent, and for ejectment of the defendants, under s. 52 of the Rent Act. The applications in the suits, which gave rise to this appeal, were for the appointment of a receiver under the provisions of s. 503 of the Civil Procedure Code. The plaintiffs alleged that the defendants' lease was about to expire, and that the greater part of the mehal was *Chowli*, and as it was the harvest season, unless a receiver were appointed, they would be unable to realise the greater portion of their claim as the defendants were heavily involved

The Second Subordinate Judge, before whom the application was made, granted the prayer, and nominated a receiver, and the nomination was subsequently confirmed by the District Judge, on the [497] motion being referred to him under s. 505, who considered the appointment of a receiver not only expedient but imperative

Against this order one of the defendants now appealed to the High Court on the ground that s. 503 was wholly inapplicable to the case, and that a receiver could not be appointed to collect the rents and profits of the mehal, that the rents payable by the tenants formed no part of the subject-matter of the suit, and could not therefore be made over to the custody of a receiver ; and that the suit being under s. 52 of the Rent Act, s. 503 of the Civil Procedure Code had no application

Mr. Bell and Baboo Kalkissen Sen for the Appellant.

Mr. Pugh, Mr. Twisdale and Munshi Mahomed Yusuf for the Respondents.

The **Judgment** of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows.—

These are appeals against an order of the lower Court, appointing a receiver to take charge of the property held by the defendants on a lease, in suits brought against them under s. 52 of the Rent Law for recovery of arrears of rent and for ejectment

The learned counsel for the appellant contends that s. 503 of the Civil Procedure Code, under which the order appealed against has been made, is not applicable to these suits. He says that the suits are really for arrears of rent only, and the ejectment of the defendants is merely incidental upon the non-payment of the amount of the decree, whatever it may be, within fifteen days from the date of the decree. He also contends that s. 503 of the Code is not applicable at all to suits brought under the Rent Act. He points out that before the passing of Act X of 1859, the landlord himself had the power under the old Regulations to appoint private receivers called *sazawals*, but that that power was taken away by Act X of 1859, and that in Act X of 1859 it does not appear that revenue officers, who under that Act had to try rent suits, had any power to appoint receivers ; and the learned counsel seems to contend that the present law also excludes even the Civil Courts from the power to appoint receivers. As to this matter we think it clear, on the words of s. 34 of the Rent Law [498] of 1869, that all the provisions of the present Code of Civil Procedure apply to suits brought under that Act, save as in the Act otherwise provided. There is no specific provision in Bengal Act VIII of 1869 which excludes the operation of s. 503 in express terms. The learned counsel, however, contends

that ss. 23 and 52 of the Rent Law of 1869 together do in effect exclude the operation of s. 503 of the Civil Procedure Code; for s. 23 provides that no lease of a farmer or other landholder, not bearing a permanent or transferable interest in land, "shall be cancelled, nor the lease-holder ejected otherwise than in execution of a decree or order under the provisions of the Act;" and s. 52 says that "the decree for ejectment shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed." It is argued that the appointment of a receiver is tantamount to the ejectment of the lease-holder, and is therefore opposed to the provisions of ss. 23 and 52. If the suit were simply for the recovery of arrears of rent, there is no doubt that s. 503 of the Code of Civil Procedure would not apply. But it seems to us clear that the suit really is one for the recovery of the tenure itself, and therefore s. 503 will apply, unless Mr. Bell is right in his contention that it is excluded by ss. 23 and 52 of the Rent Law. We are of opinion that these sections do not exclude the operation of s. 503 of the Code. The appointment of a receiver is not, we think, the same thing as the cancellation of a lease, or the ejectment of a lease-holder. As pointed out by the learned counsel on the other side, the possession of the receiver is not adverse to the lease-holder, and could not be pleaded against him in any question of limitation. The possession of the receiver is for the benefit of the parties to the suit. We think, therefore, that the Court below had discretion to appoint a receiver in the cases before us. That being so, we dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[The possession of a receiver is not adverse to any of the parties but is only for the benefit of the parties to the suit —11 Cal , 496 , 2 C L J., 602 at 611 , 17 Mad , 501, 503.]

[499] APPELLATE CIVIL.

The 10th April, 1885

PRESENT

SIR RICHARD GARTH, KT , CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Dena Nath Banerjee and others. . . . Plaintiffs

versus

Hari Dasí. . . . Defendant.*

Second appeal, Interference on question of facts in—Remand of appeal heard by a Subordinate Judge to District Judge—Act XIV of 1882, s. 566.

If, on second appeal, it is found that certain material facts, having an important bearing upon a question at issue in the suit, have been omitted to be considered by the lower Appellate Court, the High Court will interfere with the decision of the lower Appellate Court, even though it be on a question of fact

THIS was a suit for arrears of rent, the plaintiffs alleging that the amount of the *jumma* held by the defendant was Rs 20 per annum.

The defendant admitted that the amount of the *jumma* was originally Rs. 20 per annum, but pleaded that he had, on the 25th June 1862, purchased

* Appeal under s 15 of the Letters Patent against the decree of Mr. Justice BEVERLEY, one of the Judges of this Court, dated the 3rd of September 1884, in appeal from Appellate Decree No. 631 of 1883, against the decree of Baboo Bhuban Chundra Mukherji, Subordinate Judge of Hooghly, dated the 29th December 1882, reversing the decree of Baboo Prasanna Coomar Sen, Munsiff of Serampore, dated the 26th June 1882.

from plaintiff No. 1 his six-anna share in the property under a *kobala*, and that he had since that date paid rent for the remaining ten annas at the rate of Rs. 12-8-0.

It appeared from the evidence that the plaintiffs and defendant had originally interchanged a *pottah* and *kabuliat* on the 11th June 1862, and it was admitted that the *pottah* had been lost, and a second granted in its stead on the 29th July 1862. On the 4th August 1862 the second *pottah* and the *kobala* were both registered by a person, who was the *mokhtar* of all the plaintiffs.

The Munsiff framed no issue as to whether the *kobala* was genuine, but as incidental to an issue which was framed as to the amount of the *jumma* at which the defendant held, he allowed evidence to be given as to whether the plaintiff No. 1 had sold his six-anna share to the defendant, and finding that the plaintiffs had failed to prove that they had ever collected rent at [500] Rs. 20, and that he saw no reason for disputing the *kobala*, gave the plaintiff a decree at the rate of Rs. 12-8-0.

On appeal to the Subordinate Judge the case was remanded to the Munsiff's Court, in order that an issue should be raised as to the genuineness of the defendant's *kobala*, and on such remand the issue was found in favour of the defendant.

On the case again coming before the Subordinate Judge, the Court reversed the finding as to the genuineness of the *kobala*, and gave the plaintiff a decree at the rate of Rs. 20 per annum

The ground for the Subordinate Judge's disbelief in the defendant's *kobala* being that the *pottah* of the 29th July 1862 purported to have been granted by all the plaintiffs, whereas if the sale of 25th June 1862 had really taken place, the *pottah* would have been granted by the plaintiff who owned the ten-anna share only.

The defendant appealed to the High Court on the question of the genuineness of the *kobala*. Mr. Justice BEVERLEY was of opinion that the reasons given by the Subordinate Judge would have had some force had the second *pottah* been an instrument creating a new tenure between the parties, but seeing that the second *pottah* was given in place of the one lost and in correspondence with the *kabuliat* which the defendant had given, it was probable that this would sufficiently account for the name of plaintiff No. 1 appearing in the second *pottah*, even though he might have in the meantime sold his right thereunder. He was also of opinion that the Subordinate Judge should have taken into consideration the fact that the person appearing at the Registration Office on behalf of all the plaintiffs on the 4th August 1862, when both the second *pottah* and the *kobala* had been registered, was the *mokhtar* of all the plaintiffs; he therefore remanded the case for the reconsideration of the Subordinate Judge.

The plaintiffs appealed under s. 15 of the Letters Patent.

Baboo Jagat Chunder Banerjee for the Appellants contended that the case should not have been sent back for the reconsideration of the Subordinate Judge, as the latter had already clearly found as a fact that the defendant's *kobala* was not genuine.

[501] Baboo Bhobani Charan Dutt and Baboo Tarucknath Sen for the Respondent.

Judgment of the Court was delivered by

Mitter, J.—The principal question in this case is, whether the *kobala* set up by the defendant, and said to have been executed by one of the plaintiffs, Dena Nath, in 1862, is genuine or not?

It is true that this is a question of fact, and the Subordinate Judge, on appeal, came to the conclusion that the document in question was not genuine; but if in second appeal it is found that certain material facts which have an important bearing upon the question at issue have been omitted to be considered, this Court has always interfered with the decision of the lower Appellate Court, even if it be on a question of fact.

In this case the learned Judge of the Court, in his judgment, has pointed out certain facts which have a material bearing upon the question, whether the *kobala* is genuine or not, he has also pointed out that these facts have not been considered by the Subordinate Judge. That being so, we think that the case was properly remanded, but, under the circumstances, we think it right to add that the appeal will be remanded to the District Judge. This appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[A second appeal will lie where there is a finding without any evidence to support it, or if the finding is based on irrelevant matters or on a misconception of what the evidence is, all these being cases of *substantial error* or *defect in procedure* (C.P.C., 1908, sec. 100, cl. c.).—14 Cal., 700 at 747, 17 Cal., 875, 29 Bom., 1, 17 Bom., 475, 28 Cal., 179; 20 Bom., 753. A second appeal will also lie to impeach legal conclusions drawn from findings of fact.—19 Cal., 253, 20 Cal., 93 at 98, 24 Cal., 825, 21 Bom., 91; 9 Cal., 309, 12 Cal., 93, 16 Cal., 650.]

[11 Cal. 501]

APPELLATE CIVIL

The 15th April, 1885.

PRESENT

MR JUSTICE FIELD AND MR. JUSTICE BEVERLEY.

Laidley and others..... Defendants

versus

Gour Gobind Sarkar.....Plaintiff.

Occupancy rights—Partnership holding a cultivating lease—Indigo concern as a cultivating ryot—Bengal Act VIII of 1869, s. 6.

A firm owning an indigo concern, and carrying on the manufacture of indigo, took, in the collective names of Robert Watson & Co., a cultivating lease of certain lands, which they held continuously for more than twelve years, cultivation of these lands being carried out by the servants of the firm, and also by sub-tenants.

Held, that the lease must be taken to be a lease to the individuals who were at the time of the grant members of the firm, and that under the circumstances of the particular case they had obtained an occupancy right.

[502] *Quere*, whether a right of occupancy could have been obtained in this case if the whole of the original grantees had died, either before the completion of the twelve years of

* Appeal from Original Decree No. 171 of 1883, against the decree of Baboo Jugad Bundhoo Gangooly, Officiating Subordinate Judge of Moorshedabad, dated the 4th of May 1883.

occupation, or after acquiring a right of occupancy; or if it could be obtained, whether such right could, according to the custom of the locality, be transferred to persons subsequently admitted as members of the firm.

The test of a ryotee lease is, whether the lease has been originally granted for the purpose of cultivation, and if it has been so granted, it is none the less a ryotee lease, though the lessee may happen subsequently to sublet

THIS was a suit brought on the 30th June 1882 by one Gour Gobind Sarkar against the individual members of the firm of Robert Watson & Co. (who were set out as being J. W. Laidley, T. H. Wardie for self, and as executor to the estate of the late J. Dalrymple. C. B. Skinner, A. Magniac, D. Mathewson, George McLeod, R. Jardine, J. Johnstone, A. D. Dallas, G. M. Robertson, C. H. Hamilton, A. Mathewson, J. M. MacDonald, J. Stuart, J. R. Bullen-Smith, J. J. Paterson, J. J. J. Keswick) to recover, with mesne profits, an eight-anna share of certain lands which had accreted to mehal Paraota.

The plaintiff alleged that he was the owner of an eight-anna share of certain *dearah* lands, formed by alluvion after diluvion, of Paraota Goladoria, in zillah Moorshedabad, and that he had let out on lease this land to the defendant company in 1267 for a term of ten years, and that the defendant company had executed in his favour the following *kabuliat*. "We, Robert Watson and Company, do execute this *kabuliat* in the year 1267 to the following effect. You are in possession by right of inheritance of the *dearah* lands formed by alluvion after diluvion of Taruf Paraota Goladoria, together with Mozafa Godagaree, Shaker Mondle's dyer and other mehals appertaining to your mother, the late Radhamoni Dassya. We applied for taking a *jote pottah*, a *pottah* in respect of the above *dearah*, consisting of about 2,488 beegahs of land as per measurement made by yourself, and being culturable and unculturable land, and land covered with water and sand, etc., a moiety of which is your *putni* right and lying between these boundaries, viz (here followed the boundaries). We execute this *kabuliat* in your favour for a term of ten years, from the year 1267 to 1276, and on these conditions, that we shall annually [503] make measurement in the month of Aughran in the presence of the agents of both parties, and whatever lands shall be found fit for the cultivation of indigo, etc., we shall hold possession by cultivation of indigo, etc., and by means of cultivation in *bhag-jote* with the tenants, and after deduction of a moiety share of the co-sharer from the rent of those lands, at the annual rate of 11 annas 15 gundas a beegah, we shall pay the remaining moiety to you. If for any reason we do not cultivate the culturable lands, but keep the same waste, we shall not raise any objection to the realization of the rent thereof. We shall continue to pay the rent of all culturable lands at the above rate. To this effect we, having received a *pottah*, execute this *kabuliat* of a temporary *jote*. 2nd Jait 1267."

He further alleged that, on the expiry of this settlement, the defendant company again took a temporary *jote* settlement of the same land, for a further term of ten years, on the same terms, that on the expiry of this last settlement in 1287 he took *khas* possession of these lands, but that the defendant company in 1287 forcibly interfered with such possession by sowing indigo on this land. The defendant company on being opposed took proceedings under s. 530 of the Criminal Procedure Code, which resulted in their being maintained in possession, and the plaintiff thereupon brought this suit for the purposes set out above. The defendant company contended that they had acquired a right of occupancy in the land, and that the whole of the lands claimed by the plaintiff did not appertain to mehal Paraota, but that a portion thereof fell within their own *putni* mehal Obdoynugger.

The evidence showed that the defendant company cultivated indigo in *bhag-jote* and *nij-jote*, in *bhag-jots*, by allowing tenants to sow indigo and *choytah*, the former being taken by the defendant company, and the latter by the tenants, the year following this double crop, the land being let out to the tenants at a certain rental for other cultivating purposes, and in *nij-jote* by themselves cultivating indigo and letting out the land in the following year to the tenants for other cultivating purposes. No evidence was, however, given connecting the persons who entered into the *kabuliat* under the collective name of "Robert Watson & Co" with the persons who were made defendants in the suit.

[504] The Subordinate Judge found that the defendant company had held continuous possession of the *dearah* from 1267 up to the time of suit, partly in *nij-jote*, partly in *bhag-jote*, and partly by renting the land out to tenants, but he held (1) that they could not, as *dur-putnidars* of an eight-anna share in the mehal, create, by taking advantage of their *jote* lease of the other eight-anna share of the *dearah*, a sub-tenure which would last after the extinction of their *durputni* right to the detriment of the *putnidar*, and (2) that they could not acquire under s 6 of Bengal Act of 1869 an occupancy right as tenants under themselves, (3) that inasmuch as the defendants were members of a firm of capitalists, the members of which were liable to change and succession, they could not by any length of time acquire an occupancy right, he therefore gave the plaintiffs a decree for *khas* possession of an eight-anna share in the lands together with *wasilat*.

The defendant company appealed to the High Court.

Mr. Bell (with him Baboo Bhobani Charan Dutt) for the Appellants contended that the case of *Rai Komul Dossee v. Laidley* (I. L. R., 4 Cal., 957) should not be followed. The lease in that case being an *yara* lease, whilst the present lease was a cultivating lease, the observations made therefore by Mr Justice JACKSON, regarding the right of a firm to obtain an occupancy right, were *obiter dicta*, and also cited the case of *Cannan v. Kylash Chander Roy Chowdhry* (25 W. R., 117), and submitted that a firm could obtain a right of occupancy, and that the case of *Durga Prosunno Ghose v. Kalidas Dut* (9 C. L. R., 449) pointed out the test of a ryotee lease.

Baboo Guru Das Bannerjee for the Respondent relied on the case of *Rai Komul Dossee v. Laidley* (I. L. R., 4 Cal., 957).

The Judgment of the Court (so far as is material for the purpose of this report) was as follows —

Field, J. (BEVERLEY, J., *concurring*) — It is contended that the defendants are entitled to a right of occupancy in the yellow-coloured land as to which this appeal has been preferred, and also in the eleven *days* coloured white and lying to the west of the land coloured yellow. The Subordinate Judge has decided [505] against the defendants in respect of this occupancy right upon the authority of two cases, one of which will be found in 25 W. R., 117, and the other in I. L. R., 4 Cal., 957. We think that the present case is distinguishable from both these cases. The report of the first case (*Cannan v. Kylash Chander Roy Chowdhry*) is very brief. The judgment of MACPHERSON, J., is as follows:— "As regards the first ground of appeal, we think that there is nothing in it. It may be, or it may not be, that Mackilligan had acquired a right of occupancy in this land. But it is clear that the Agra Bank, which has been in possession only some six or seven years, cannot, merely as a transferee of Mackilligan's interest and relying on his previous possession, have any right of occupancy, unless the Bank's landlord has admitted that it has such a right." In this passage the claim of the Agra Bank to a right of occupancy is negatived on two

grounds, *first*, that the Bank had been in possession only six or seven years; and, *secondly*, that being the transferee of Mackilligan's interest, it was not entitled to any right of occupancy which he might have had. The learned Judge then proceeds: "We are asked to declare that the Agra Bank has a right of occupancy as standing in the place of a certain indigo concern, which held this land for more than twelve years. But an 'indigo concern' or 'firm' has no corporate or legal existence which we can recognise in a suit like this. So far as the question of a right of occupancy is concerned, all that we can look at is occupancy by particular individuals; and as far as such occupation of this land goes, the present appeal fails." The report does not show the particular facts of the case, with reference to which these observations of the learned Judge were made. We do not know who were the persons who constituted the indigo concern or firm, or whether their names were upon the record, or whether there was any evidence to show that these persons had held for twelve years after they had obtained possession. The second case is the case of *Rai Komul Dossee v. Laidley*. It is clear from the *pottah* given at page 958 that this was a case of an *ryara* lease, and that it was not like the present case, which is a case of a *jotedari* lease, that is, a cultivating lease. This being so, any observations that were made in the judgment in that [506] case with respect to the rights of a ryot were *obiter dicta*. Referring to the case of *Cannan v. Kylash Chunder Roy Chowdhry*, JACKSON, J., said: "In those observations we concur, and it would be impossible, we think, to hold that a firm or partnership could take a grant of land, and by arrangement amongst themselves, continuing for a series of years by changes in the partnership, hand over the land from one person to another under the guise of a right of occupancy." These remarks are, we doubt not, quite correct as applied to the facts of that particular case. but at the same time we must bear in mind that as that lease was an *ryara* lease (a lease of an interest intermediate between the zamindar and the cultivator), they were *obiter dicta* and are not binding as a precedent. The learned Judge proceeds "What the firm of *Robert Watson & Co* took from the zamindar in this case was not a ryot's tenure for the purpose of ordinary agricultural use. It was a tract of land amounting to an estate to be worked by them by means of capital for the purpose of carrying out a particular speculation." These latter observations have, in our opinion, no application to the facts of the case now before us, and we think, therefore, that neither of the two precedents quoted is on all fours with the case which we have to decide. The lease in the present case runs as follows —(Here followed the lease as set out above) We think this lease is on the face of it a cultivating lease, and that this question is not affected by the fact that the cultivation was to be that of indigo, or that the lessees happened to be manufacturers of the indigo when cultivated. The test of a ryotee lease adopted in many decisions of this Court, and now accepted by the Legislature, is whether the lease was originally granted for the purpose of cultivation, and if it was granted for that purpose it is none the less a ryotee lease, though the lessee may happen subsequently to sublet. We think then that this lease was a cultivating lease—a lease granted to the lessees for the purpose of cultivating indigo, and so long as cultivation is contemplated, we think it is immaterial whether the cultivation intended is that of rice, jute, indigo or other crop. But then it is said that this was a lease granted to the firm of *Robert Watson & Co.*, and under such a lease particular individuals cannot acquire [507] a right of occupancy. If this lease had been drawn up by skilled legal agency, instead of *Robert Watson & Co.*, there would have been inserted the names of the persons who then were members of that partnership. But inasmuch as the names of these persons could be

ascertained on the principle *id certum est quod certum reddi potest*, we think that this must be taken to be a lease to the individuals who were at that time members of the firm of *Robert Watson & Co.* If the lessees happened to be Hindus or Mahomedans, we think it would have been impossible to contend that occupation by them for more than twelve years under this lease granted for the purpose of cultivation would not have conferred upon them a right of occupancy, there being no clause in the lease to bar the acquisition of that right, and we think that the same result will follow in the case of lessees who happen to be Englishmen engaged in the manufacture of indigo, seeing that they cultivated the indigo in order to manufacture it. If it had been pleaded that the original grantees under the lease were all of them dead, that they had died either before the expiry of twelve years from the commencement of their possession under the lease, or after a right of occupancy had been acquired by them by twelve years occupation, and if it were further contended either that the period of less than twelve years during which the original grantees were in possession could not be added, to the other subsequent period during which persons subsequently admitted as members of the firm were in possession, in order to make up the statutory period of twelve years, or, again, that the right of occupancy acquired by the original grantees by twelve years possession could not be transmitted, or transferred, to persons subsequently admitted as members of the firm—then, in either of these cases, a question would have been raised which must have been tried and determined, and it might well have been argued that in order to make up the statutory period necessary to confer a right of occupancy, occupation of less than twelve years by the original grantees could not be added to any period of occupation by persons subsequently admitted as members of the firm, or, again, that a right of occupancy acquired by the original grantees could not be transmitted or transferred to persons subsequently admitted [308] as members of the firm. But no such plea has been made, and no such question has been raised, and we think that we ought not to assume, in the absence of pleading and evidence, that the whole of the grantees of 1267 are dead, that they died either before the completion of the twelve years occupation, or that, having died after acquiring a right of occupancy by twelve years occupation, such right could not, according to the custom of the locality, be transmitted or transferred to persons subsequently admitted as members of the firm. In our view of the case we think that the grantees under these *pottahs* being *pottahs* for cultivation, *pottah* of the nature of ryoti *pottahs*, could have acquired a right of occupancy. There is nothing to show and no allegation that the original grantees who entered upon possession are dead, and if they have since held or cultivated (and this cultivation may have been by their servants, or through sub-tenants, *bhag-jotedars* and the like) they have acquired a right of occupancy. The facts of the two cases quoted to us have no similarity to the facts of the case with which we have to deal, and we think that the law there laid down does not apply.

We, therefore, come to the conclusion that the defendants, having been for more than twelve years in the occupation of this land as cultivators, have acquired a right of occupancy therein. In this view we must reverse so much of the decree of the lower Court as declares the defendants not entitled to a right of occupancy in the lands which have been declared to form a portion of the plaintiff's estate, and we must further set aside so much of the decree of the Court below as awards to the plaintiffs mesne profits in respect of this land.

Appeal allowed in part.

NOTES.

[For this case to be applied, as an instance of a firm acquiring occupancy rights, it should be shown that the original grant included the defendants, or, in the case of transfers and devolutions, that the holding is by custom assignable (1901 7 C. L. J., 475.

The circumstances at the inception of the tenancy are to be taken into consideration to decide the original purpose of cultivation, however it may have been cultivated subsequently —11 Cal , 501 , 29 Cal 707 P. C , (1912) 16 C L J 322, 18 I C. 471 at 473.

In 18 I C 471 (Cal.) at 473 this case has been explained as *not* laying down that because a man does not as a fact have any tenant under him he must be a raiyat whatever the nature of the holding , and the dicta of FIELD J at p 505 had reference to the nature of the holding in the case which was a *jotedari* case]

[509] APPELLATE CIVIL

The 24th April, 1885.

PRESENT

MR JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Jogi SinghDefendant

versus

Kunj Behari Singh and another... ..Plaintiffs.'

Act XL of 1858, s. 3—(Act VIII of 1859)—Suit against minor—Permission to friend to defend—Presumption when no permission recorded by Court—

Misdescription of minor—Guardian—Minor—Act XIV of 1862, s. 443.

A suit was brought against a mother "for self and as guardian of A and B, minor sons of C, deceased," at a period when Act VIII of 1859 was in force. The mother had not taken out a certificate under Act XL of 1858, and no permission was recorded by the Court allowing the mother to defend on behalf of the infants under the provisions of s 3 of that Act. A decree was made in the suit, and in execution thereof certain property belonging to A and B was sold and purchased by X, the decree-holder. Subsequently on A's coming of age, A and B, by A as his next friend, instituted a suit against X and their mother to recover the property so purchased by X.

Held, that under the provisions of Act VIII of 1859 it was not necessary to formally record sanction to the mother to defend under s 3 of Act XL of 1858, and that the fact of sanction having been given might be presumed by the Court, and that on the facts of the case such presumption was warranted.

Held, also, that though A and B were not properly described in the previous suit, it was a mere defect in form, and did not affect the merits of the case, being in accordance with the prevailing practice at the time when the suit was brought, and that there is no authority for saying that, when minors have been really sued, though in a wrong form, a decree against them would not be valid.

THE facts of this case were as follows :—On the 4th August 1871 Mussummat Jhalo Koeri, who was the mother of the plaintiffs, jointly with her deceased husband's brother, Chet Narain Singh, executed a mortgage bond in favour of the defendant Jogi Singh. On the face of the bond it appeared that Mussummat Jhalo Koeri purported to be acting "for herself and as guardian of Kunj Behari Singh and Nanku Singh (the plaintiffs), minor sons and heirs of Pheku Singh, deceased." She had not, however, taken out a certificate under Act XL of [510] 1858. Jogi Singh subsequently brought a suit on the bond, and obtained a decree on the 29th June 1875, in execution of which he brought to sale the property in dispute in this suit, and at the execution sale purchased it himself. In his plaint Jogi Singh made Chet Narian Singh defendant, and also sued Jhalo Koeri "for self and as guardian of Kunj Behari Singh and Nanku Singh,

* Appeal from Appellate Decree No. 354 of 1884, against the decree of W. Verner, Esq., Judge of Bhagulpore, dated the 19th of December 1883, reversing the decree of Hafez Abdul Karim, Khan Bahadur, Subordinate Judge of that district, dated the 10th of June 1882.

minor sons of Pheku Singh, deceased", and it appeared that throughout the proceedings in that suit Jhalo Koeri and the minors were described in these terms.

Kunj Behari Singh having now attained majority, instituted this suit along with his brother Nanku Singh, who was still an infant, and for whom Kunj Behari Singh acted as next friend, against Jogi Singh, to recover their share of the property so purchased by him, and they made their mother Jhalo Koeri a party defendant. Jhalo Koeri took no part in the suit, and did not appear or defend.

The plaintiffs' case was that their mother Jhalo Koeri executed the bond on her own account, and that as she had not obtained a certificate under Act XL of 1858, she had no authority to deal with their property or bind them, that there was no legal necessity for the loan for which the bond was given, that they were not parties to Jogi Singh's suit, and were not bound by the proceedings therein, and that the decree in that suit was obtained by fraud and collusion. Jogi Singh traversed the whole of the plaintiffs' allegation, and alleged that their mother had been acting as their guardian and manager since the death of their father, and that he had made them parties to his suit, and they were represented therein by her. He further contended that the suit was barred by limitation, inasmuch as it was brought more than one year after an application had been made to the Collector for transfer of names in respect of the share of the property in suit.

Amongst the issues the following were raised.—

- (1) Is the suit barred by one year's limitation?
- (2) Was the decree, under which the property in suit was sold, fraudulently obtained by Jogi Singh?
- (3) Was the bond of the 4th August 1871, on which the decree in question was passed, executed by Jhalo Koeri as guar-^[511]dian of the plaintiffs, and was the suit instituted by Jogi Singh instituted against her in a similar capacity, and was the decree therein passed against her as such?
- (4) Did the plaintiffs' share in the property pass under the sale in execution of the decree?
- (5) Was the loan contracted for legal necessity?

The Subordinate Judge decided all the issues in favour of the defendant Jogi Singh, except that of limitation, and in the findings of fact the lower Appellate Court concurred. Upon the question as to whether the plaintiffs were parties to and properly represented in the suit instituted on the bond by Jogi Singh, the Subordinate Judge, after discussing at some length the following cases which were cited and relied on by the parties—*Sherafutoollah Chowdhry v. Sreemutty Abedoomissa Bibee* (17 W. R., 374), *Komul Chunder Sen v. Surbessur Doss Goopto* (21 W. R., 298), *Hunooman Persaul Panday v. Mussamut Babooee Munraj Koonweree* (6 Moo. I. A., 393), *Ishan Chunder Mitter v. Buksh Ali Soudagur* (Marsh, p. 614), *Tarnee Churn Gangooly v. Watson & Co.* (12 W. R., 413), *Modhoo Soodan Singh v. Rajah Prithee Bullub Paul* (16 W. R., 231), *Junghee Lall v. Sham Lall Misser* (20 W. R., 120), *Makbul Ali v. Srimatti Masnad Bibi* (3 B. L. R., 54), *Buzrung Sahoy Singh v. Mussamut Mautora Chowdhran* (22 W. R., 119), *Mongula Dossee v. Sharoda Dossee* (20 W. R., 48); *Mrinamoye Dabia v. Jogodishuri Dabia* (I. L. R. 5 Cal., 450), *Saikh Abdool Kureem v. Syud Jaun Ali* (18 W. R., 56), *Noggendro Chundro Mitro v. Sreemutty Kishen Soondory Dassee* (19 W. R., 133)—decided the question in favour of the defendant, also finding that no collusion or fraud had been practised, that there was legal necessity for the loan, and that the suit was not barred by limitation, and consequently dismissed the plaintiffs' suit with costs.

The lower Appellate Court agreed with the Court below upon all findings of fact, but considering itself bound by the [512] decisions in *Sreenarain Mitter v. Sreemutty Kashen Soondery Dassee* (11 B. L. R., 171); *Mrinamoye Dabra v. Jogodishuri Dabra* (I. L. R. 5 Cal., 450); and *Durgapersad v. Keshopersad Singh* (I. L. R., 8 Cal., 656); held, that the minors were not legally represented in Jogi Singh's suit, and were not bound by the decree or proceedings therein. That Court was, however, of opinion that so far as the wording of the plaint in that suit went it was sufficient under Act VIII of 1859 to constitute the minors defendants.

Agreeing with the lower Court, therefore, upon the question of necessity, and the absence of fraud or collusion, the lower Appellate Court reversed the decree, holding that the plaintiffs were entitled to a decree declaring their right to the possession of the property in dispute on their repaying to the defendant Jogi Singh one-half of the consideration-money for the bond, together with interest up to the date when he obtained possession of the property under dispute.

Against that decree the defendant Jogi Singh appealed to the High Court, upon the ground that the decree obtained by him was binding upon the plaintiffs, and that his purchase was valid and could not be set aside; and the plaintiffs filed cross objections, contending that they were entitled to recover the property without repayment of any portion of the bond debt, and that even if liable to pay anything, all they could be legally made to pay was half the purchase-money paid by Jogi Singh, and not half the debt due on the bond as held by the Court below.

Mr. R. E. Twidale and Baboo Anund Gopal Palit for the Appellant

Baboo Mohesh Chunder Chowdry and Baboo Sahgram Singh for the Respondents.

The Judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This was a suit to recover possession of certain properties which were purchased on the 4th April 1876 by the defendant No. 1, Jogi Singh, who is the appellant before us, at a sale in execution of a decree. The plaintiffs are the sons of one Pheku [513] Singh; one of them is a minor, and the other has attained majority. During their minority, Chet Narain Singh, their uncle, as also their mother on her own behalf and on behalf of her sons, executed a mortgage bond for Rs. 1,700. A decree was subsequently obtained upon that document in June 1875, and in execution of that decree the properties in suit were sold and purchased by the defendant. The plaintiffs brought the present suit in January 1882 to recover possession of their share of the properties thus sold to the defendant upon the ground that there was no legal necessity whatever for the loan contracted by the mother, that the decree was a fraudulent one, that in the suit in which the said decree was obtained they were no parties; and that at the sale their interest in the family property did not pass.

The defendant Jogi Singh denied the above allegations, and contended that he had acquired a valid title to the property by the purchase.

There were several issues raised in the Court of First Instance, but they were all decided in favour of the defendant. That Court found that there was legal necessity for the loan, that both in the bond and in the suit in which the decree was obtained, the minors were properly described and represented; and that, although no formal order was recorded by the Court giving permission to the mother under s. 3, Act XL of 1858, to act for her minor sons, yet inasmuch as "she was made a defendant in the case as guardian of the minors,

and defended the suit as such guardian, and the Court admitted her defence and decided the case accordingly, and the said decision had become final and conclusive, it should be understood that the Court had given the permission in question." The Court of First Instance further found that the decree was a *bona fide* one, and that the defendant had acquired a good title at the sale.

The Court of Appeal below has concurred with that of First Instance in all points, excepting in this, that it holds, following certain precedents quoted in its judgment, that inasmuch as the mother had no certificate under Act XL of 1858, and "it not being apparent" that under s 3 of that Act she had permission given to her to defend the suit on behalf of her minor sons, the minors were not represented in the said suit, and, [514] therefore, the decree was not binding upon them. The Judge at the same time observed that he was not prepared to say that, if "unaided by decisions," he should not himself concur in the conclusion of the Sub-Judge, but the "weight of authority" being opposed to that view, he was of opinion that the plaintiffs were entitled to recover, but subject to the payment of a moiety of the money found to be due under the mortgage bond aforesaid, they (the plaintiffs) at the same time getting credit for the sum of Rs. 1,062-6 paid by their mother during their minority.

The defendant has appealed against the said decision upon the ground that the decree in execution of which the property was sold was under the circumstances set out in the judgment of the first Court binding upon the plaintiffs, and that he had acquired a valid title under his purchase. The plaintiffs have filed cross-objections insisting that an unconditional decree should have been given to them.

It will be observed that the decree in execution of which the property was sold was made at a time when the old Procedure Code, Act VIII of 1859, was in force, and which did not contain a chapter like chapter XXXI which we have in the new Procedure Code, and which provides in s. 443 that "where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, etc., etc." If we had to consider the provisions of the present Procedure Code with reference to what was done in the previous suit in regard to the minors, we should feel grave doubts as to whether there was any appointment of a guardian *ad litem*, and whether the plaintiffs were parties in that case. But, as we have already observed, that suit was not governed by the rules laid down in the Code of 1877. What we have to do in the present instance is to consider the provisions of the Procedure Code of 1859, read with s. 3, Act XL of 1858, and determine whether there was such a material defect in the procedure of the previous suit in regard to the minors, as to render it incumbent upon us to say that the minors were not properly represented, and that the decree passed in that suit was not binding upon them. Now, s. 3 of Act XL of 1858 provides that no person shall be entitled to institute or defend a [516] suit connected with a minor's estate, of which he claims charge until he shall have obtained a certificate under the Act, but that when the property is of small value, or for any other sufficient reason, the Court having jurisdiction may allow any relative of the minor to institute or defend a suit on his behalf, notwithstanding no certificate had been granted. The question then arises, whether, in the previous case, the present plaintiff's mother was allowed by the Court in which the suit was instituted to defend it on their behalf. If we were prepared to hold that under the law there must be a *written* permission, we should have felt ourselves bound to hold that such a permission having not been recorded the minors were not represented in that case. But we do not

understand the law to be so, and in this view we are supported by a ruling of this Court in *Aukhil Chunder v. Tripoorra Soonduree* (22 W. R., 525). It is indeed true that in one of the cases referred to by the Judge of the Court below a Divisional Bench of this Court in *Mrinamoye Dabla v. Jogodishuri Dabla* (I. L. R., 5 Cal., 450) was of opinion "that the permission must be formally recorded, as it is an act of judicial discretion which is necessarily open to appeal"; but it will be observed in the first place that the suit in that instance was governed by the Procedure Code of 1877 and not that of 1859, and, in the second place, it was not necessary, as we understand the case, for the learned Judges who decided it to come to any decision upon this matter, and, in the third place, the unrecorded order of the Court (supposed to have been made) allowing the mother to appear for the minor was made, in the course of the same proceedings which were the subject-matter of appeal to this Court, and therefore the whole of the proceedings having been before this Court in appeal, the learned Judges were in a position to pronounce, and were authorized to pronounce, judgment upon the question of the regularity or otherwise of the proceedings in connection with the appearance and representation on behalf of the minors. An order like this is not by itself subject to appeal, but if the case in which the order is made is appealed against, its propriety and validity may be determined by the Appellate Court. But, in the present instance, the action of the Court in allowing the mother to defend this [516] suit on behalf of her minor sons is not before us in appeal. What we have to determine is, not whether the Court was right in allowing the mother to represent the minors and to defend the suit on their behalf, but whether, as a matter of fact, the Court did allow her to do so. Upon this matter, the Court of First Instance, upon a consideration of the whole of the circumstances, came to the conclusion that it was to be presumed that the Court did accord such permission to the mother. The learned Judge of the Appellate Court does not in any way disagree with the first Court in this conclusion, but, on the contrary, observes "I am not prepared to say that, if unaided by decisions, I should not myself concur in this finding of the Sub-Judge."

That being so, it really comes to be a question of fact, viz., whether the conclusion arrived at by both the Courts below in this matter, viz., that under the circumstances permission may be presumed to have been given, is erroneous in law. We are of opinion that the grounds upon which the Courts below have proceeded are such as legitimately warrant such a conclusion, and we are unable, nor are we called upon to disturb the same.

Besides the case referred to above, viz., *Mrinamoye Dabla v. Jogodishuri Dabla* (I. L. R., 5 Cal., 450), the learned Judge of the Court below has relied upon two decisions of the Privy Council, viz., *Srinarain Mitter v. Sreenuttty Krishen Soondery Dassie* (11 B. L. R., 171), and *Durgapershad v. Keshopersad Singh* (I. L. R., 8 Cal., 656).

In the first of these two cases, the suit was for setting aside two deeds for the adoption of a child, and it was brought against Sri Narain Mitter "for himself and guardian of his minor son." The Judicial Committee, being evidently of opinion that the minor was not properly described, held that the child was no party to the suit, and then made the following observations: "If the son had been made co-defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. On a suit by the plaintiff to set aside the deeds upon the ground that there [517] had been no adoption, the plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the plaintiff the guardian of the child if he had

sued her for a declaration that the child had been validly adopted. If the father really refused to give the child in adoption, because he did not desire to have him adopted, he was not a proper person to protect the child's interest, or likely to make the best case in his behalf in a suit to declare the adoption invalid." What the Judicial Committee held, was that, in the circumstances of that case, the defendant could not be constituted guardian of the minor, and that the minor was not represented by his natural father. That case is, therefore, really no authority for the question which the learned Judge had to decide in this case, and it will be observed that the remarks of the Judicial Committee were made in appeal against the judgment of the lower Court in the suit in which the minor was said to have been sued against through his guardian. In the present instance, the proceedings of the suit which was instituted against the minors are not before us in appeal.

In the other case, namely, in the case of *Durgapershad v Keshopersad Singh* (I L. R., 8 Cal., 656), it appears that the suit in which the previous decree was obtained was brought against the minors under the guardianship of both their uncle and mother. An *ex parte* decree was in the first instance passed against both the defendants, but subsequently, upon application by the mother, the Court revived the suit, but eventually struck off the name of the mother and did not allow her to appear as the guardian of the minors. It seems to have been contended that the uncle was the guardian, but the Judicial Committee held that he was not so, he not having obtained a certificate under s. 3, Act XL of 1858. No question seems to have been raised as to whether or not the uncle had been permitted under the proviso to s. 3 to defend the suit on behalf of the minors; and, indeed, in the circumstances of that case, the question could not be raised. The decree was an *ex parte* one. There was no appearance at all on behalf of the minors, and therefore [518] the Court was not called upon at any time during the progress of the suit to exercise the discretion vested in it by the proviso to s. 3, Act XL of 1858. That being so, the only question before the Judicial Committee was whether the suit was brought against the minor represented by a legal guardian. In this view of the matter, it appears to us that the decision in that case does not help us in deciding the questions raised on the present occasion.

Being of opinion, as already expressed, that s. 3 of Act XL of 1858 does not require any written order allowing the next friend to sue or defend a suit on behalf of the minor, and that the Courts below have rightly found that such a permission might be presumed in this case, we cannot but hold that the minors were duly represented in the previous suit, and are therefore bound by the result thereof. And we may observe that the view which we take of this matter accords with that expressed by the Allahabad High Court in *Kedar Nath v. Debi Din* (I. L. R., 4 All., 165).

There is one other point that we think we ought to notice. It was a point that was raised by the learned vakeel for the respondent, viz., that the minors were not properly described in the previous suit. This is indeed true, but this was merely a defect in form—a defect which does not, in our opinion, affect the true merits of the case. The description that was given of the minors was in accordance with the prevailing practice at the time when that suit was brought; and we agree in the view expressed by a Divisional Bench of this Court in holding "that there is no authority for saying that where the minors have been really sued, though in a wrong form, a decree against them would not be valid"—*Grish Chunder Mookerjee v. Miller* (3 C L. R., 17). See also *Komul Chunder Sen v. Surbessur Doss Goopto* (21 W. R., 298). The decree against the minors was obtained, and the sale took place in execution

in the year 1876, and we think it would not be right, after this length of time, to unrip all that has taken place, and disturb the title which the defendant acquired so many years ago.

[319] Upon all these considerations we are of opinion that the decree of the lower Court should be set aside, and that of the first Court restored, with costs.

Appeal allowed.

NOTES.

[If a minor is properly represented in a suit or proceeding by a next friend or guardian, the minor is bound by the decree even though the next friend is not formally appointed by the Court:—11 Cal., 509; 14 Cal., 159, at 162, F.B.]

In the recent case of 36 Mad., 295, where the question related to compromise, the Privy Council held that the formalities of the C. P. C., when a minor is a party to the suit, are imperative.

A suit instituted by a minor without a next friend is merely an irregularity which can be waived by the conduct of the defendant—19 Mad., 127; but not so in the case of a minor being sued without a guardian, it is a nullity:—24 Cal., 25; 24 All. 383, 28 All. 137; 12 Bom 18.]

[11 Cal. 519]

APPELLATE CIVIL.

The 29th April, 1885.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE MACPHERSON.

Lal Mahomed... ..Defendant

versus

Kallanus.... ..Plaintiff.

Evidence—Estoppel of tenant—Act I of 1872, s. 116—Derivative title.

A, a ryot, being in possession of a certain holding, executed a *kabuliat* regarding this holding in favour of B (who claimed the land, in which the holding was included, under a derivative title from the last owner), and paid rent to B thereunder.

Held, that A was not estopped by s. 116 of the Evidence Act from disputing B's title.

The words "at the beginning of the tenancy" in s. 116† of Act I of 1872 only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.

THIS was a suit for arrears of rent.

The plaintiff alleged that he had obtained an *ijara pottah* for ten years, from Kartick 1287, of an eight-anna share in a certain mouzah from Mahomed Ismail, Mahomed Eayashin, Shamshenessar Bibi, Azizanessa Bibi and Shaban Bibi. That one Sheikh Lal Mahomed had, subsequently to the execution of the *ijara pottah*, executed in Baishakh 1288 a *kabuliat* for three years on account of a certain *jote* in this mouzah, which *jote* had formerly been held by Sheikh Lal Mahomed under Mahomed Ismail, and that the rent of this *jote* being in arrears, he brought this suit for the purpose above mentioned.

* Appeal from Appellate Decree No. 2222 of 1883, against the decree of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 18th July 1883, reversing the decree of Baboo Har Nath Rai, Munsiff of Bazitpore, dated the 14th of February 1883.

† [Sec. 116 —No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and

no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.] *

The defendant denied that the persons under whom the plaintiff claimed had had any right in the mouzah, and stated that he had never paid rent to any of them. He further stated that one Ekram Hossain was originally the owner of an eleven-anna share in this mouzah, and that he had paid rent to him for the land for [520] which rent was now claimed, and that after Ekram's death he had paid rent to Soorja Mia and other heirs of Ekram Hossain; that Mahomed Ismail and certain others of the heirs of Ekram Hossain had been deprived of their share in the estate by a deed of *mimangsapatia*, and, although they had since attempted to get possession, they have failed to do so. He further stated that he had executed the *kabuliat* under coercion.

The only issue framed was whether or no the *kabuliat* had been executed under coercion.

The evidence showed that the defendant had formerly paid rent to Ekram Hossain, and after his death to Soorja Mia and other heirs of Ekram Hossain, but that since the execution of the *kabuliat* it was admitted that he had paid rent to the plaintiff; that in 1287 the plaintiff had built his sudder cutcherry on the premises in dispute, and had forcibly compelled the defendant and others to come and execute *kabulats*. The plaintiff gave certain evidence denying that coercion had been used.

The Munsiff considered that no issue regarding title to the land ought to be raised, section 116 of the Evidence Act precluding the defendant from disputing the plaintiff's title, the defendant having admitted the execution of the *kabuliat* and the subsequent payment of rent under it, and that the only question to be decided was whether or no the *kabuliat* had been obtained by coercion, and as to this he held that, taking into consideration the terms which were imported into the *kabuliat*, and the evidence given by the defendant as to the means employed in getting the *kabuliat*, and the unreliable evidence given by the plaintiff in contradiction, coercion had been proved, and he, therefore, dismissed the plaintiff's suit.

The plaintiff appealed to the Subordinate Judge, who held that the defendant having admitted execution of the *kabuliat*, the onus was upon him to prove that coercion was used, that there was no reliable evidence to show that the *kabuliat* was obtained by coercion, and that supposing even that there had been, this fact would not make the *kabuliat* void, as the defendant had ratified the contract by paying rent to the plaintiff, and after further stating that there appeared to be a dispute as to the title to the land between the plaintiff and one Soorja Mia, to whose [521] side the defendant had been gained over, he decided that, as the defendant had attorned to the plaintiff, he was liable to pay the rent sued for until such time as it might be established that Soorja Mia had a better title than the plaintiff. He therefore allowed the appeal.

The defendant appealed to the High Court.

Mr. Phillips (with him Baboo Grish Chunder Chowdhry) for the appellant. The question of previous payments of rent to the plaintiff was not raised in any issue, and the lower Court ought not to have decided on this point without receiving rebutting evidence from the defendant, the Courts below were wrong in not allowing the defendant to prove the title of the persons set up by him, notwithstanding the execution of the *kabuliat* in favour of the plaintiff who claimed under a derivative title; *Lodai Mollah v. Kally Dass Roy* (I. L. R., 8 Cal., 238); I am not estopped from setting up a derivative title.

Baboo Mohiny Mohun Dass (with him Baboo Rash Behari Ghose) for the respondent.—The case of *Protap Chunder Roy Chowdhry v. Jogendro*

Chunder Ghose (4 C. L. R., 168) shows that such questions of title cannot be raised in rent suits. When a person has been in possession of land by receiving rents or by any acknowledgment of his position as a landlord, such person would, apart from any question of his title to the property, have a right to claim rent from his ryot. See *Bhyro Singh v. Rajah Leelanund Singh Bahadoor* (21 W. R., 153). The defendant is estopped from disputing our title—see s. 116 of the Evidence Act, and the classification of estoppels there given is not exhaustive. The other side would confine estoppel as between the tenant and the person who has let him into possession, but I say the doctrine is much wider.

Mr. *Phillips* in reply.—I concede we admitted that we paid rent to the plaintiff after the *kabuliat*, but I say the admission does not amount to an estoppel, the case of *Bhyro Singh v. Raja Leelanund Singh Bahadoor* does not apply, as it is no authority [522] on the construction of the Evidence Act, the case being decided in the Court of First Instance before the Evidence Act came into force. With regard to the question whether there are rules of estoppel outside the Evidence Act, see *Ganges Manufacturing Co. v. Soorymull* (1 L. R., 5 Cal., 669), which shows that where the estoppel is pleaded as estopping a person from giving particular evidence, the only rules of estoppel are those laid down in the Evidence Act, but that all rules of estoppel were not of course rules of evidence.

Here, however, we have a particular section, viz., s. 116, which applies to such an estoppel as arises in the present case; for the only question here is whether my client is entitled to give evidence on a certain point. It is clear that a derivative title may be disputed; the words "the beginning of his tenancy" in s. 116 mean the beginning of the tenant's tenancy and not the introduction of a new landlord.

The case of *Cornish v. Searell* (8 B & C, 471) was the case of a person without any title coming forward and getting a tenant to execute a lease, and the whole of the argument there turns on his being in possession and not on his being let into possession, that case is on all fours with the present. *Hall v. Butler* (4 C. L. R., 168) favours my contention, that the beginning of the tenancy means the creation of the tenancy originally. There is no question here of attornment, it is one of agreement. The case of *Protab Chunder Roy Chowdhry v. Jogendro Chunder Ghose* (10 A & E., 204) should be considered in two portions (1) as concerning the right of an intervenor setting up his title; and (2) whether the original defendant had a good defence to the suit. In deciding the case, the second matter, the intervenor, was put out of the question, and therefore the question of title went out with him, and it seems to me that the case merely decides that a defendant will not be allowed on appeal to shift his case, and that when this is done the Courts will not interfere. But here we seek to raise the question of title ourselves, there is no intervenor in this case. There seems no estoppel against disputing a derivative title, admitting derivation of title, one may set up the fact that [523] your original landlord's title is forfeited, and set up another, and in such a case the estoppel would be to the plaintiff.

Judgment of the Court (MCDONELL and MACPHERSON, JJ.) was as follows:—

This suit was brought to recover arrears of rent based on a *kabuliat*. The defendant admitted having given the *kabuliat*, but stated that he had done so under coercion. He also raised the further defence that at the time when the *kabuliat* was executed the plaintiff had no title to the share claimed by him. The Munsiff was of opinion that under s. 116 of the Evidence Act the defendant could not, if the *kabuliat* stood, deny the plaintiff's title. So he

confined himself to the simple issue as to whether the *kabuliat* was obtained by coercion or not, and finding, for the reasons given in his judgment, that it was so obtained, he dismissed the plaintiff's suit. The Subordinate Judge, on appeal, held that the evidence to prove coercion was not reliable, and that the defendant could not avoid the contract, as he had ratified it by paying rent. He, therefore, reversed the Munsiff's judgment and decreed the plaintiff's suit.

In second appeal it was urged before us that by giving the *kabuliat* the defendant was not estopped from showing that the plaintiff had no title, and that the lower Appellate Court ought to have allowed the defendant to prove the title of the persons set up by him, notwithstanding the execution of the *kabuliat* in favour of the plaintiff who claims under a derivative title. We consider that, upon the facts found, the defendant is not estopped by s. 116 of the Evidence Act, from denying the plaintiff's title. The words "at the beginning of the tenancy" in that section can only apply to cases in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not to a case like the present where the tenants have previously been in possession. Possession in this case was really from the ryot defendant to the plaintiff, and not from the plaintiff to the defendant. Further, it cannot be said that there was any such contract between the parties as would estop the defendant from denying the plaintiff's title inasmuch as no consideration was given. Had the plaintiff inducted the defendant into possession, the giving of the possession would have been the [524] consideration, but the defendant was in possession before, and all that he did was to give a *kabuliat* to a person claiming a derivative title from the last owner. This title the defendant now wishes to dispute, and we think that he is entitled to do so. We, therefore, set aside the judgment of the Subordinate Judge, and direct that the case be remanded to the Munsiff to allow the defendant an opportunity of proving the title of the persons set up by him. Each party will be allowed to adduce fresh evidence, but the onus of proving this will, of course, lie upon the defendant. The costs of this appeal will follow the result.

Case remanded.

NOTES.

[A tenant who being already in possession, attorned to another, is not estopped from impeaching the title of that other. —11 Cal., 519; (cited in 17 Mad., 275); 12 C. L. J., 428 at 432; but in (1903) 7 C. W. N., 596 it was pointed out, after fully discussing this case, that it is no authority for the proposition that the learned Judges intended to lay down that a person in occupation of land may select his rent-receiver and execute a solemn agreement promising to pay him rent and pay him rent for a time with full knowledge that he had no right to the land and thereafter at any time decline to pay him rent pleading want of title in him and without attempting to show any other circumstances which would invalidate the contract of tenancy. See also *Carlton v. Bowcock* (1884) 51 L. T., 659.]

So also in *Serjeant v. Nash, Field & Co* (1903) 2 K. B. 304, Lord Justice STIRLING observed, that payment of rent by the plaintiff to a person by whom he was not let into possession did not create an estoppel, but was simply in the nature of an admission which might be explained.

Although the rule appears to be as above stated, as regards the difference created by the fact of possession, see the acute criticism in *Franklin v. Merida* (35 California 558) quoted *in extenso* in *Bigelow on Estoppel* (1913), sixth Edn., p. 570 *et seq.* (foot-note).]

[11 Cal. 525]

ORIGINAL CIVIL.

The 16th April, 1885.

PRESENT :

MR. JUSTICE WILSON.

Ali Serang and others.... Plaintiffs

versus

Beadon.....Defendant.

*Detention in jail—Suit by thirteen persons jointly for damages for detention—
 Plaint taken off the file—Causes of action, Joinder of—Separate
 causes of action—Practice—Act XIV of 1882, s. 26.*

Thirteen persons who had been committed to jail under one warrant, and for the same, offence, jointly sued the Superintendent of the Presidency Jail for their wrongful detention in jail after the term of imprisonment to which they had been sentenced had expired, claiming Rs. 2,600 as damages.

The defendant applied to have the plaint taken off the file on the ground that the plaintiffs had improperly joined in one suit several distinct and separate causes of action belonging to them as separate individuals.

Held, that the plaint must be taken off the file.

THIS was an application on notice to the plaintiff for an order that the plaint in the above suit should be taken off the file, on the ground that the plaintiffs had improperly joined in the same suit several distinct and separate causes of action belonging to them as separate individuals.

The plaintiffs (13 in number) on the 8th January 1884 were engaged as firemen on board the steamer *Ellora*, and had been prosecuted in the Chief Presidency Magistrate's Court, at the instance of the agents of the steamer, for desertion from the *Ellora*, and on the 16th April 1884 were convicted therefor and [525] sentenced to one month's rigorous imprisonment and forfeiture of all wages.

On the 25th April 1884 the prisoners obtained a rule in the High Court, calling upon the agents to show cause why the sentence passed by the Presidency Magistrate should not be set aside, on the ground that there was no legal evidence of desertion, and that the official books, as required by the Indian Merchant Act, 1859, had not been produced at the trial, a rule *nisi* was granted, and the prisoners permitted to find bail on sufficient security. On the same day an application for bail was made to the Presidency Magistrate, and he, on the 26th, directed the Superintendent of the Presidency Jail to bring up the prisoners before him, and fixed the amount of bail at Rs. 200 for each prisoner. The prisoners were unable to furnish this security, and were kept eight days in custody at the *thanna*, and were then sent back to the Jail on the 5th May 1884. On the 30th April 1884 the rule, having been argued, was discharged.

The term for which the prisoners were sentenced expired on the 5th May 1884, but the prisoners were not released on that date; the Superintendent of the Jail being of opinion that the eight days during which the prisoners had been removed from the jail could not be counted in calculating the term of imprisonment.

The prisoners thereupon applied to the High Court on the 16th May for their discharge from custody, and obtained a rule *nisi* , calling upon the Chief

Presidency Magistrate or the Crown to show cause why they should not be released, which rule was made returnable by 4 P.M. on the same day. Before this rule came on to be heard, the prisoners were, however, released, although later in the day the rule was made absolute.

On the 9th March 1885 the 13 persons, who had been imprisoned jointly, brought a suit against the Superintendent of the Presidency Jail, after due notice, for their wrongful detention in jail, claiming Rs. 2,600 as damages. The plaint was duly admitted in Court, and the suit set down in the *remanet* board.

The defendant thereupon applied to have the plaint taken off the file on the grounds above set out.

The Officiating Standing Counsel (Mr. *Bonnerjee*) for the Defendant contended that the plaintiffs could not jointly bring [526] the suit; and that s. 26 of Act XIV of 1882 was not applicable to the plaintiffs' case, inasmuch as although sent to jail under the same warrant and for the same offence, they had not the same cause of action; that each of the plaintiffs might have possibly a separate cause of action, but in such case (the damages claimed being Rs. 2,600, which, if divided amongst the 13 plaintiffs, would give to each Rs. 200), the suit would have to be brought in the Small Cause Court.

Wilson, J.—I had some doubts in admitting the plaint, but having regard to my recollection of the case of *Booth v. Briscoe* (L. R., 2 Q. B. D., 496) I thought it safer to admit it.

Mr. *Bonnerjee* cited and distinguished *Booth v. Briscoe*.

Mr. *Braunfeld* for the Plaintiffs contended that the suit was rightly framed, the prisoners having been charged, tried, convicted and committed to jail together; that they had incurred expenses together in obtaining their release, that had the suits been brought separately there would have been a multiplicity of suits, which it was the policy of the law to avoid, and in all probability the defendant would have applied to consolidate them, and cited *Coryton v. Lithby* (2 Saund. Pt. I, p. 115), *Barratt v. Collins* (10 Moo. J. B., 446), *Booth v. Briscoe* (L. R., 2 Q. B. D., 496).

Wilson, J. considered that there was nothing to justify the plaintiffs thus joining in one suit, seeing that their causes of action, though similar in nature, were in fact distinct and separate. He, therefore, directed the plaint to be taken off the file.

Attorney for the Plaintiff Mr. *Cockerell Smith*.

Attorney for the Defendant: Mr. *R. L. Upton*.

NOTES.

[Mr. *Hukm Chand* in his *Civil Procedure* (1900), Vol. I, p. 379, remarks. "The headnote of the case observes that they (the plaintiffs) were even committed to jail under one warrant, but there is nothing in the Report itself to bear that out, and the point would be immaterial unless the act of detention were deemed to be one"]

Under the C.P.C., 1882, there was formerly a difference of opinion as regards the meaning of 'cause of action' with reference to misjoinder of plaintiffs, but the decisions tended towards the view of the Calcutta High Court.—34 Cal., 662; 11 C.W.N., 688; 22 Cal., 833; 26 Mad., 647; 26 Bom., 259; 18 All., 432; 6 I.C., 15 (Mad.).

The C.P.C., 1908, O 1, r. 1 now enacts that "all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate suits, any common question of fact or law would arise." This is in accordance with the new English rules.

Under the C.P.C., 1908, this case cannot be deemed bad for misjoinder.]

[527] ORIGINAL CIVIL.

The 7th May, 1885.

PRESENT:

MR. JUSTICE NORRIS.

Shamsonnessa Begum.....Judgment-creditor

versus

Anne Love.....Judgment-debtor.

*Warrant of arrest—Imprisonment in jail not named in warrant—Release—
Civil Procedure Code—Act XIV of 1882, ss. 336, 337.*

A Sheriff's officer, of his own motion, delivered over to the officer in charge of the Alipore Jail, a judgment-debtor who had been duly committed to the Presidency Jail.

Held, that the imprisonment was unlawful, that the delivery over to the officer in charge of the Alipore Jail amounted to a release; and that the prisoner was entitled therefore to be discharged.

IN this case one Anne Love was arrested on the 2nd May 1885 in execution of a decree obtained by one Shamsonnessa Begum against her as the executrix of her late husband.

The 2nd of May being a day on which the Original Side of the Court was closed, the Sheriff's officer took the judgment-debtor at once to the Presidency Jail; the warder, however, refused to receive the judgment-debtor (his reason being that female prisoners were not admitted to the Presidency Jail) and she was thereupon taken to the Russa Jail for females, but it being found on arrival that that institution was closed, she was taken to, and placed in, the Alipore Jail in the 24-Pergunnahs.

The judgment-debtor remained in custody in the Alipore Jail until the 4th May, when she was brought up before the Court for committal in accordance with s. 336 of the Code of Civil Procedure. Mr. Justice NORRIS directed she should be discharged from custody on finding security to the satisfaction of the Registrar, this, however, she was unable to do, and she was therefore committed to the Presidency Jail. The warrant, as drawn, was in the usual form, and was addressed to the Sheriff of the town of Calcutta and to the Superintendent of the Presidency Jail, directing the former personage to take and convey the judgment-debtor to the Presidency Jail, and the latter to receive and keep her there in safe custody until satisfaction of the decree.

The Sheriff's officer then took the judgment-debtor back to the Alipore Jail, delivered her over to the jail authorities, and deposited diet-money with the jailor. On the 6th May Mr. *Handley* [528] applied to the Court for a writ of a *habeas corpus*, directed to the Superintendent of the Presidency Jail. The Superintendent of the Jail, in accordance with this writ, produced the judgment-debtor on the 7th May, before Mr. Justice NORRIS.

He was then examined, and stated that for the purposes of the above order he had obtained the person of the judgment-debtor from the Superintendent of the Alipore Jail; that under a direction received from Government in the form of a circular order, females were never received at the Presidency Jail, but were taken to the Russa Jail; that this latter Jail had lately been abolished; that no diet-money had been received at the Presidency Jail on account of Anne Love.

Mr. *Handley* submitted that the judgment-debtor was entitled to be discharged from custody, as she had been illegally detained in a jail outside the jurisdiction of the Court in direct contravention to the terms of the warrant, and as no diet-money had been deposited with the Jailer of the Presidency Jail.

Baboo Nemye Churn Bose for the Judgment-creditor.

Norris, J.—In this case W. N. Love, also called Anne Love, was arrested on Saturday last by Brown, the Sheriff's officer, under a warrant issued out of this Court, dated the 2nd of May 1885. She was arrested on Saturday, the 2nd of May, and in consequence of the Court not sitting at the time of the arrest, she was, according to Brown's statement, taken to the Presidency Jail. Brown says he showed the warrant to the warder, and the warder refused to receive the prisoner; that he then went to the Russa Jail, that he found that the Russa Jail had ceased to exist, and he then took the prisoner to the Alipore Jail where she remained till Monday.

The warder says the warrant was not shown to him, and that there was no refusal on his part, or on the part of any other person, to receive the prisoner.

Anne Love was produced here on Monday, the 4th instant, and under s. 336 I directed that on her giving security for the sum of Rs. 1,800 to the satisfaction of the Registrar to appear when called upon, and to apply within one month to be declared an insolvent, she should be released from arrest, and [529] failing her giving security I directed, as I was bound to do, that she should be taken to the Presidency Jail.

She went before the Registrar and was unable to furnish security for the sum of Rs. 1,800 to his satisfaction. Thereupon a warrant under the seal of the Court was made out and signed by him.

It is directed to the Sheriff and to the Superintendent of the Presidency Jail, and is as follows. "Whereas W. N. Love, also called Anne Love, has been brought before Her Majesty's High Court of Judicature at Fort William in Bengal this 4th day of May one thousand eight hundred and eighty-five, under a warrant in execution of a decree which was made and pronounced by the said Court on the eighteenth day of September one thousand eight hundred and eighty-four in a suit wherein Shamsonnessa Begum is plaintiff, and Anne Love, the widow and heiress and executrix of the last will and testament of William Nicholas Love, deceased, is defendant, and by which decree it was ordered that the said defendant should pay to the plaintiff the sum of Rs. 1,606-6 for certain taxed costs, and also the sum of Rs. 91 for costs of execution, besides Sheriff's fees and charges; and whereas the said W. N. Love, also called Anne Love, has not obeyed the decree, nor has satisfied the said Court that she is entitled to discharge from custody under the provisions in that behalf of Act XIV of 1882. These are therefore to will and require you the said Sheriff to take the said W. N. Love, also called Anne Love, and to carry and convey her forthwith to the said 'Jail' (that is, the Presidency Jail) under safe and secure conduct. And you, the said Superintendent aforesaid, are hereby in Her Majesty's name commanded and required to take and receive the said W. N. Love, also called Anne Love, into the jail, and keep her imprisoned therein until the said decree shall be fully satisfied, or the said W. N. Love, also called Anne Love, shall be otherwise entitled to be released according to the terms and provisions of the said Act relating to the execution of decrees by imprisonment. And the said Court does hereby fix four annas per diem as the rate of the monthly allowance for the subsistence of the said W. N. Love, also called Anne Love, during

her confinement under this warrant of commitment. Witness Sir RICHARD [530] GARTH, Knight, Chief Justice, at Fort William aforesaid, the 4th day of May in the year of our Lord one thousand eight hundred and eighty-five."

Now the Sheriff's officer, instead of taking the prisoner to the Presidency Jail as he was commanded to do, of his own motion, because the officer in charge of the Presidency Jail had on the previous Saturday refused to receive her for intermediate custody, took her to the Alipore Jail, and there delivered her with the warrant to the officer in charge of the Alipore Jail. I am of opinion that his duty was to take her to the Presidency Jail and leave her there. The Superintendent of the Presidency Jail may, under the orders of Government, have taken such course as he may have been authorized to take with reference to her custody, but the Sheriff's officer's duty was to do as he was commanded to do. He had no authority to take her out of the jurisdiction, and leave her in the custody of the Superintendent of the Alipore Jail. She was in unlawful imprisonment from the time she was delivered to the Alipore Jail, and I am of opinion that when the Sheriff's officer delivered her to the Superintendent of the Alipore Jail, she was in fact released, and I direct her to be discharged.

Attorney for Applicant : Mr. H. H. Remfry.

NOTES.

[Compare with this 29 Cal., 286=6 C. W. N., 254 where the Court's jurisdiction to order confinement in a jail outside its jurisdiction was in question]

[11 Cal. 530]

CRIMINAL APPELLATE.

The 29th April, 1885.

PRESENT.

MR. JUSTICE PRINSEP AND MR. JUSTICE PIGOT.

Mehter Ali and others.....Appellants

versus

Queen-Empress.....Respondent.

*Enhancement of sentence on appeal—Criminal Procedure Code—Act X
of 1882, ss. 423, 439—Penal Code, s. 330.*

A head constable was convicted under s. 330 of the Penal Code, and at a trial before a Sessions Judge sentenced to four months simple imprisonment, the prisoner appealed. The High Court, in dismissing the appeal, directed, as a Court of Revision, that the sentence passed should be enhanced

[531] FOUR persons, viz., Mannu Lall, Sub-Inspector, Mehter Ali, Head Constable, Hussien Buksh, Constable, and Ameer Buksh, Constable, were charged under s. 330 of the Penal Code with having voluntarily caused hurt to certain persons in order to extort confessions from them, which might lead to the detection of the murder of one Mussamut Dhuri. The Sessions Judge, differing from both assessors, found that Mannu Lall and Mehter Ali were guilty under s. 330 of the Penal Code, and sentenced Mannu Lall to simple imprisonment for one year, and Mehter Ali to simple imprisonment for four months; he, also concurring with one of the assessors, found that Hussien

* Criminal Appeal No. 220 of 1885, against the order passed by J. Pratt, Esq., Officiating Sessions Judge of Purneah, dated the 11th March 1885.

Buksh and Ameer Buksh were also guilty under s. 330 of the Penal Code, and sentenced them to two years rigorous imprisonment.

The prisoners appealed to the High Court.

Baboo Bordo Nath Dutt for Mehter Ali. The other prisoners were unrepresented.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*) for the Crown.

The Judgment of the Court was delivered by

Prinsep, J.—As regards the two constables, the evidence leaves no doubt in our minds with regard to the correctness of the order of the Sessions Judge convicting them, under s. 330 of the Penal Code, of having caused hurt to certain persons, accused of murder of Mussamut Dhuri with the intention of extorting confessions from them.

As regards the other appellant, Mehter Ali, who occupied a somewhat higher position, being a head constable, it is argued that the evidence on the record does not amount to actual proof that he himself caused any such hurt to any of these persons. In support of this contention our attention has been drawn to some discrepancies in the evidence on the record, and especially on comparison of the evidence given by the principal witnesses at the trial with statements made at the various preliminary stages of the proceedings. These discrepancies, however, do not affect the general character of the evidence. The evidence is clear that false confessions were obtained from these persons who were arrested by the Police on suspicion of having murdered the [532] woman Dhuri, and that these false confessions were the result of violence toward these persons openly caused by the two constables as well as of illegal detention in Police custody beyond the period prescribed by law. The appellant head constable was for some days in charge of the Police investigation, and the superior officer of these constables when openly using violence to the prisoners in their custody, and he was throughout in the immediate neighbourhood of the places where this violence was used, and in constant company with the constables. We find ourselves, therefore, unable to come to any conclusion, but that he was not only cognizant of those assaults, but he was an accomplice in them, and in the illegal detention as the means by which he intended to obtain false confessions. We, therefore, think that there are no reasonable grounds for questioning the correctness of the conviction of the head constable Mehter Ali.

In sentencing the head constable to four months simple imprisonment, it would seem that the Sessions Judge had before him the fact that he had found that there was a superior officer also engaged in the investigation, and in his opinion more culpable than the head constable. We have not before us the case of the Sub-Inspector, and we desire to express no opinion regarding it; but even in the view taken by the Sessions Judge, we think that this sentence is altogether inadequate, and therefore, in dismissing the appeal of Mehter Ali, we direct, as a Court of Revision, that in lieu of the sentence passed by the Sessions Judge, he be sentenced to six months rigorous imprisonment calculated from the date of the sentence of the Sessions Court.

The appeals of the two constables are dismissed.

Appeals dismissed.

NOTES.

[The High Court has power while hearing an appeal, as a Court of revision, to enhance the sentence :—11 Cal., 530 ; 10 Bom., 254, even so as to alter its nature, 6 All., 622 (F.B.) ; See also (1889) P. R. Cr., 7 ; (1898) P. R. Cr., 17 (F.B.).]

[633] APPELLATE CIVIL.

The 31st March, 1885.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Mohamaya Goopta and others.....Plaintiffs

versus

Nilmadhab Rai..... ..Defendant.*

*Notice to quit or pay an enhanced rent—Two-fold claim, both for rent and ejectment, not sustainable—Decree for rent and ejectment—**Bengal Act VIII of 1869, s. 14*

Where *A*, after notice to his tenants to pay rent at an enhanced rate from the commencement of the ensuing year or quit, brought a suit in which he prayed for a higher rate of rent or ejectment in the alternative. *held*, that in such a suit the plaintiff could not insist upon a two-fold claim for both rent and ejectment, nor obtain a decree for rent for the first quarter and ejectment thereafter

It is doubtful whether a notice in the alternative form to pay enhanced rent from a certain day or quit is a good notice *Janoo Mundur v. Braro Singh* (22 W. R., 518) doubted.

IN this suit, instituted on the 17th Bhadro 1288 (1st September 1881), the plaintiffs not only claimed rent for the last quarter of 1287 B. S., at the rate of Rs. 14-4 per annum, but on the basis of a notice, calling upon their tenant either to quit the holding or pay rent at the enhanced rate of Rs. 43 per annum from the beginning of the year 1288 B. S., also prayed for enhanced rent for the first quarter of 1288 B. S., and failing that, for *khas* possession of the holding and ejectment of the defendant. The Munsiff found the notice proved and gave the plaintiff a decree at the old rate up to the end of the first quarter of 1288 B. S. On appeal, the District Judge observed: "A reference to the notice will show that it is really a notice to quit the land from the beginning of the year 1288 B. S., and, in the event of the [634] defendant not complying with this requisition, an exorbitant rent in the form of a penalty is imposed. Paragraph 4 of the plaint prays, in the first place, for enhanced rent, and failing this prayer being granted, the plaintiff asks for *khas* possession; but the Government Pleader on behalf of the appellant does not press the claim for any more rent than that decreed, but urges that his client is entitled to immediate *khas* possession. Finding as I do on the evidence that a notice of ejectment was duly served on the defendant by registered letter in Pous 1287, I can see no reason why the defendant should be allowed to retain possession as he has been found to be a mere tenant-at-will." The Judge accordingly supplemented the Munsiff's decree by ordering the immediate ejectment of the defendant.

An appeal was preferred by the defendant to the High Court, and the value of the suit being for Rs. 15, the appeal came on before a single Judge. Mr. Justice FIELD, in reversing the decree of the lower Appellate Court, said: "The District Judge assumes in his judgment that the Munsiff had decided

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice FIELD, one of the Judges of this Court, dated the 19th of June 1884, in appeal from Appellate Decree No. 637 of 1883, against the decree of J. G. Charles, Esq., Officiating Judge of Rajshahye, dated the 23rd of January 1883, confirming the decree of Baboo Mohendra Lall Ghoswain, Second Munsiff of Natore, dated the 31st of March 1882.

that the defendant was a mere tenant-at-will. The Munsif did not decide this question Whether the defendant was a tenant-at-will was not put in issue and tried The question of the reasonableness of the notice was not tried, and a notice in the form in which this notice was given, that is to pay a higher rent or quit, is not an absolute notice to quit on which to found a suit for ejectment. I think, therefore, that the decree of the lower Appellate Court, in so far as it directs the immediate ejectment of the defendant, must be set aside."

From that decision the plaintiffs appealed under s. 15 of the Letters Patent.

Baboo Kishori Lal Sarkar for the Appellants.

Baboo Kishori Mohun Rai for the Respondent.

The Court (GARTH, C.J., and McDONELL, J.) delivered the following **Judgments:**—

Garth, C.J.—This was a suit by the plaintiff, who was the defendant's landlord, for a double purpose.

He first claimed rent from the defendant at the rate which the defendant and his father had been paying up to the close of the [535] year 1287. He then claimed enhanced rent for the first three months of 1288, but if the Court should be of opinion that he was not entitled to this enhanced rent, he claimed to eject the defendant as from the close of the year 1287.

This latter claim was founded upon a notice to quit, which the plaintiff had served upon the defendant of a somewhat ambiguous character.

The notice was given about three months before the close of the year 1287; it stated that the defendant, who had succeeded his father in the tenancy, had no interest (which meant, we presume, no permanent interest) in the tenure, and it required the defendant to quit the land at the end of the year 1287; or, if he did not quit the land, to hold it at an enhanced *jumma* of Rs. 43.

The defence to the suit was that the defendant was not a tenant-at-will, but that he held a permanent *mourasi* tenure in the land.

The issues for determination were—

1st.—Whether the defendant's tenure was *mourasi*?

2nd.—What is the *jumma* of 15 biggahs 13½ cottahs?

3rd.—Was the notice of enhancement served upon the defendant? and

4th.—Are the plaintiffs entitled to the enhanced rate claimed?

The Munsif found that the defendant's was not a *mourasi* tenure, but he did not go on to ascertain what its real nature was. He also found that the notice of enhancement was not binding upon the defendant, and, consequently, he gave the plaintiff a decree for the old rent, that is, the rent at which the defendant and his father had held previously to the end of 1287.

From that decree the defendant [plaintiff?] appealed, and the District Judge held that the plaintiff had a right in this suit to insist upon his two-fold claim—that is to say, the claim for rent and the claim for ejectment. He apparently left confirmed the decree which had been made by the first Court for the rent up to the end of the first three months of 1288; but he says that the plaintiff had a right to avail himself also of the notice to quit, and so to eject the defendant from the expiration of the first three months of 1288. He consequently gave the plaintiff a decree for ejectment as from that time.

[536] On appeal to this Court, the learned Judge considered that it had not been determined by the first Court whether or not the defendant was a tenant-

at-will. This, he says, was an important question; and if the suit could have been maintained for ejectment, he would have thought it necessary to remand the case, in order to have the question determined, whether the defendant was or was not a tenant-at-will. But he found that the notice to quit was not sufficient to entitle the plaintiff to eject the defendant.

The learned Judge says: "The question of the reasonableness of the notice was not tried; and a notice in the form in which this notice was given, that is, to pay a higher rent or to quit, is not an absolute notice to quit on which to found a suit for ejectment. I think, therefore, that the decree of the lower Appellate Court, in so far as it directs immediate ejectment of the defendant, must be set aside, and the appeal decreed with costs."

The effect of that decision was to set aside the decree of the District Judge, in so far as it related to the ejectment, and to confirm it so far as it related to the rent.

It has been contended before us that the learned Judge was wrong, and that the notice was a valid one and meant this: "I insist upon your paying an enhanced rent at the rate of Rs. 43 for the whole tenure from the close of 1287; and, unless you pay that, I give you notice to quit as from the close of 1287."

It is said that there is a case of *Janoo Mundur v. Brijo Singh*, reported in 22 W. R., 548, and decided by PHEAR and MORRIS, JJ., which approves of a notice to quit in that form. There the plaintiff, a landlord, sued to obtain an enhanced rent, on the strength of a notice which he had given under ss. 14 and 5 of Bengal Act VIII of 1869, but in that case the defendant was a tenant-at-will, and not an occupancy ryot, and PHEAR, J., in giving judgment, lays down the law thus:

He says: "As has been more than once remarked in this Court, the right of the plaintiff is in accordance with s. 8 to make his own terms with the defendant, or to turn the defendant out of the occupation of the land. He could do this by serving him with a reasonable notice requiring him to quit his occupation at [537] the end of the year, unless he agreed to pay thenceforward the rates of rent mentioned in the notice, and in the event of such a notice as this being served, if the ryot chooses to continue on in the occupation of the land, he must be taken to have agreed by implication to hold the land at the rate mentioned in the notice. This was the view apparently taken by the Full Bench in the case of *Bokronath Mundul v. Binodh Ram Seem*, which is reported in 10 W. R., 33."

Now, in the first place, I am not aware of any other case in which this ruling of PHEAR, J., has been approved. It was an extra-judicial opinion, not necessary for the purposes of the case then under consideration, and I think it may well be doubted whether a tenant, after receiving such an alternative notice, and continuing in occupation of the land, would be liable to pay the enhanced rent claimed.

But even if Mr. Justice PHEAR were right in his opinion, it would hardly avail the plaintiff in the present suit, because all that Mr. Justice PHEAR says is this, that if a notice is given requiring a tenant to quit at the end of the year, or else to pay a rent at a specified rate, and the tenant does not quit, it may be inferred that he agrees to hold at the specified rate, and the landlord may sue him for rent at that rate. He does not go on to say that the landlord would have a right to proceed against him in the same suit both for rent and ejectment.

* It seems to us that what the plaintiff has attempted to do in this case is not warranted by any rule of law. If the notice to quit was a valid one, it was a notice to quit at the end of the year 1287; and if the plaintiff had a right to eject him at all, he had a right to eject him, and treat him as a trespasser as from the close of that year.

It was open to the plaintiff at the close of the year to waive his right to eject, and to treat the defendant as a tenant. But he had no right to do both. He had no right to say: "I will waive my right to eject you during the first three months of 1288. I will treat you as a tenant during those months, and after that I will eject you." The plaintiff must avail himself of his notice as from the end of 1287, or not at all. He cannot waive his right to eject for a time, and insist upon it afterwards.

[538] Thus far we have assumed that the notice to quit was a valid one, but, speaking for myself, I confess I have some doubts whether it is so. A notice to quit ought to be clear and unambiguous. This is the English rule, and it seems to me a sensible one, but it is not necessary under the circumstances to decide that point.

We think that in this case the learned Judge of this Court was right in holding that the decree for ejectment which has been made by the lower Appellate Court must be set aside. We do not desire to add anything to what the learned Judge has said upon the other points. No doubt the first Court has not decided anything as to whether the defendant is a tenant-at-will or not. All that has been decided is that the defendant's tenure is not the *mourasi* tenure which the defendant claimed. Therefore, in any fresh suit that may be brought, it will be open to either party to show what the nature of the defendant's tenure really is, assuming, of course, that it is not a *mourasi* tenure. This appeal must be dismissed with costs.

McDonell, J.—I concur in holding that the appeal must be dismissed on the ground that the plaintiff could not sue the defendant as a tenant and as a trespasser in one and the same suit, by suing as a tenant he must be held to have waived his right to eject him as a trespasser. I am doubtful whether in this country a notice, by which a tenant is given his option either to pay an enhanced rent from a certain day or quit, should be held to be insufficient and invalid. [NOTE.—See *Ahearn v. Bellman* (L. R. 4 Ex. D. 201).] I do not know of any cases in which this has been held, and certainly notices in this form have been not unfrequently given by landlords in this country.

Appeal dismissed.

NOTES.

[The following is from *Fawcett on Landlord and Tenant* (1905) III Edn., p. 474.—"It was formerly considered that a notice was not effectual which gave the tenant an option either to go or to stay at an increased rent [*Doe v. Jackson* (1779) 1 Douglas 175], though the tenant, if he stayed, was bound to pay the increased rent [*Roberts v. Hayward* (1828) 3 C. & P., 432]. However, it is now settled that the landlord may incorporate with the notice an offer of a new agreement, and the addition of a clause that if the tenant retained possession of the premises after a specified date, the annual rent would be increased in a specified manner, was held not to invalidate the prior notice to quit.—*Ahearn v. Bellman* (1879) 4 Ex. D. 201. So an intimation that the tenant will not stop unless a reduction is made in the rent operates as a notice to quit, with an offer to go on at a lower rent:—*Bury v. Thompson* (1895) 1 Q. B. 231, affirmed 72 L. T. 187."

See also 22 Bom., 241.]

[539] APPELLATE CIVIL.

The 30th March, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Trailokia Nath Nundi.....Plaintiff

versus

Shurno Chungoni.....Defendant.*

Evidence Act (I of 1872), s. 90—Documents thirty years old, their natural and proper custody.

Where a daughter professed to hold under a *pottah*, more than thirty years old, in favour of her father and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of the father's heirs : held, that the daughter's custody of the *pottah* was a natural and proper custody within the meaning of s. 90 of the Evidence Act.

The rule laid down in s. 90,† as to proof of execution of documents thirty years old, ought to be applied in this country with special care and caution

THIS was a suit to eject, after notice, a tenant from a small parcel of homestead and garden land. The defendant contended that she had been in possession of the land by payment of rent ever since the death of her father for a period of forty years, and relied upon a *pottah* which purported to have been executed in favour of her father on the 11th Aughran 1229 B. S., corresponding with the 25th November 1822. The Munsif not only found the document to be spurious, but held that, inasmuch as the father had grandsons by other daughters living, the possession of the defendant, who was a childless widow, was that of a mere tenant-at-will, and gave a decree to the plaintiff. On appeal, the Subordinate Judge held that there was no reason to question the genuineness of the *pottah* under the thirty years rule, that the defendant had an occupancy right in the land, that, although she was not the heiress of her father, she had been in possession of the land for more than twelve years, and set aside the Munsif's decree.

[540] The plaintiff appealed to the High Court, and the value of the suit being laid at Rs. 10, the appeal was heard and dismissed by a single Judge of the Court.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice MACLEAN, one of the Judges of this Court, dated the 3rd of December 1883, in appeal from Appellate Decree No 1552 of 1882, against the decree of Baboo Bhubon Chunder Mukerji, Second Sub-Judge of Hooghly, dated the 14th July 1882, reversing the decree of Baboo Durga Churn Ghose, Second Munsif of Hooghly, dated the 31st of January 1882.

†[Sec. 90 —Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This explanation applies also to section eighty-one.]

On appeal to a Division Bench, it was contended on behalf of the plaintiff that the thirty years' rule ought to be received with caution; and that in view of the circumstance that the defendant was not the heiress of her father, her status was no higher than that of a tenant-at-will, and her custody of the *pottah* not a natural and proper custody.

Baboo *Trailokya Nath Mitter* for the Appellant.

Baboo *Kalkissen Sen* for the Respondent.

The Judgment of the Court was as follows:—

Garth, C.J. (MCDONELL, J., *concurring*).—In this case the plaintiff claims to eject the defendant from a small property, upon the ground that she is a tenant-at-will, and he has given her a notice to quit.

The defendant's answer is, that she and her father before her have been in possession of this property, which is homestead land, for about sixty years, under a *pottah* which was granted to her father by the person who is admitted to have been the proprietor at that time.

The plaintiff tried to make out that the defendant held under some agreement with a person under whom he claims, but that fact was negatived by the Court below.

The *pottah* said to have been granted to the defendant's father was produced in the Court below by the defendant, and the Subordinate Judge considers it to be proved, inasmuch as he finds that the defendant has had it in her custody since her father's death, and that under the circumstances this was the proper custody.

That decision of the Subordinate Judge has been confirmed by the learned Judge of this Court, and we are asked to say by the appellant that the learned Judge was wrong for two reasons: first, it is said that the defendant, although she is the daughter of the person who obtained the *pottah*, was not his legal heir, because it appears from the defendant's own evidence that she has a sister's son alive, who would be her father's legal heir. But [541] it appears that this young man, although no doubt her father's heir, has never claimed the property in question, nor has he interfered to disturb the defendant's possession of it, and the Court below has found as a fact that the defendant has been in possession, as she says she has, for the last 40 years, and that her father was in possession before that time.

Under these circumstances, we are asked to say that the *pottah* was not in its proper custody, because it was in the possession of a person who was not the legal heir of the first grantee.

Then, secondly, it is contended that the plaintiff ought to succeed, because the only person who can legally hold under the *pottah* is the heir of, or some one legally claiming from, the first grantee, and as the defendant was not the heir of the first grantee, and as she has not proved any other title from him, she can only be holding as a tenant-at-will, and is therefore liable to be ejected as such.

Upon the first of these points I have already made some observations during the argument. No doubt the rule laid down in s. 90 of the Evidence Act ought to be applied in this country with special care and caution. It is a rule which even in England must be exercised with caution. Mr. *Taylor*, in dealing with that subject in page 595 of the 6th ed., (7th ed., p. 560) of his book on Evidence says: "No doubt this species of proof deserves to be scrutinized with care; for, first, its effect is to benefit those who are connected in interest with the original parties to the documents, and from whose custody they have been

produced, and next, the documents are not proved, but are only presumed to have constituted part of *res gestæ*. Still as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed."

I very much wish that in this country we could say, as Mr. *Taylor* here says of the state of things in England, *that forgery and fraud are of rare occurrence*. I need hardly say that the more frequent fraud and forgery are, the more care and caution is necessary in applying this rule, because nothing can be more easy than for an unscrupulous person, who is wrongfully in possession [542] of property, and wants to make out a title to it, to forge a deed in his own favour more than thirty years old, and then produce it himself in Court, and say that, because he is in possession of the land, he must needs be the proper custodian of the deed, and so relieve himself from the necessity of proving the execution of the instrument. We, therefore, entirely agree with the learned *vakeel*, who has argued this case for the appellant, that any Court should be exceedingly cautious in applying that rule in this country.

But as regards the question in this case, let us see what Chief Justice TINDAL says, in delivering judgment in the House of Lords in the very important case of *The Bishop of Meath v. The Marquess of Winchester* [3 Bing (N. C.) (183) 200], where, in speaking of documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, he says, "and this is precisely the custody which gives authenticity to documents found within it, *for it is not necessary that they should be found in the best and most proper place of deposit*. If documents continue in such custody there never would be any question as to their authenticity, but it is when documents are found in other than their proper place of deposit, that the investigation commences *whether it was reasonable and natural, under the circumstances in the particular case*, to expect that they should have been in the place where they are actually found, for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some being more so, some less, and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."

These words of the Chief Justice may be taken as laying down an excellent rule in questions of this kind, and in this case we must look, not only to the actual custody, but to the circumstances [543] under which this *pottah* is produced. It is found by the Court below that the defendant and her father have been in possession of this property for sixty years, and having regard to the close relationship which existed between them, and to the fact, that the property is a very small one, there would seem nothing more likely than that the defendant should have been allowed to have the enjoyment of the property, to the exclusion of a grandson, who, if he was born at all, at his grandfather's death, which does not appear, was probably a child of tender years.

Under these circumstances it seems to us impossible to say that the *pottah* when produced by the defendant did not come from such a custody, as after the lapse of sixty years brought it within the rule, which rendered it unnecessary to prove its execution.

Suppose, on the other hand, that the *pottah*, instead of being produced by the defendant, had been produced by the nephew, a young man who had never been in possession of the property and perhaps had never seen it, surely the objection that his was not the proper custody would have been more cogent than it is now.

We think that the daughter of the grantee, who has been in possession of the property these many years, and has paid rent for it all that time, may fairly be considered as a more proper and less suspicious custodian of the document than the nephew, who has never been in possession of the property.

Then, as regards the second point that has been raised by the appellant, we think that the plaintiff has no right to treat the defendant as a tenant-at-will. Assuming the *pottah* to be a good one, which we must do for the purposes of this question, it is clear that the plaintiff has no right to treat a person who holds by right of the *pottah* as a tenant-at-will. The defendant has been holding professedly under the *pottah*, and paying the plaintiff the rents reserved by it. If she is not entitled to the *pottah* herself, she must be taken to have been paying rent for the person, whoever he may be, who is entitled under it. She may be answerable to that person for the profits, but the plaintiff has no right to treat her as holding by a different tenure or to eject her as a tenant-at-will.

The appeal must, therefore, be dismissed with costs

Appeal dismissed.

NOTES.

[The presumption as regards the genuineness of ancient documents should be used with great care and caution, 13 I C, 120, (1913) P R, 81=20 I C, 868, 19 I. C., 964, but not arbitrarily —(1902) 29 Cal, 740.

As regards the Appellate Court's powers with reference to the admission, see (1911) 13 I.C. 120 (Cal.)

As regards the practice in admitting documents, see 22 M L J., 217 As regards copies of ancient documents, see 21 M L. J, 981, (1910) P R, 93.]

[544] APPELLATE CIVIL.

The 6th May, 1885.

PRESENT.

MR. JUSTICE CUNNINGHAM AND MR JUSTICE O'KINEALY.

Nanda Lal Rai.....Defendant

versus

Bonamali Lahiri.....Plaintiff.*

Appellate Court—Dismissal of suits—Judgment—Findings unnecessary for disposal of case—Appeal by successful party.

When a suit has been dismissed on the merits in the Court of First Instance, and that decision is upheld by the District Judge on appeal, *merely* on the ground of non-joinder, the District Judge should not record any findings in the appellant's favour on the merits of the case; and if he does so, such findings will, on second appeal to the High Court, be expunged from the record.

*Appeal from Appellate Decree No 2093 of 1883, against the decree of F J G. Campbell, Esq., Officiating Judge of Furrripore, dated the 8th of May 1883, reversing the decree of Baboo Sharat Kumar Ghosal, Second Munsiff of Goalundo, dated the 19th of September 1881.

THIS was a suit for arrears of rent. There were two sets of defendants, namely, the first four defendants who may be called the *Lahiri* defendants, and the fifth and sixth defendants, who may be called the *Rai* defendants. The plaintiff stated that one Dharanidhur Lahiri, on the 13th of November 1879, took from one Brojo Nath Rai a *putni* lease of certain lands at a yearly rent of Rs. 78-13-0, and a *mourosi jote* lease of certain other lands at a yearly rent of Rs. 11-3-0; that Brojo Nath Rai died having previously in January 1873 made a will by which he left an 8-annas share of his lands to the plaintiff Bonomali Lahiri; that on the death of Brojo Nath Rai, the *Rai* defendants, as his heirs-at-law, entered into possession of his lands; and that after the death of Brojo Nath Rai, the *Lahiri* defendants, who were the heirs and successors of Dharanidhur Lahiri, paid a *moiety* of their rent to the *Rai* defendants, but had refused to pay the plaintiff anything from the year 1284, though they had up to that time paid him an 8-annas share of their rent.

The Court of First Instance dismissed the suit on the ground that, upon a proper construction of the will of Brojo Nath Rai, the plaintiff had no cause of action against the defendants. The plaintiff appealed to the District Judge, who disagreed with the Munsiff's construction of the will, but upheld the decree on the ground of non-joinder of parties. Thereupon one of the defendants appealed to the High Court on the ground that the [545] District Judge, having dismissed the appeal on the ground of non-joinder of parties, was wrong in entering into the question of the construction of the will.

Baboo *Srinath Das* and Baboo *Kishori Lal Sarkar* for the Appellant.

The Respondent did not appear.

The Judgment of the Court was delivered by

Cunningham, J.—An appeal has been filed in this case, notwithstanding its dismissal, by one of the defendants on the ground that the judgment and decree of the lower Court contain findings which, though immaterial to the decision of the case and unnecessary for the Judge to decide, yet, as they form part of the judgment and decree, might give rise to the application of the doctrine of *res judicata* hereafter

We think that the appellant is entitled to ask this Court to have the judgment and decree of the lower Court so amended, as to remove from them all the findings of the Judge, except that upon which the decision turned, namely, that the suit as framed could not be brought.

The appeal will be decreed, and the judgment and decree of the lower Court will be modified with a view to these remarks. The appellant will get his costs in this Court.

Appeal allowed.

NOTES.

[Findings on which the case is not decided should not form part of the decree:—(1903) 26 All., 234. Where they have been made so, they have no binding effect as *res judicata*; likewise when the Appellate Court bases its judgment on some findings only, not all:—6 Bom., 110, 7 Cal., 381; 8 Cal., 631; 24 Cal., 616; 5 C. W. N., 653; 10 C. W. N., 934; 21 All., 117, 30 Mad., 447.

But this is not applied to cases where there is nothing to show which of the findings were deemed decisive:—28 Mad., 333.

The reasoning of CUNNINGHAM, J., in this decision of 11 Cal., 544, has been adversely criticised by *Hukm Chand* in his *Civil Procedure* (1900), Vol. I, p. 195, citing 18 All., 186, while discussing the proposition that a decision to be *res judicata* need not have been embodied in the decree. The lower Court, although deciding the case on some issues, is competent to find on all the issues, though such other findings may not constitute *res judicata*:—(1904) 9 C. W. N., 60.] •

[11 Cal. 546]

APPELLATE CIVIL.

The 11th May, 1885.

PRESENT . .

MR. JUSTICE McDONELL AND MR JUSTICE MACPHERSON.

The Brahmaputra Tea Co., Ltd.Plaintiffs

versus

E ScarthDefendant.*

Restraint of trade—Contract Act—Act IX of 1872, ss 27, 74—

Breach of contract—Damages.

A contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer, is bad under s. 27,† of the Contract Act

Quere, as to the effect of an agreement of service by which a person binds himself *during the term of his agreement*, not, directly or indirectly, to compete with his employer

[546] THIS was a suit brought to recover Rs. 3,109 as damages for breach of contract of service, and also for an injunction to restrain the defendant from serving within forty miles of the plaintiff's premises, or in the alternative for further damages amounting to Rs 12,437

The plaintiffs, who were the members of the Brahmaputra Tea Company, Limited, stated that they had entered into an agreement, dated 4th November 1877, with the defendant, under which they had agreed to engage the defendant as an assistant tea-planter for the purpose of working their gardens in Assam for a term of four years, that on the 3rd October 1880 they had entered into a further agreement with the defendant to serve in the same capacity, which subsequent agreement was to become operative at the termination of the fourth year of service under the first agreement, that by the terms of the subsequent agreement the defendant bound himself to serve the Company for three years from the 5th November 1881, and also by clause 8 of the agreement bound himself to pay to the Company by way of liquidated damages the sum of £250 sterling, if he should cease to be in the service of the plaintiffs by voluntarily quitting or discharging himself from such service without the consent of the Company at any time during the fifth year of such service,

* Appeal from Original Decree No 247 of 1883, against the decree of A. E. Campbell, Esq., Subordinate Judge of Sibsagar, dated the 22nd of August 1883.

Agreement in restraint of trade void

Exception 1 —One who

Saving of agreement not to carry on business of which good-will is sold,

Exception 2.—Partners

Of agreement between partners prior to dissolution;

Or during continuance of partnership.

† [Sec 27 —Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void

sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business

may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business, similar to that of the partnership, within such local limits as are referred to in the last preceding exception.

Exception 3.—Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.]

and further bound himself to pay by way of liquidated damages the sum of £20 sterling per month, for every month of the said term of three years then remaining unexpired, in the event of his so ceasing to be in the Company's service at any time during the sixth or seventh years of the term of service under the said two agreements, that under the 10th clause of the subsequent agreement the defendant further agreed that he would not, at any time, during the said agreement, or during a period of five years from the date of the determination thereof, either alone, as a member of any Joint Stock Company, or partnership, or as agent, assistant traveller, or servant for, to, or of any Joint Stock Company or partnership, or as owner or one of the owners of any plantation or garden for the cultivation of tea, or of any factory for its manufacture or sale, or by advancing money by way of loan or otherwise to any person or persons, Joint Stock Company, or partnership engaged in the cultivation, manufacture or sale of tea, directly or indirectly [547] engage or be concerned, or interested in, or promote cultivation, manufacture or sale of tea or any other similar description of business for the time being carried on by the plaintiff-Company within forty miles of any of the Company's premises in Assam, that by the 11th clause of the subsequent agreement it was stipulated and provided that, in the event of any breach by the defendant of all or any of the stipulations on his part contained in the said 10th clause, the plaintiff-Company should be at liberty to restrain the defendant by the injunction of a Court of competent jurisdiction from such breach, or to sue the defendant for, and recover from him the sum of £1,000 by way of liquidated damages, that by the said agreement it was provided that the stipulation therein contained should be construed, and the rights of all parties thereto governed in all respects in accordance with the principles of English law: that the defendant voluntarily quitted the plaintiff-Company's service without their consent on the 4th November 1882, and took service in the Moabund Tea Estate within two miles of the plaintiff-Company's premises in Assam. For the breach of these agreements the plaintiff-Company brought the suit above mentioned. The defendant, whilst not denying the fact that he had left the service of the Company prior to the expiry of the contract of the 3rd October 1880, urged that that agreement should be read with a letter written to him by the General Manager for the Company in India, dated the 4th September 1879, which contained amongst other things the following words: "This new agreement is subject to termination by six months' notice on either side", and he stated that, when entering into the new agreement of the 3rd October 1880, he had fully understood, and was given to understand by the General Manager that the notice alluded to would apply to the new agreement, and that, being of such opinion, he had on the 17th May 1882 duly given a notice to quit to the Company, and further contended that the 10th clause of the agreement was void under s. 27 of the Contract Act.

It appeared from the evidence that the letter of the 4th September 1879 above referred to contained the terms of a fresh agreement between the defendant and the Company, and that these [548] terms were accepted by the defendant, and that at the time that the agreement of the 3rd October 1880 was entered into, the defendant was serving the Company under the agreement proposed in the letter of the 4th September 1879. The plaintiffs adduced no evidence, showing that they have suffered damage from the act of the defendant.

The Subordinate Judge found (1) that at the time the defendant had entered into the agreement of the 3rd October 1880 he was serving under the agreement, the terms of which were set out in the letter of the 4th September 1879; (2) that the defendant had failed to prove any oral agreement, showing

that the agreement could be terminated on a six months' notice, (3) that clause 10 of the agreement was void under s. 27 of the Contract Act, but that as the defendant had broken the terms of the agreement he awarded the plaintiff a sum of Rs. 900 as damages, having regard to the increased pay which the defendant had drawn subsequent to the time when the agreement came into operation.

The plaintiff appealed to the High Court on the grounds that clause 10 of the agreement was not void, and that the damages awarded were too small.

Mr. Pugh (with him Mr. Atkin) for the Appellant

Mr. Sale (with him Mr. Dignam and Bahoo Prasn Nath Pundit) for the Respondents.

The Judgment of the Court (McDONELL and MACPHERSON, JJ.) was as follows:—

This appeal raises questions under ss. 27 and 74 of the Contract Act. On the 3rd of October 1880, the defendant, the respondent in this appeal, entered into an agreement with the Brahmputra Tea Company, by which he undertook to serve the Company as assistant tea-planter for a term of three years, to be computed from the date of the termination of his fourth year's service under a prior agreement. The Company agreed to pay him a salary of Rs. 300 a month for the fifth year, Rs. 350 for the sixth year, and Rs. 400 for the seventh year. It is admitted that this agreement took effect from the 5th of November 1881. On the 17th of May 1882, the defendant gave notice of his intention to [549] leave, and on the 27th of November following, he actually did leave the Company's service without their consent, and became manager of the Moabund Tea Estate, which is about two miles distant from one of the Company's gardens. It is alleged that he has, by so doing, infringed the 8th, 10th and 11th clauses of the agreement.

[Here followed the 8th, 10th, 11th clauses which are set out above.]

The Company on the 30th of June 1883 brought this suit to recover Rs. 3,109-6, the equivalent of £250, for the infringement of the 8th clause; and for an injunction to restrain the defendant from serving on the Moabund Tea Estate, or, in the alternative, to recover Rs. 12,437, the equivalent of £1,000 as damages for the infringement of the 10th clause. The lower Court held that the agreement in clause 10, being in restraint of trade, was void under s. 27 of the Contract Act. For the infringement of the agreement in the 8th clause it awarded a sum of Rs. 900 as compensation.

The plaintiff-Company appealed against that decision on the grounds that the contract contained in the 10th clause is not void, and that the compensation awarded is unreasonably small.

We entertain no doubt that the contract in the 10th clause is void, so far as it restrains the defendant from taking service, or from engaging in, or promoting directly or indirectly, the cultivation of tea for a period of five years from the date of the termination of his agreement, although the restriction only extended to a distance of forty miles from any of the Company's gardens. COUCH, C.J., and PONTIFEX, J., held in the case of *Madhub Chunder Poramanick v. Raj-coomar Das* (14 B. L. R., 76) that the words "restrained from exercising a lawful profession, trade or business" do not mean an absolute restriction, and are intended to apply to a partial restriction. It is quite clear that such a contract would not come within any of the exceptions to s. 27, and it is impossible to suppose that the Legislature, while making certain exceptions to the general rule, would omit to provide for a contract of this kind, if it was intended to be an exception. Contracts by which persons are restrained

[550] from competing, after the term of their engagement is over, with their former employers within reasonable limits, are well known in English law, and the omission to make any such contract an exception to the general prohibition contained in s. 27 clearly indicates that it was not intended to give them legal effect in this country. KINDERSLEY, J., in *Oakes v. Jackson* (I. L. R., 1 Mad., 134) refused to give effect to such a contract as contrary to the law in India; but there the restriction was also considered unreasonable under the English law. It is unnecessary to refer to the English cases which have been cited as the case must be governed by the Contract Act. An agreement of service by which a person binds himself *during the term of the agreement* not to take service with any one else, or directly or indirectly take part in, promote or aid any business in direct competition with that of his employer, is, we think, different. An agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force. It is unnecessary to consider all the conditions in the 10th clause. It is sufficient to say that we are not disposed to agree with the Judge that it is wholly void. As, however, the agreement has long since expired, no injunction can now issue. We need not consider the question of damages, as we should not, under any circumstances, have awarded any without giving the respondent an opportunity of complying with an injunction.

The remaining contention is that the sum awarded as compensation for the breach of the condition in the 8th clause is unreasonably small. The case clearly falls within s. 74 of the Contract Act, the effect of which was to do away with the distinction between liquidated damages and a penalty, and to leave it to the Court in all cases in which a sum is named in the contract as the amount to be paid, to award against the party who has broken the contract reasonable compensation not exceeding the sum named. It is clear that the Court might have awarded the full sum stipulated without any proof of damages or loss. The plaintiff gave no proof of actual damage or loss, and the Court assessed the damages with [551] reference wholly to the increased emoluments which the defendant had drawn subsequent to the time when the agreement came into operation. Though averse to interfere with the decision of the Judge on this point, we think he has not exercised his powers rightly or discreetly in this matter. The agreement was deliberately entered into and as deliberately broken. The Company refused to assent to the defendant's leaving before his time. He not only went, but took service as manager of a neighbouring factory. The sum of £250 was entered in the agreement by the defendant himself, so he knew full well what he was doing and what risk he was incurring, and, so far as we can see, there was no reasonable or sufficient ground for his act. No doubt the Court has a discretion to fix what it considers reasonable compensation; but when the parties have already agreed among themselves as to what the penalty should be, we think the Court should not, in fixing the compensation, wholly ignore the amount agreed on, unless this is, on its face, wholly unreasonable with reference to the position of the parties and the breach provided against. In this instance the sum, though large, cannot be considered wholly unreasonable; and it was, we must take it, fixed after due consideration with reference, not only to any actual expense to which the plaintiff might be put in supplying the defendant's place, but to all the circumstances attending the loss of his services, which the agreement was intended to secure. These circumstances the Judge has not at all taken into consideration. He has merely made the defendant pay as compensation the amount of the increased salary which he obtained under the agreement. We have had great doubt whether we ought not, under

the circumstances, and in the absence of any proof to the contrary, to consider as reasonable the sum which the parties themselves agreed on. We are clearly of opinion that the amount awarded by the Judge was unreasonably small, and having a discretion in the matter, which we exercise in favour of the defendant, we think a sum of Rs. 2,000 would be a proper sum to allow. The appeal is decreed to that extent, but as it only partially succeeds, we think each party should bear his own costs in this Court. The order of the Court below as to costs will stand.

Appeal decreed in part.

NOTES.

[AGREEMENTS IN RESTRAINT OF TRADE—

The Indian law as contained in the Indian Contract Act 1872, sec 27, differs from the English law on the subject, rendering void all restraints partial as well as absolute —14 B. L. R., 76, 85, 86, 11 Cal., 545, 19 Cal., 765, 1 Mad., 134. An agreement not to compete with the employer is *after* the termination of service void 11 Cal., 545, 1 Mad., 134, (1912) 16 C. W. N., 534, 19 Cal., 765, but during the contract period of service, he may be restrained by injunction, even without *express* negative covenant* —(1908) 36 Cal., 354, (1898) 23 Bom., 103, (1903) 5 Bom. L. R., 878; (1894) 18 Bom., 702 at 708 (where, however, injunction was not given on other grounds)

Agreements to manufacture and sell in a certain manner and proportions (1903) 6 Bom., L. R., 23, to do work at certain rates and divide profits (1897) 22 Bom., 861, 18 I. C., 183, *Collins v. Locke*, 4 A. C., 674, to sell all manufactured articles to one (13 Mad., 472) were upheld, but *see* (1909) 9 C. L. J., 216. 13 C. W. N., 388

An agreement for consideration not to supply coolies for a rival was held void —14 M.L. T., 491 21 I. C., 768

As regards damages, *see* (1898) 3 C. W. N., 43, 18 I. C., 183]

[532] REFERENCE FROM MOFUSSIL COURT OF SMALL CAUSES.

The 8th May, 1885.

PRESENT

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND

MR. JUSTICE McDONELL.

Sashi Bhusan Dutt, minor, by his next friend

Hridai Nath Mundle.Plaintiff

versus

Jadu Nath Dutt.....Defendant.*

Act IX of 1872, ss. 10, 11—Bond, Minority of obligee—Voidable contract.

A contract entered into with a minor is merely voidable at the option of the minor, and there is nothing to prevent him suing thereon, supposing the contract to be otherwise valid.

THE plaintiff, a minor, through his next friend, instituted a suit in a Mofussil Court of Small Causes on a bond given for the value of certain goods.

The defendant admitted the bond, but contended (*inter alia*) that it was not enforceable, inasmuch as the plaintiff, one of the contracting parties, was a minor at the time the bond was given.

* Small Cause Court Reference No. 386 of 1884, made by Baboo Mohendra Nath Ghose, First Munsif of Jehanabad, dated the 18th of November, 1884.

The Munsif found that there was no valid contract which could be lawfully enforced on either side, one of the contracting parties having been a minor; and that consequently there was no valid contract under s. 10 * of the Contract Act. He therefore dismissed the suit, contingent on the opinion of the High Court as to whether, having regard to s. 10 of the Contract Act, a minor, who is the obligee of a bond given for the value of certain goods, can sue upon it?

No one appeared for either party on the reference.

The **Opinion** of the Court was delivered by

Garth, C.J., (MCDONELL, J., *concurring*).—The only point, as we understand, which is referred to us in this case is, whether, having regard to s. 10 of the Indian Contract Act, a minor, who is the obligee of a bond given for the value of certain goods, can sue upon it.

The Munsif considers that he cannot, because the bond is void, as having been entered into by a party not competent to contract.

[553] We think this is a mistake. It is true that the language of the Indian Contract Act may well have led to the mistake, but we consider that the law here is the same as it is in England. A contract entered into with a minor is only *voidable* at the option of the minor [see Addison on Contracts, 3rd edition, page 169, *Harri Ram v. Jitan Ram* (3 B. L. R., A. C., 426)]

NOTES.

[OVERRULED—

A contract by a minor is void and not merely voidable —30 Cal , 539 P.C. . 30 I. A., 114, overruling the former current of Indian cases which held otherwise. These were prior cases, 18 Cal., 259, 19 Bom., 697 ; 23 Bom , 1

A sale to a minor was also held to be void, 33 Mad , 312 , but not when a guardian acts in the matter .—33 All., 657

As regards compensation, *see*, 28 Bom , 181 ; 26 All , 342 , 1904 P. R , 33 ; (1910) P R., 76 ; 31 All., 21 , 32 All , 25]

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What agreements are contracts

expressly declared to be void.

*[Sec. 10 —All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.]

[11 Cal. 553]

APPELLATE CIVIL.

The 12th May, 1885.

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE AGNEW.

Laidley and others.....Plaintiffs

versus

Bishucharan PalDefendant.*

*Stipulation in kabuhat for increase in rent— Suit to recover rent as agreed—**Notice of enhancement—Bengal Act VIII of 1869, s. 14.*

Where a *kabuhat* contains an agreement to pay a certain specified rent for a certain specified area, although no rate per bigha was fixed, and also an agreement to pay further rent at the rate specified for lands found on measurement to be held in excess of the lands of which the *gumma* was fixed, a landlord is entitled to recover such increased rent without serving any notice on the tenant under s. 14 of Bengal Act VIII of 1869, and it is a reasonable presumption to make that the rate per bigha was the average rate of rent payable in respect of the lands for which the total amount of rent payable was fixed *Nistarini Das v Bonomali Ghattejee* (I. L. R., 4 Cal., 941, 4 C. L. R., 278) followed.

In this suit the plaintiffs sought to recover the sum of Rs. 1,175-13, as arrears of rent and cesses, together with interest thereon due for the years 1287—1289 from the father of the defendant against whom the suit was originally filed.

The plaintiffs' case was that Sridhur Chunder Pal, deceased, the defendant's father, held a tenure in their *patni mehal* Nischindipur, comprising 109 bighas at an annual rent of Rs. 61-5, under a *kabuhat* dated the 2nd Magh 1262 B.S., that the [554] *kabuhat* contained a stipulation to the effect that in case Sridhur Chunder Pal should cultivate or hold any land in excess of the quantity specified, he should be liable to pay excess rent for the same at the rate specified in the *kabuhat*, that in the year 1286 a measurement was made, and it was found that the quantity of land held was 516 bighas 16½ cottahs, and that the rent payable for this quantity at 9 annas per bigha, i.e., the average rate according to the *kabuhat*, was Rs. 290-11-5, and the amount payable for road-cess and public works cess was Rs. 13-12, making a total of Rs. 304-7-5 per annum.

The defendant in answer took two preliminary objections: (1) that no notice of enhancement having been served the suit would not lie, and (2) that a portion of the claim was barred by limitation. He also denied the genuineness of the *kabuhat*, and raised other pleas immaterial for the purpose of this report. The only question decided in the lower Courts was the first preliminary objection, and upon that question the first Court held that the suit would not lie. The reasons given for that decision were as follows:—

"It is argued on behalf of the plaintiffs that as the *kabuhat* contains a stipulation for payment of additional rent for any excess land that may be found on measurement, the suit for increased rent is maintainable without previously serving the defendant with notice under s. 14, Bengal Act VIII of 1869. In support of this contention the plaintiffs rely on the Full Bench

* Appeal from Appellate Decree No. 1608 of 1884, against the decree of W. F. Meraa, Esq., District Judge of Midnapore, dated the 28th of May 1884, affirming the decree of Baboo Gonesh Chunder Chowdhuri, Subordinate Judge of that district, dated the 18th of July 1883.

ruling in the case of *Nistarini Das v. Bonomali Chatterjee* (I. L. R., 4 Cal., 941, 4 C. L. R., 278). I think the circumstances of this case are different, and the Full Bench ruling does not apply. It appears from the *kabulhat* that the 109 bighas originally let out comprised different classes of lands. It does not specify the quantity of each class, nor the rate payable for each. It is impossible to ascertain from the *kabulhat* how the total rent of Rs. 61-5 was fixed. The clause relating to the payment of excess rent simply says that such rent should be paid according to the *nirikh* mentioned in the *kabulhat*. But the *kabulhat* does not give the *nirikh*, and there is no evidence to show what the *nirikh* was according to which the total annual rent was assessed. According to the *chitta* [555] produced by the plaintiffs there are now as many as thirteen different descriptions of lands held by the defendant, and plaintiffs claim rent for the whole quantity at an average rate of 9 annas per bigha. This is the average rate per bigha of the 109 bighas originally let out. But I fail to see how the rent for the 516 bighas 16½ cottahs, said to be now in the occupation of the defendant, can be assessed at that rate. It appears from the report of the case decided by the Full Bench referred to above, that there was no dispute in that case as to the rates for the different descriptions of lands—the rates were specified in the *pottah*. In that case what remained to be done after the *pottah* was executed, in order to ascertain the amount of rent to be paid by the tenant, was simply to find out by measurement the quantity of land comprised in the holding. The circumstances of this case are very different.”

The Court, therefore, dismissed the plaintiffs' suit, holding that it could not proceed without proper notice being served under s. 14, Bengal Act VIII of 1869.

The lower Appellate Court came to the same conclusion, and confirming the decision of the lower Court, dismissed the appeal with costs.

The plaintiffs now specially appealed to the High Court.

Bahoo Bhobani Charan Dutt for the Appellants.

Baboo Sornmath Das and Baboo Nil Madhub Sen for the Respondent.

The **Judgment** of the High Court (TOTTENHAM and AGNEW, J.J.) was as follows —

This was a suit to recover from the defendant, tenant, rent greater in amount than has been paid by him hitherto.

The suit was based on a contract embodied in the *kabuliat* given by the defendant.

The only question before us in second appeal is, whether in such a suit it was necessary that the plaintiff should first serve a notice of enhancement under s. 14 of the Rent Law.

The Courts below have held that a notice was necessary, and for want of it they have dismissed the suit. The Full Bench [556] decision of this Court in *Nistarini Das v. Bonomali Chatterjee* (I. L. R., 4 Cal., 941; 4 C. L. R., 278) was cited in the Court of First Instance, but was held not to apply to this particular case.

We are of opinion that the Full Bench case does apply. The suit was upon a contract to the effect that the defendants, agreeing to pay a certain rent for a certain specified area, bound themselves to pay further rent, at the rate set out in the *kabulhat*, for any lands found on measurement to be in their cultivation in excess of the area of which the *jumma* had been fixed. The Full Bench decided that in such a case a notice under s. 14 was not necessary in order to enable the plaintiff to institute his suit.

It has been objected in this case that no rate is fixed in the *kabuhat*. It is true there is no specified rate per bigha mentioned, but we think that a reasonable interpretation of the *kabuhat* is, that when a certain amount, namely, Rs. 61-5, has been fixed for 109 bighas of land, the rate is the average of 9 annas per bigha. At any rate we think that the plaintiffs are entitled to have their suit tried. Upon the trial of the suit what will be found to be the area, rate of rent and so forth, we have not to decide. All we now hold is that the case can proceed without previous notice under s. 14.

The decrees of the Courts below will be set aside, and the case remanded to the first Court to be tried on the merits.

Costs will abide the result. The appellant is entitled to a refund of the Court-fee for the memorandum of appeal to this Court.

Appeal allowed and case remanded

NOTES.

[See also 14 Cal., 99.]

[557] APPELLATE CIVIL.

The 12th May, 1885

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE AGNEW.

Bhagbat Panda..... Plaintiff

versus

Bamdeb Panda and another Defendants.

*Set-off—Right of defendant to set-off a claim for an unascertained amount—
Civil Procedure Code (Act XIV of 1882), s. 111.*

The provision of the Civil Procedure Code (Act XIV of 1882), s. 111, does not take away from parties any right to set-off, whether legal or equitable, which they would have had independently of that Code. And such right exists not only in cases of material debts and credits, but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant should be driven to a cross suit.

Where, therefore, a decree had been obtained against certain persons in respect of arrears of rent of an *ijara* held jointly by them, and one of them having been forced to pay the whole amount of decree sued the others for contribution, and when in such suit the defendants pleaded that, although the plaintiff had paid off the whole of the decree in question, he was not entitled to recover any portion from them, inasmuch as he was indebted to them for his share of the *ijara* rents, the whole of which had been paid by them to the zamindar in previous years, as well as in respect of rent due to them for the share on account of a portion of the land which he himself held in *my jote*, and for which he had paid no rent, and that on accounts being gone into, it would be found that their claim exceeded that of the plaintiff.

* Appeal from Appellate Decree No 1315 of 1884, against the decree of H. Gillon, Esq., Officiating District Judge of Cuttack, dated the 29th of April 1884, affirming the decree of Baboo Hari Krishna Chatterji, First Munsif of that District, dated the 17th of April 1883.

Held, following *Clark v. Ruthnavaloo Chetti* (2 Mad. H. C., 296) and *Kishorechand Champalal v. Madhows Vyram* (I. L. R., 4 Bom., 407) that, notwithstanding the provisions of s. 111 of the Civil Procedure Code, the defendant's claim for the share of rents paid by them to the zamindar on account of the same *iyara* might properly be pleaded as a set off, and be taken into account in determining the plaintiff's suit as arising out of the same transaction, but that their claim for rent for the portion of the lands held by the plaintiff in *nij jote* could not be treated in such manner, but must form the subject-matter of a separate suit.

IN this case the plaintiff sought to recover from the two defendants two-thirds of the sum of Rs. 440-4-11, which he had [338] been forced to pay in satisfaction of a decree obtained against himself and the defendants jointly.

In the plaint he alleged that he and the defendants took a *mustajiri* settlement in respect of certain mouzahs in Pergunnah Tiran from one Saroda Prosad Gangopadhyaya and others in the year 1282 for a term of five years at a *jumma* of Rs. 848-15-6, that the rent having fallen into arrears, a suit was brought against them for the recovery of Rs. 396-1-11, and a decree was passed for the amount claimed and costs, that in execution of the decree he was arrested, and was forced to pay the sum of Rs. 440-4-11, and he therefore now sued to recover two-thirds of that amount as the share due by the two defendants, together with interest thereon. The defendants did not dispute the facts as above stated, but pleaded that they were entitled to a sum of money from the plaintiff in respect of his share of certain losses which they stated had been suffered in respect of the *iyara* during the four years from 1282 to 1285. The collection having fallen short of the rent, the whole of which had been paid by them, and as the plaintiff had not paid his share, they claimed the sum of Rs. 243-3-11 on that account and interest to the amount of Rs. 110-4. They further claimed from the plaintiff the sum of Rs. 102-7-2 as two-thirds of the rent and cesses due to them on account of a portion of the land so taken in *iyara* which had been held in *nij jote*, and cultivated by the plaintiff himself. They further pleaded that it was owing to the plaintiff's own laches that the suit had been instituted against them by the zamindar, and that the plaintiff had himself made ample collections with which to pay the amount due under the decree, and that, on an account being taken, it would be found that the plaintiff was indebted to them, and not they to the plaintiff.

The Munsif, without going into the merits, held that under the provisions of s. 111 of the Civil Procedure Code the set-off pleaded by the defendants was not one which could be allowed, as it did not fulfil any of the conditions required by that section. He accordingly gave the plaintiff a decree for the amount claimed with costs.

On appeal the Judge came to the conclusion that the Munsif was wrong in treating the objection taken for the defence as a [359] plea of set-off. He held that no such plea was urged, and that all the defendants relied on was for what they were justly entitled to in such a suit, namely, an account of the entire receipts and disbursements of the *iyara*, and that, as without such an account being taken, he held that no proper decree could be made, he remanded the case to the Munsif for the account to be taken.

On the remand the Munsif went into the accounts, and after dealing with the various claims set up by the defendants, both on account of collections and also of rent stated to be due to them by the plaintiff for the lands held by him in *nij jote*, came to the conclusion that there was due to the defendants an aggregate amount more than the amount claimed from them by the plaintiff, and accordingly dismissed the suit with costs. The plaintiff thereupon

appealed against that decree, but the lower Appellate Court saw no reason to differ with the findings of the Munsiff, and dismissed the appeal with costs.

The plaintiff now specially appealed to the High Court.

Baboo *Nil Madhub Sen* for the Appellant.

Baboo *Karuna Sindhu Mukherjee* for the Respondents

The Judgment of the High Court (TOTTENHAM and AGNEW, JJ) was as follows:—

The question laid before us for decision by the appellant's pleader is, whether the defendants in this suit were entitled under s. 111 of the Civil Procedure Code to set-off against the plaintiff's claim certain amounts in respect of which they alleged a claim against him, such amounts being, at the time when the written statement was filed, unascertained. The suit was one for contribution in respect of a decree obtained jointly against the plaintiff and defendants, but which was liquidated by the plaintiff alone. The decree was in respect of arrears of rent of an *ijara* held jointly by the plaintiff and defendants. The defendants pleaded that, although the plaintiff had paid off the whole of the decree in question, still he was not entitled to recover any portion of the decretal amount from them, because they had paid up to the zamindar the whole of the *ijara* rents for other years, and had been out of pocket by so doing, the collections having fallen short of the rents payable to the zamindar, and the plaintiff [580] having failed to contribute his share of the sum so paid. It was also alleged that the plaintiff himself held in *nij gote* a portion of the *ijara* land, and that in respect of such land he was liable to pay rent to the defendants. And there was a further allegation that in the year 1286, being the last year of the *ijara*, the plaintiff had himself realised a portion of the rent from the ryots, but had not paid over to the defendants their share of such rent.

The first Court originally decreed the suit, holding that s. 111 did not apply to the case, and that, therefore, if the defendants had any counter-claim, they must establish it by a separate regular suit. This decision was set aside by the lower Appellate Court, and ultimately, an account being gone into, the Courts below have concurred in holding that the amount claimed by the defendants from the plaintiff is in excess of that which the plaintiff claims from the defendants, and the suit has accordingly been dismissed.

It appears to us quite clear that so far as s. 111, of the Code of Civil Procedure is concerned, the original judgment of the first Court was correct in law. The counter-claim of the defendants did not fulfil any of the conditions set out in s. 111, as entitling them to plead the set-off. But the pleader for the respondent, in the course of his argument, has shown us decisions of the High Courts of Madras and Bombay, in which it was held that s. 111 of the Civil Procedure Code does not take away from parties any right to set-off whether legal or equitable, which they would have had independently of the Code. The cases are *Clark v. Ruthnavaloo Chetti* (2 Mad. H. C., 296) and *Kishorchand Champalal v. Madhowji Visram* (1. L. R., 4 Bom., 407). It was observed by the Madras High Court that "the right of set-off will be found to exist not only in cases of material debts and credits, but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit." We think that we may properly adopt the principle followed in these two decisions, and affirm the ruling of the lower Appellate Court so far as the defendants' demand can be said to arise out of the same transaction as that of the [581] plaintiff. We think, therefore, that the decree, satisfied by the plaintiff, having been for arrears of rent of the same *ijara* to which the defendants' demand relates, the defendants' counter-claim in respect of the *ijara* rents paid by them to

the zamindar without the assistance of the plaintiff should be taken into account in determining the suit. But we think that the claim which the defendants advanced for rent from the plaintiff as for land cultivated and held by him exclusively within the *ryara* should not be entertained. That, we think, is a separate matter from the rents payable to the zamindar.

Further, the Court in which this suit was tried had no jurisdiction to entertain any claim for rent by the defendants against the plaintiff. In that part of the country in which the suit was brought, Act X of 1859 is still in force, and suits for rent are tried in Revenue and not in Civil Courts. Further, it appears on the face of the record that, as regards a portion of the claim for rent, the defendants' demand was barred by limitation at the time when their written statement in this suit was filed. It remains, therefore, to be decided whether the amount of rent paid to the zamindar by the defendants without the help of the plaintiff, and for which the plaintiff was liable jointly with themselves, amounts to such a sum as will cancel the plaintiff's claim in this suit. If the amount recoverable under this head by the defendants is equal to, or in excess of, the plaintiff's claim against them, the suit will properly be dismissed. If, on the other hand, this amount is less than the plaintiff's admitted claim against the defendants, he will obtain a decree for the excess. The first Court simply says that the claim of the defendants under the first two heads, that is, the *ryara* rent and the rent payable by the plaintiff for his *ny* land, together exceed the amount of the plaintiff's claim. The District Judge must now determine whether the amount claimed by the defendants under the first head alone is sufficient to satisfy the plaintiff's claim. The case must go back to the lower Appellate Court for that purpose.

The costs of this appeal will be apportioned in proportion to the ultimate result

Appeal allowed and case remanded.

NOTES.

[The Civil Procedure Code does not bar the right of set-off not falling within the express provisions thereof, equitable set-off in respect of claims arising out of the same transaction are permitted —(1865) 2 M. H. C. 298, (1885) 11 Cal. 557, (1889) 16 Cal. 711, (1892) 15 All. 9

In a suit on a promissory note for balance found due on settlement of accounts between principal and agent, the arrears of salary may be set off. —(1913) 19 C. L. J. 152; (1889) 16 Cal. 711

In a suit for refund of price paid on a contract of sale of timber, set-off may be allowed of loss incurred on re-sale of part not taken delivery of —(1892) 15 All. 9

In a suit for partnership accounts, money paid to partners may be set-off :—(1888) 10 All. 587.

In (1896) 21 Bom., 126 the claim of damages for failure to perform part of the contract, the subject-matter of the suit, was not allowed to be set-off on the ground of *probable delay* in investigating the question.

The claim to be set off must have arisen out of the same transaction :—Claims under separate mortgage deeds were not allowed to be set off. —(1903) 8 C. W. N. 174.]

[562] APPELLATE CIVIL.

The 13th May, 1885.

PRESENT.

MR. JUSTICE TOTTENHAM AND MR. JUSTICE AGNEW.

Ram Narain Rai and others Plaintiffs

versus

Ram Coomar Chunder Poddar..... Defendant.*

Evidence—Rent Suit—Decree obtained ex parte against registered tenant.

In a suit for rent the plaintiff claimed that he was entitled to payment both in cash and kind, and in order to show that he was entitled to recover rent in kind tendered two *ex parte* decrees obtained by his predecessor against the persons registered as tenants of the tenure at the time the decrees were obtained, such decrees being for rent both in cash and in kind. It appeared that the defendant was the owner of the tenure at the time the two decrees were passed, having acquired the tenure by foreclosure, although he had not registered the transfer in the plaintiffs' books, and that he was not made a party to the suits in which the decree was passed.

Held, that as the defendant was not a party to the suits in which the decrees were obtained, and did not claim through the parties against whom they were passed, they were not admissible in the suit as evidence against him.

The decision in *Sham Chand Koondoo v. Brojonath Pal Chowdhry* (21 W. R., 94) does not lay down that a decree against a registered tenant is to be evidence for ever in future proceedings against an unregistered transferee not a party to it, but all that case decides is that for the purpose of satisfying that particular decree an unregistered transferee is bound by it, whether he was a party to the suit or not, the tenure being liable for the rent.

THIS was a suit brought by the plaintiffs to recover arrears of rent from the defendant both in cash and in kind, together with cesses and interest thereon.

The claim for the rent covered the years 1287-1290, and in answer thereto the defendant pleaded that the claim for 1287 was barred under s. 13 of Act X of 1877, inasmuch as a previous suit had been brought in the year 1880 and dismissed, and that the claim for the rent of 1288 was also barred because it should have formed portion of the subject-matter of that suit, having accrued due before the institution thereof. The main defence, however, raised was that no rent in kind was ever paid by the defendant or his predecessors to the plaintiffs and their prede-[563] cessor, and it was this plea and the issue framed thereon which gave rise to the second appeal to the High Court. In support of their contention that they were entitled to rent in kind, the plaintiffs produced and tendered in evidence three decrees, and the other evidence upon the point included two *pottahs* which contain no stipulation for the payment of any rent in kind.

The first decree relied on by the plaintiffs was dated the 13th March 1858, and was made upon a *solenamah* in a suit in which one Uma Churn Ghosal, the predecessor of the plaintiffs, was the plaintiff, and Kally Churn Dey, predecessor of the defendant, was defendant. The *solenamah* recited that the plaintiff in the suit alleged that rent was payable in cash and in kind, that the defendant had paid the rent in kind but not the cash rent, and that an

* Appeal from Appellate Decree No. 1983 of 1884, against the decree of Baboo Gonesh Chunder Chowdhry, First Subordinate Judge of Midnapore, dated the 13th of July 1884, modifying the decree of Baboo Sham Chand Rai, Munsiff of Garbetta, dated the 29th of November 1883.

amount of Rs. 15-12 was due. The defendant appeared by a vakeel, but made no defence, and the decree was passed in terms of and reciting the *solenamah*.

The defendant contended that this decree was not admissible in evidence in the present suit against him, but the first Court, relying upon the case of *Parbutty Dass v. Purno Chunder Singh* (I. L. R. 9 Cal., 586) held that it was admissible in evidence, and held that the *solenamah* contained an admission that rent was payable in kind, and that the defendant was bound thereby.

The other two decrees relied on and tendered by the plaintiffs in evidence were *ex parte* decrees obtained in the years 1868 and 1876 against the successors of Kally Churn Dey, who were the registered tenants, and these decrees the first Court also admitted in evidence, holding that it was not shown that they had been obtained by any fraud or collusion. For this finding the Court relied on the decision in *Maharaja Beerchunder Manick Bahadoor v. Ramkishen Shaw* (14 B. L. R., 370), and *Birchunder Manickya v. Harriish Chunder Dass* (I. L. R., 3 Cal., 383).

The first Court, finding the other issues in favour of the plaintiffs, therefore came to the conclusion that rent in kind was payable, and gave the plaintiffs a decree.

On appeal the lower Appellate Court came to the conclusion that the decree of the 13th March 1858 did not establish the [564] contention that rent was payable in kind, inasmuch as it was based on the *solenamah* which contained no such admission, and the only claim made in the plaint being for rent in cash, although a statement was made then that rent was payable in kind, it could not be assumed that by consenting to a decree the defendant admitted the accuracy of all statements in the plaint.

The Sub-Judge further held that the other two decrees, dated 1868 and 1876, were not admissible in evidence against the present defendant.

As it appeared that the defendant was not made a party defendant to either of these suits, although he was then the owner of the tenure in respect of which the arrears were claimed, there being no other evidence to prove that rent was payable in kind, he modified the decree of the lower Court in that respect, and gave the plaintiffs a decree for the amount of rent claimed in cash only.

The plaintiffs now specially appealed to the High Court, the principal grounds taken being that the decree of the year 1858 showed that rent in kind was payable in respect of the tenure, and that the lower Appellate Court was wrong in holding that the decrees of 1868 and 1876 were not admissible in evidence against the defendant in this suit.

Baboo Mohesh Chunder Chowdhry for the Appellants.

Baboo Guru Doss Bonnerjee for the Respondent.

The **Judgment** of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

The points taken in this second appeal relate to certain decrees adduced in evidence by the plaintiffs in the Courts below.

The question at issue between the parties was, whether the rent of the tenure in question was payable solely in cash, or partly in cash and partly in kind, as claimed by the plaintiff. The plaintiff put in, as part of his evidence, three decrees. One was a decree based on a *solenamah* and made in the year 1858, and the other two were *ex parte* decrees, obtained in 1868 and 1876 respectively.

In the *solenamah* decree it was recited that the plaintiffs alleged [565] the rent of the tenure to be payable partly in cash and partly in kind, but the claim was only in respect of cash rent; and the decree, according to an agreement between the parties, was for the payment of a certain amount of money.

The *ex parte* decrees of 1868 and 1876 were, it appears, for rent both in cash and in kind. As regards the first decree on the *solenamah* the lower Appellate Court held that that decree did not in any way decide that the rent of the tenure was partly payable in kind, and it has been contended before us that the lower Appellate Court was wrong in this interpretation. The point was not very much pressed, and we are clearly of opinion that the lower Appellate Court was right, for the decree in question decided nothing whatever as to the rent being payable in kind. It was simply a decree containing a recital of the plaint, but ordering payment of rent in cash according to an agreement between the parties.

As regards the *ex parte* decrees of 1868 and 1876, the lower Appellate Court held that they were inadmissible in evidence. And against this decision this appeal has been preferred. The lower Appellate Court considered them to be inadmissible, because the appellant, who is the defendant in this suit, was not made a party in either of the suits in which the *ex parte* decrees were passed, although he was then the owner of the tenure in respect of which the arrears were claimed. The first Court had admitted these decrees in evidence upon the ground that they were obtained against the registered tenants. The present defendant claims to have acquired the tenure by foreclosure, but he did not register the transfer in the plaintiffs' books.

For the appellant before us it is contended that these decrees were admissible as having been obtained against the registered tenants, and much reliance has been placed upon the decision of a Full Bench of this Court in *Sham Chand Koondoo v. Brojonath Pal Chowdhry* (21 W. R., 94), and other cases have also been cited. It appears to us, however, that the pleader for the respondent is right in his contention that the Full Bench decision in *Sham Chand Koondoo v. Brojonath Pal Chowdhry* (21 W. R., 94) did not hold [566] that a decree against a registered tenant was to be evidence for ever in future proceedings against an unregistered transferee not a party to it, and who had become the actual owner of the tenure, but all that was held in that case was that for the purpose of that particular decree, that is, with reference to its satisfaction, the unregistered transferee was bound by that decree whether he was a party to it or not, the tenure being liable for the rent. It seems to us that upon the findings in the present case the *ex parte* decrees in question are not admissible against the present defendant. He was not a party to them, nor does he derive his title from the parties against whom those decrees were passed. The finding of the lower Appellate Court is that the defendant's title was complete before the decrees were obtained against the registered tenants of the tenure. As the defendant therefore was not a party to the suits in which those decrees were obtained, and does not claim through the parties against whom those decrees were passed, the Full Bench decision in *Gujju Lall v. Fatteh Lall* (I. L. R., 6 Cal., 171) precludes us from holding that they were admissible. Although, therefore, the present defendant was bound as owner of the tenure by the *ex parte* decrees when passed, we cannot hold that they are evidence against him in the present proceedings.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES

[As regards the admissibility of judgments in evidence, see the Notes to *Gujju Lall v. Fatteh Lall*, 6 Cal., 171, in the Law Reports Reprints, also 12 All., 1.]

[11 Cal. 566]

FULL BENCH REFERENCE.

The 15th May, 1885.

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP,
MR. JUSTICE WILSON, MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

In the matter of Gopinath..... . Petitioner

*versus*Kuldip Singh and others.....Opposite Parties.¹

*Sanction to prosecute—Proceedings under s. 52 of Act III of 1877—Registration
—Act III of 1877, ss. 82, 83.*

It is not necessary that sanction should be given before instituting a charge under s. 82 of the Registration Act.

[567] THIS case arose from certain proceedings taken in connection with a deed which purported to have been executed by one Gopi Nath and his three sons in favour of Kuldip Singh and his brothers, passing to the vendees the proprietary right of the vendors in a certain mouzah. This deed bore date the 27th March 1884, and was presented to a Sub-Registrar for registration by Kuldip Singh on the 19th July 1884. Gopi Nath and his three sons were summoned to attend before the Sub-Registrar and, failing to appear, a warrant was issued against them. On the 8th September the executants, the vendors, denied execution of the deed, and as a consequence registration was refused. An appeal was made to the Registrar, and he directed an enquiry to be held in the matter by the Deputy Collector, in enquiring into the matter the Deputy Collector reported that the parties had compromised the case, and a petition in accordance with the compromise was presented to the Registrar by Gopi Nath and his sons, in which they stated that they had received Rs. 305 as consideration for the sale, and that they were then ready to admit execution and have the deed registered. The District Magistrate, however, insisted on the enquiry being carried through, being of opinion that, if the vendors had really executed the document before its presentation, they had made a false statement in denying execution, or, if that was not so, Kuldip Singh must have committed forgery. A fresh enquiry was therefore held, and on it the Deputy Magistrate came to the conclusion that Gopi Nath and his sons had executed the deed, and that they had falsely denied execution before the Sub-Registrar, concluding his report with the words. "They may, therefore, be prosecuted under s. 82 (a) of the Registration Act." On the 27th March 1885, Mr. Boxwell, the Magistrate of the District, passed the following order: "Gopi Nath will be prosecuted for perjury before Mr. Hampton." Gopi Nath, after being summoned to appear to answer to a charge under s. 82 (a) of Act III of 1877 on the 25th April, applied on the 18th April that proceedings should be stayed, as no sanction for the prosecution had been granted. The Deputy Magistrate, Mr. Hampton, rejected the application, stating that the prosecution had been directed

¹ Full Bench Reference on Criminal Motion No. 165 of 1885, from an order of J. Boxwell, Esq., District Magistrate of Gya, dated the 27th March 1885.

by Mr. Boxwell, who was Registrar as well as Magistrate of the [368] district. Gopi Nath, thereupon, applied to the High Court to have the proceedings taken against him set aside, on the ground that the District Magistrate had no jurisdiction to grant sanction, that the sanction did not comply with the terms of s. 195 of the Code of Civil Procedure. Mr Justice PRINSEP and Mr. Justice PIGOT on the 24th April 1885, after expressing a doubt as to the correctness of the decision in *Queen-Empress v. Batesar Mandal* (I. L. R., 10 Cal., 604), ordered the record to be sent for, and directed that in the meantime proceedings before Mr. Hampton should be stayed. On the 28th April, after perusing the record, the same learned Judges referred to a Full Bench the question, whether, before proceedings can be taken before a Magistrate in regard to false evidence alleged to have been intentionally given before an officer acting under the Registration Act, sanction must have been given by such officer, or some officer to whom he is subordinate? The order of reference was as follows.—

“The irregularities complained of in this case relate to the manner in which sanction to prosecute has been granted and to the proceedings subsequently taken but before we can properly consider the effect of those irregularities, we must first find whether any sanction is necessary before proceedings can be taken before a Magistrate regarding false evidence, said to have been given before a registration officer.

Section 195 of the Code of Criminal Procedure declares that no Court shall take cognizance of any offence punishable under s. 193 of the Indian Penal Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint of such Court or of some other Court to which such Court is subordinate. The offence said to have been committed in this case is punishable under s. 82 of the Registration Act. It is, no doubt, of the same nature as that punishable under s. 193 of the Penal Code, but if the terms of these sections be compared, it will be seen that, whereas under s. 82 of the Registration Act a sentence of seven years' imprisonment can be passed in any case of intentionally giving false evidence [569] before a registration officer, s. 193 of the Penal Code provides that that sentence shall be passed only in a case in which the false evidence has been given in a stage of a judicial proceeding. This raises the question whether a proceeding before a registration officer is a judicial proceeding, which again involves a consideration of the second point whether a registration officer is a Court within the meaning of s. 195 of the Code of Criminal Procedure.

Our attention has been directed to the case of *Queen-Empress v. Batesar Mandal* (I. L. R., 10 Cal., 604) in which it was held that sanction to a prosecution, arising out of proceedings before a registration officer is necessary before it can be commenced.

We are inclined to disagree with the view thus expressed with regard to the terms of s. 195 of the Code of Criminal Procedure, and of s. 83 of the Registration Act; and we, therefore, refer for determination by a Full Bench of this Court whether, before proceedings can be taken before a Magistrate, in regard to false evidence alleged to have been intentionally given before an officer acting under the Registration Act, sanction must have been given by such officer or some officer to whom he is subordinate? ”

On the hearing before the Full Bench—

Mr. *Mullick* (with him *Baboo Jogesh Chunder Dey*) appeared for Gopi Nath.

Mr. *Braunfeldt*, who appeared for Kuldip Singh, was not called upon.

The Opinion of the Full Bench was as follows :—

It appears that the charge against the accused with which we are now dealing was not made under s. 193 of the Penal Code, but under s. 82 of the Registration Act. It is, therefore, not necessary for the purposes of the case to consider whether, when in holding an enquiry under that Act, the Registrar is acting as a "Court," within the meaning of s. 195 of the Criminal Procedure Code. We have only to consider whether before instituting a charge under s. 82, any sanction at all is necessary.

[570] We are of opinion that no sanction is required. It has been contended that, under s. 83 of the Registration Act, it is necessary that some one of the officers who are mentioned in that section must have given previous permission to institute proceedings; but we think that it is not so. The provisions of s. 83 are not obligatory. They rather seem to be intended for the purpose of enabling the officers of the Registration Department, when they should see fit, to institute any prosecution under the Act upon their own responsibility.

NOTES.

[See 10 Cal., 604; 12 Bom., 36; 12 Mad., 201, where 10 Mad., 154 and 11 Mad., 3 are explained, also 15 Mad., 138, 2 C. W. N., CCXLIV]

[11 Cal. 570] CRIMINAL MOTION.

The 19th May, 1885.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Goverdhan Sinha and another.....Petitioners

versus

The Queen-Empress..... Opposite party.*

Embankment—Addition to existing embankment—Notification, publication of, under Bengal Embankment Act—Bengal Act II of 1882 (Bengal Embankment Act), ss. 6, 76, cl. (b). and 80.

The words "shall add to any existing embankment" in cl. (b) s. 76, of Beng. Act II of 1882, are not intended to mean any repair of an existing embankment, even if the effect of such repair be to make the embankment higher or broader, but only mean an extension in the length of an existing embankment.

The notification referred to in s. 6 of the Act must be published in the manner provided by s. 80, and it is not sufficient for such notification merely to be published in the *Calcutta Gazette*.

THIS motion arose out of a prosecution under the provisions of s. 76 of Bengal Act II of 1882. The accused were charged with "adding to an embankment"

* Criminal Motions Nos. 134 and 135 of 1885, against the order passed by Baboo Umesh Chandra Batavyal, Deputy Magistrate of Tumlook, dated the 10th of March 1885.

within the prohibited area without having previously obtained the permission of the Collector as provided by clause (b) of that section.

It was not disputed that the permission of the Collector had not been obtained, but the accused pleaded that what they had done merely amounted to repairing the embankment, and not to an addition thereto, and even if there had been any addition [571] that they could not be convicted, inasmuch as there had been no publication of the requisite notice under the provisions of s. 80.

The complainant, a sub-overseer of the Public Works Department, in the case against Goverdhan Sinha gave evidence to the effect that the embankment had existed for a period of five years at a height of only 1 foot, and that the accused, in spite of being warned and prohibited from doing so, had raised it to a height varying from $2\frac{1}{2}$ to $3\frac{1}{2}$ feet. In answer, the accused produced evidence to the effect that the normal height of the embankment was from 4 to 5 feet, but that owing to the encroachment of the river it had been reduced in height, and that from time to time repairs were made, and that when the repairs complained of were made, it was only one foot in height. The Deputy Magistrate disbelieved the evidence on behalf of the accused, and came to the conclusion that the act of raising the embankment from a height of 1 foot to a height of from $2\frac{1}{2}$ feet to $3\frac{1}{2}$ feet constituted "an adding to it," and finding that the notice required was published in the *Calcutta Gazette*, convicted the accused and fined him Rs. 7, and ordered him to remove the additional earth.

The facts and the findings of the Deputy Magistrate in this case against the other accused, Sree Nath Biswas, were substantially the same.

The accused thereupon applied to the High Court for a rule to have the conviction set aside upon the ground that the publication of the notice was not sufficient, and that even upon the facts admitted or proved, no offence had been committed, as the act did not amount to adding to the embankment, but merely to repairing it.

The application was made on the 17th April 1885 by Mr. Pugh on behalf of the accused before a Bench consisting of PRINSEP and PIGOT, JJ., and a rule nisi was issued.

The rule came on for hearing before MITTER and NORRIS, JJ., on the 19th May 1885, and Mr. Pugh (Baboo Tarak Nath Palit and Baboo Jogesh Chandra De with him) contended that no offence had been committed, as it was not shown that any addition had been made to the embankment, so as to bring the accused within the term of clause (b) of s. 76, and that the notification [572] required by s. 6 must be published in the manner provided by s. 80, and as that had not been done, the decision was erroneous, and the conviction should be set aside.

Mr. Pugh, during the course of his argument, referred to a decision of a Bench of the High Court consisting of PRINSEP and MACPHERSON, JJ., in the matter of *Boy Kanto Nath Roy*, petitioner, decided on the 12th September 1884 (Criminal Motion No. 297 of 1884, *unreported*), in which the Court held that s. 76 does not make the mere repairing of an existing embankment without the permission of the Collector a punishable offence, but prohibits the erection of any new embankment, or addition to any existing embankment, and that publication of the notification in the *Calcutta Gazette* was not sufficient, but the provision of s. 80 must be complied with before a conviction could be sustained.

No one appeared on behalf of the Opposite Party.

The Judgment of the Court (MITTER and NORRIS, JJ.) was as follows:—

In these two cases the petitioners before us have been convicted under s. 76,* cl. (b) of Beng. Act II of 1882, called the Bengal Embankment Act, 1882. The facts proved against the petitioners are, that they have repaired existing embankments so as to make them higher, and probably broader, than they were before, and it was also proved that they did these acts without taking the previous permission of the Collector as required by clause (b) of s. 76. It is further found by the Magistrate that under s. 6 of the Act, the Lieutenant-Governor, by a notification, declared that the tracts within which these embankments exist, are tracts within which the provisions of cl. (b) of s. 76 shall take effect. It is stated in the affidavit, and not contradicted in any way, that no proclamation and general notice of this declaration under s. 6 was published in the manner prescribed in s. 80 of the Act.

There is no finding in the Magistrate's judgment that any such proclamation and general notice were published in accordance with s. 80.

Two points have been taken before us. In the first place, it is contended that the Magistrate has erred in construing the [573] words, "shall add to any existing embankment" in cl. (b) of s. 76, as including a repair of the kind found in this case. It is contended that these words mean an addition to an existing embankment in the sense that such embankment is extended in its length.

The second objection is that, supposing the construction put upon the section in question by the Magistrate is correct, still the conviction is bad, because no proclamation and general notice of the fact that cl. (b) of s. 76 would take effect in that part of the country where these embankments exist had been published in accordance with s. 80 of the Act. We are of opinion that the conviction must be set aside upon both these grounds. We agree with the learned counsel that the words, "shall add to existing embankments," are not intended to mean any repair to an existing embankment, even if the effect of such repair be to make the embankment higher or broader. These words only mean an extension in the length of an existing embankment. If the construction which has been put by the Magistrate were correct, it would be almost

* [Sec. 76 (a)—Every person who, in any of the territories to which this Act extends, without the previous permission of the Collector, shall erect, or cause or wilfully permit to be erected, any new embankment, or shall add to any existing embankment, or shall obstruct or divert, or cause or wilfully permit to be obstructed or diverted, any watercourse, if such act is likely to interfere with, counteract or

impede any public embankment or any public watercourse,

(b) every person who, within the limits of the tract included in any prohibitory notification under section 6, without the previous permission of the Collector, shall erect, or cause or wilfully permit to be erected, any new embankment, or shall add to any existing embankment or shall obstruct or divert, or cause or watercourse; wilfully permit to be obstructed or diverted, anyand

Penalty for abetment of such acts. • (c) every person who shall abet any such act as is mentioned in clauses (a) and (b), shall be liable, on conviction, to a fine not exceeding five hundred rupees, or in default of payment to imprisonment of either description for a period not exceeding six months.

The words "shall add to any existing embankment" in cl. (b), s. 76 of Bengal Act II of 1882, are not intended to mean any repair of an existing embankment, even if the effect of such repair be to make the embankment higher or broader, but only mean an extension in the length of an existing embankment. The notification referred to in s. 6 of the Act must be published in the manner provided by s. 80, and it is not sufficient for such notification merely to be published in the *Calcutta Gazette*—*Goverdhan Sinha v. The Queen-Emress* I.L.R., 11 Cal., 570.]

impossible to carry out the provisions of the Act. Certainly, it cannot be contended that any ordinary repair to an existing embankment would be included within the words, "shall add to an existing embankment," and if any ordinary repair is not included, how is the line of demarcation to be drawn?

Then, again, these words, if construed in the way in which the Magistrate has construed them, would be meaningless in applying them to the provisions of s. 79, which says: "Whenever any person is convicted of an offence under either of the three last preceding sections, the convicting Magistrate may order that he shall remove the embankment or obstruction, or repair the damage, in respect of which the conviction is held, within a period to be fixed in such order." If throwing additional earth on an embankment means an addition to an existing embankment within the meaning of clause (b), it would be almost impossible for the convicting Magistrate to define the quantity of earth to be removed from the embankment, in order to carry out the provisions of s. 79.* We are, therefore, of opinion that the construction put upon the words of cl. (b) of [574] s. 76 is not correct, and that the construction for which the learned counsel contends is the right one.

Then, as regards the other point, we are of opinion that under s. 80 it was necessary to publish the general notice mentioned in s. 6 of the Act in the way prescribed by s. 80. In this view we are supported by an unreported decision of this Court in Criminal Motion No. 297 of 1884, dated 12th September 1884. The words, "every proclamation and general notice by this Act required to be issued or given," used in s. 80, are sufficiently wide to include the notice referred to in s. 6.

Upon both these grounds, therefore, we are of opinion that the convictions in these two cases are wrong. We accordingly set aside the convictions and sentences in these two cases. The fines, if realized, will be refunded.

Conviction quashed.

NOTES.

[The words 'shall add to any existing embankment' in sec. 76, cl. (a), of Bengal Act II of 1882, include an addition to the height of an embankment, 30 Cal., 481 F.B., overruling 11 Cal., 570. In 38 Cal., 413, an attempt was made to maintain that the decision in 30 Cal., 481, applied only to section 76, cl. (a), and did not overrule 11 Cal., 570, which applied to s. 76, cl. (b). But it was held that 30 Cal., 481, overruled 11 Cal., 570, and the principle applied to cl. (b) as well.]

*[Sec. 79.—Whenever any person is convicted of an offence under either of the three last preceding sections, the convicting Magistrate may order that he shall remove the embankment or obstruction, or repair the damage, in respect of which the conviction is held, within a period to be fixed in such order. If such person neglects or refuses to obey such order within the fixed period, the engineer may remove such embankment or obstruction, or repair such damage; and the cost of such removal or repair shall be levied from such person in addition to any other penalty in the manner provided in sections 386, 387 and 389 of the Code of Criminal Procedure, 1882.]

[10 Cal. 574]

APPELLATE CIVIL.

The 21st May, 1885.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACPHERSON.

Bhoocha.....Petitioner

versus

Elahi Bux.....Opposite Party.*

Guardianship of infant female child not having attained puberty—Maternal grandmother as guardian—Act IX of 1861, s. 3—Mahomedan Law.

Under the Mahomedan law, the grandmother is entitled to the guardianship of a minor female child in preference to the child's paternal uncle, where such child, although married to a minor, has not attained puberty.

THIS was an application made under Act IX of 1861 by one Bhoocha for a declaration as to her right to the guardianship of her granddaughter Inami Begum, as against one Elahi Bux, her paternal uncle. Inami Begum, at the time of this application, was a minor, not having attained the age of puberty, but was married, and was living in the house of her paternal uncle Elahi Bux. It appeared that since the death of Inami's father, she and her mother had lived sometimes with her grandmother and [575] sometimes with Elahi Bux, but that Elahi Bux used to make a monthly allowance for the support of the mother and daughter. Subsequently the mother of Inami married one Ahmed Ali, a man of no position, and a few days subsequent to the marriage Inami went permanently to live with her paternal uncle, and in his house was married to a Mahomedan boy 12 or 14 years of age. On the hearing of this application, the following issues were fixed:—

- (1) Has the girl been married?
- (2) Is the petitioner entitled to the custody of the girl's person?

The Judge found that the child had been legally married; and with regard to the second issue, he gave the following judgment:—

"The petitioner's pleader has urged that, failing the mother, the maternal grandmother is the proper person to have charge of the child, and no doubt, other things being equal, she would have a preferential claim; but I do not find that there is any absolutely binding rule on the subject, and I think that s. 3 † of Act IX of 1861 allows the Court a discretion when empowering it 'to make such order as it shall think fit in respect to the custody and guardianship of the minor.' Mr. Amir Ali in his work on the Personal Law of the Mahomedans lays down at p. 212 that 'the right of *hazanat* is founded primarily for the benefit of the child, and is to be exercised by those relations who are most likely to bestow care and kindness upon it': and at p. 210 quotes with approval the remarks of Mr. Santayra, viz., '*l'intérêt de l'enfant*'

* Appeal from Order No. 257 of 1884, against the order of W. H. Page, Esq., Officiating Judge of Bhagulpore, dated the 21st of May 1884.

Court, after hearing statements of the parties, etc., to make order regarding custody or guardianship of minor.

†[Sec. 3:—On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their agents if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case.]

l'importe sur toutes les autres considérations, et les juges ont la faculté de subordonner l'application de la règle aux circonstances de fait ; all the circumstances of the present case show that the best interest of the minor will be served by her being left where she is ; she will not lack female guardianship, because the aunt of her husband is living in the house of her uncle, and has charge of her. I therefore refuse the application."

Bhoocha appealed to the High Court

Moulvi *Serajul Islam* for the Appellant

Mr. *Mullick* and Baboo *Tarrack Nath Dutt* for the Respondent.

[576] The Judgment of the Court was delivered by

Garth, C.J.—We are extremely unwilling in this case to interfere with the order of the lower Court. We believe that under the circumstances the uncle of the girl is a far preferable guardian of Inami Begum to the petitioner, the grandmother.

But the decision of MITTER and WILKINSON, JJ., in *Fuseehun v. Kajo* (I. L. R., 10 Cal., 15) is directly in favour of the appellant ; and we think that we are bound by that decision, unless we are prepared to refer the question to a Full Bench.

That also was a case decided under Act IX of 1861. The plaintiff was the maternal grandmother of the minor, a girl aged 12 years, *who had attained puberty*. The parties who claimed to be guardians were, first, the mother of the minor, who, as in this case, had married again, and was disqualified from being guardian, and, secondly, the paternal uncles of the minor. The Court held that, though under Mahomedan law the uncles would be the proper guardians, s. 21, Reg. X of 1793 (applicable to minors under the Court of Wards), and s. 27 * of Act XL of 1858 (applicable to other minors), read together, prohibited the appointment of anyone but a female to be the guardian of a female. The girl was accordingly made over to the custody of the maternal grandmother and taken away from that of the paternal uncles.

In this case the plaintiff is the grandmother of the minor, who, although she has not attained puberty, is found to have been lawfully married. The defendant is the girl's paternal uncle. The mother of the girl, as in the case referred to, has married again, and is consequently disqualified from acting as guardian.

The facts of the above case are therefore, so far as the main point in question is concerned, undistinguishable from those of the present, and we consider that we are bound by it. At the same time, we have so much doubt as to whether that case was rightly decided, that we should be disposed to refer the question to a Full Bench if it were not for the fact that the girl in this instance, although married, appears not to have attained the age of puberty.

The only ground upon which we doubt the correctness of the above case is this : that the learned Judges seem to consider that [577] s. 27 * of Act XL of 1858 *obliges the Civil Court to appoint a female as the guardian of the person*

* [Sec. 27 : —Nothing in this Act shall authorize the appointment of a guardian of the person of a female whose husband is not a minor ; or the appointment of a guardian of the person of any minor whose father is living and is not a minor ; and nothing in this Act shall authorize the appointment of any person other than a female as the guardian of the person of a female. If a guardian of the person of a minor be appointed during the minority of the father or husband of the minor, the guardianship shall cease as soon as the father or husband (as the case may be) shall attain the age of majority]

Act not to authorize the appointment of guardians of certain married women and other persons.

Guardianship during the minority of the father or husband of a minor when to cease.

of a female minor. We think that it may well be doubted whether the Act did not mean to leave the law as it was, in which case we might take as our guide the rule of Mahomedan law.

But it would seem from *Baillie's Mahomedan Law*, second edition, p. 438, that where a girl has not attained the age of puberty, the *grandmother* is a proper guardian, in preference to her uncle or other male relative, so that even if Act XL left the matter open, the rule of Mahomedan law would seem in favour of the petitioner.

We think, therefore, that the judgment of the lower Court should be reversed, and that the girl should be given over to her grandmother as her guardian. Each party, under the circumstances, will pay their own costs.

Appeal allowed.

NOTES.

[See notes to 10 Cal., 15]

[11 Cal. 577]

CRIMINAL REFERENCE.

The 22nd May, 1885.

PRESENT .

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Joydeo Singh.....Petitioner

versus

Harihar Pershad Singh...Opposite Party.*

Sanction—Fresh sanction granted more than six months after expiry of prior sanction—Grounds upon which such fresh sanction should not be granted—Criminal Procedure Code, Act X of 1882, s. 195.

Sanction was granted to prosecute a defendant for forgery and perjury alleged to have been committed by him in a civil suit which was decided against him on the 22nd August 1882. The defendant then preferred an appeal which was dismissed on the 9th August 1883. The plaintiff commenced criminal proceedings against the defendant, under the sanction, on the 23rd July 1884, but such proceedings having been commenced more than six months after the date of the sanction, the charge was dismissed. The plaintiff then, on the 20th August 1884, applied for a fresh sanction which was granted on the 13th April 1885.

Held, that assuming that the Munsiff who granted the fresh sanction had power to do so, as to which the Court expressed no opinion, such fresh sanction should not have been granted unless some explanation was given for [578] the omission to commence proceedings within six months, and as no such explanation was given, or any special grounds shown why a fresh sanction should be given, the Munsiff did not exercise a sound discretion in granting such fresh sanction, and consequently his order was set aside.

THIS was an application to set aside an order granting sanction to prosecute the petitioner for forgery and giving false evidence.

The facts were as follow :—

The petitioner, one Joydeo Singh, had been one of the defendants in a regular suit in which Harihar Pershad Singh, the opposite party, was plaintiff. That suit was decided on the 22nd August 1882 against the defendant, and on

* Criminal Revision No. 171 of 1885, against the order passed by Moulvie Ata Hossein, Munsiff of Arungabad, dated the 13th April 1885.

the application of the plaintiff the Munsif, on the same day, granted sanction to the plaintiff to prosecute Joydeo Singh and one Charan Singh for forgery and giving false evidence. The defendants preferred an appeal against the Munsif's judgment, deciding the case against them and the decree passed thereon, but that appeal was dismissed on the 9th August 1883. On the 23rd July 1884 the plaintiff instituted criminal proceedings against Joydeo Singh and Charan Singh under the sanction granted on the 22nd August 1882. The case came on for hearing on the 19th August 1884 before the Deputy Magistrate, who then for the first time discovered that the sanction upon which the proceedings were based had been granted more than six months previous to their being commenced, and he accordingly dismissed the case. The plaintiff Harihar Pershad Singh then on the 20th August 1884 applied to Moulvie Ata Hossain (Baboo Gocool Chand, the Munsif who had heard the regular suit and granted the previous sanction having meanwhile been transferred) the then Munsif of Arungabad to renew the sanction granted by his predecessor to prosecute Joydeo Singh and Charan Singh, and that officer accordingly granted a rule calling upon the petitioner to show cause why such application should not be complied with. The rule came on for argument on the 13th April 1885, and resulted in a fresh sanction being granted to prosecute Joydeo Singh. Joydeo Singh now applied to the High Court to set aside that order on the following grounds.—

(1) That the Munsif was wrong in renewing an order barred by limitation ;

[579] (2) That there is no provision in the Code providing for the renewal of an order sanctioning a prosecution ,

(3) That the officer who granted the sanction not being the officer who had heard the original suit or granted the previous sanction could not give sanction without first holding a preliminary enquiry , and

(4) That the order was therefore bad in law and made without jurisdiction.

Munshi Mahomed Yusuf for the Petitioner

Mr. Twisdale for the Opposite party.

The Judgment of the High Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—The petitioner before us was defendant in a civil suit. The suit was decreed by the Munsif on the 22nd August 1882, and at the end of the judgment a sanction was given for the prosecution of the petitioner for forgery and for giving false evidence. There was an appeal preferred against the Munsif's decree, and that appeal was disposed of against the petitioner on the 9th August 1883. Then, on the 23rd July 1884, the plaintiff in the civil suit commenced the criminal proceeding for which he had obtained the sanction on the 22nd August 1882.

While this proceeding was pending, it was discovered that the sanction upon which the prosecution relied was more than six months old. Thereupon, on the 20th August, another application was made for obtaining a fresh sanction, which was given on the 13th April 1885.

This rule was obtained by the petitioner upon the plaintiff to show cause why the order of the Munsif, dated 13th April 1885, should not be set aside.

It is contended before us that under s. 195 of the Criminal Procedure Code, it was not competent to the Munsif to give a fresh sanction for the prosecution. It seems to me to be unnecessary to express any opinion upon this point, because, assuming that the Munsif had power to grant the fresh sanction, he should not have granted it unless some explanation was given for the omission to commence the proceeding within six months. The order of the 13th April

1885 has been read to us. It discloses [580] no special grounds for granting this fresh sanction. Neither does it appear from the record that any explanation was given by the opposite party to this rule as to why proceedings were not commenced at least within six months from the date when the decree of the Munsif was confirmed in appeal.

Under these circumstances I am of opinion that the Munsif did not exercise a sound discretion in granting the fresh sanction prayed for. We accordingly set aside the order of the Munsif of the 13th April 1885.

Order set aside.

NOTES.

[After sanction had lapsed by the expiry of six months, a fresh sanction should not be granted except on special grounds.—11 Cal 577 ; 22 Cal. 176 , 22 Cal. 578 , at 578 ; 6 All. 45 ; 18 All. 358 ; 8 C. W. N. 797 , at 800.]

[11 Cal. 580]

CRIMINAL REFERENCE

The 26th May, 1885.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Queen-Empress

versus

Durga Sonar.....Accused.*

Evidence—Deposition of accused person when admissible in evidence against him in subsequent proceeding—Evidence Act (I of 1872) s. 80.

A deposition given by a person is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition.

A pardon was tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate.

Held, that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.

IN this case the accused and three others were charged with the murder of one Nemani Sonar.

On February 2nd, the accused Durga made a confession before the Joint Magistrate, who recorded the usual memorandum at the foot of the confession as required by s. 164 of the Criminal Procedure Code. Subsequently a pardon was tendered to Durga, on the 10th February by the Joint Magistrate, who

* Criminal Reference No. 16 and Appeal No. 322 of 1885, made by J. W. Badcock, Esq., Officiating Sessions Judge of Bhagulpore, on the 4th of May 1885.

recorded his reasons for so doing as required by s. 337* of the Code, as follows :
 " I am inclined to believe that he (Durga) was [581] under the impression
 " that he would be pardoned when he made his statement to the Police and
 " before me, and that his confession therefore will not be evidence against him
 " or the other accused."

Subsequently the pardon was revoked on the ground that he did not make a full disclosure of all the facts, and he was put upon his trial along with the other accused for the murder.

At the trial the Sessions Judge did not admit the confession as he considered he was bound by the statement of the Joint Magistrate as recorded at the time of granting the pardon. The deposition made by Durga before the Joint Magistrate was admitted in evidence against him, in which he stated that he had assisted at the murder.

No evidence was, however, given to prove that he was the person who had given the deposition before the Joint Magistrate.

The Sessions Judge, agreeing with the assessor, acquitted the other accused on the ground that Durga's deposition was no evidence against them, and that the other evidence was untrustworthy and unreliable; but he convicted Durga mainly upon the statement contained in his deposition, coupled with the fact that there was evidence which could be relied on; that a quarrel existed between him and the murdered man, and that they were seen together the evening before the body was found. He accordingly sentenced him to death and referred the case to the High Court for confirmation of the sentence.

Durga also appealed.

No one appeared for either party.

The **Judgment** of the High Court (MITTER and NORRIS, JJ.) was as follows :—

The Sessions Judge has admitted the depositions of the prisoner made before the Joint Magistrate of Monghyr on February 10th, 1885, without any evidence of his identity.

At page 54 of the Sessions Record the Judge says. "The Government Pleader then put in Durga's statement on oath taken on February 10th after the offer of a pardon was made under s. 337 of the Code of Criminal

* [Sec. 337 :—In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence, or with the sanction of the District Magistrate, any other Magistrate may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof

Every person accepting a tender under this section shall be examined as a witness in the case.

Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be. •

Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing, and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.]

Procedure"—(then follow some words which are quite illegible)—"under s. 339[†] of the Code of Criminal Procedure." And we suppose he thought that under [582] s. 80[‡] of the Evidence Act it was admissible without proof that the Durga Sonar who made the deposition was the same Durga Sonar then being tried.

This was a gross blunder. Without the deposition there is no sufficient evidence to warrant a conviction of the prisoner, and we accordingly set aside the conviction and direct his discharge.

Conviction set aside.

NOTES.

[See also (1903) 26 All., 108.]

[11 Cal 582]

APPELLATE CIVIL.

The 20th April, 1885.

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

Pergash Koer and another.....Plaintiffs

versus

Mahabir Pershad Narain Singh and another.....Defendants.[†]

*Mortgage—Conditional sale—Foreclosure—Suit for possession on foreclosure—
Regulation XVII of 1806, ss. 7, 8—Act IV of 1882 (Transfer of
Property Act), ss. 2, clause (c) and 86.*

The procedure laid down in the Transfer of Property Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by s. 2, clause (c) of the Act.

Where, therefore, under the provisions of Regulation XVII of 1806 notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed, and the foreclosure proceedings taken before the Transfer of Property Act came into force, and

* Appeal from Original Decree No. 277 of 1883, against the decree of Babco Amrit Lal Pal, Rai Bahadur, Second Subordinate Judge of Sarun, dated the 22nd of September 1883.

† [Sec. 339 —Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section.

No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.]

‡ [Sec. 8Q.—Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner, or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement, or confession was duly taken.]

after the expiry of the year of grace the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution sale and obtained possession before the commencement of the foreclosure proceedings and the necessary notice had not been served upon him,

Held, that it was competent to the Court to apply the procedure prescribed by the Transfer of Property Act and grant the mortgagee a decree in the terms of s. 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai v. Kishen Sahai* (I. L. R., 6 All., 262) referred to

IN this suit the plaintiffs sought to obtain possession on foreclosure of a two-anna nine-pie share, out of five annas six pie, out [583] of eleven annas share of mouzah Dhowpole, the eleven annas constituting the whole of the mouzah. They alleged that the property in suit had been mortgaged by the first defendant Solookut Deo Narain Singh to their father, since deceased, by a deed of conditional sale, dated the 1st July 1873, to secure the repayment of a sum of Rs. 2,000; that the date fixed for repayment had passed without the principal or interest being repaid, and that consequently under the provision of Regulation XVII of 1806 they had caused the requisite notice and copy of their petition for foreclosure to be served on the first defendant, the mortgagor, and the year of grace having expired on the 3rd Assar 1285, corresponding with the 16th June 1878, they brought this suit to obtain possession.

They further alleged that after the service of the notice and copy of their petition on the first defendant they learnt that in execution of a decree against the first defendant the property in suit had been sold and purchased by him *benami* in the name of the second defendant his son, Mahabir Pershad Narain Singh, and they consequently added him as a *pro forma* defendant. In their prayer they asked for a declaration that the first defendant's right to redeem was lost, and that they might have possession of the property, and they also added a prayer for "other relief, which according to law might be deemed proper to be awarded to them." They also claimed mesne profits.

The first defendant did not appear or contest the suit, but the second defendant filed a written statement, alleging, that inasmuch as he was in possession of the property by virtue of his purchase which took place on the 10th April 1876, and the notice was not served upon him, the foreclosure proceedings were *ab initio* bad as against him. He denied that he had purchased as *benamidar* for his father, and stated that the plaintiffs were well aware of the fact of his purchase and possession long before they caused the notice to be served on his father. The lower Court found as facts that the mortgage was a valid one, that the notice of foreclosure was served on the first defendant, and that the purchase by the second defendant was prior to the date of the plaintiffs' application for foreclosure; that the second defendant was a necessary party to the foreclosure proceedings; and [584] that as the notice was [not?] served on him, the plaintiffs were not entitled to succeed unless they established the fact that the second defendant was a mere *benamidar* for his father, that there was no evidence to show that they were not aware of the second defendant's purchase before instituting the foreclosure proceedings, and that they had failed to prove that the second defendant had purchased *benami* for his father.

At the hearing the plaintiffs contended that, if upon the facts they were not entitled to succeed, still it was open to the Court to make a decree under

the provisions of s. 86* of the Transfer of Property Act (IV of 1882) in compliance with the prayer for "other relief"; but the Court held that, inasmuch as the suit was based upon foreclosure proceedings taken before that Act came into operation, and as it had not been instituted under its provisions, and did not contain the necessary allegations to entitle plaintiffs to a decree under that section, the Act did not apply; and as it would be changing the entire character of the suit, the Court refused to grant any such relief, and having regard to the above findings, dismissed the suit but made each party bear their own costs.

The plaintiffs now appealed to the High Court upon amongst other grounds that there was nothing in the frame of the suit or in the circumstances of the case to disentitle them from obtaining a decree under s. 86 of the Transfer of Property Act, and that the lower Court erred in not granting them that relief.

Baboo Mohesh Chunder Chowdhry and Munshi Mahomed Yusuf for the Appellant.

Mr. C. Gregory and Baboo Durga Das Dutt for the Respondent.

The Judgment of the Court (MITTER and FIELD, JJ) was delivered by

Mitter, J.—This suit was based upon a mortgaged deed called *bye-bil-wufa*, executed by the defendant No. 1 in favour of the plaintiff's father, on the 21st July 1873. Under this deed a two-anna nine-pie share, out of five annas six pie, out of eleven annas of the mouzah in dispute, which eleven annas constituted an entire estate, was mortgaged. The plaintiff alleged that on the [555] 15th June 1877 an application was made to the District Court for service of notice under Regulation XVII of 1806, that this notice was served upon the mortgagor; and that as the money due under the mortgage was not paid within the time allowed by the Regulation, the right to redeem was barred. It was further stated in the plaint that, some time after the notice had been served, the plaintiffs came to know that the share mortgaged had been sold in execution of a decree against the mortgagee [mortgagor?] and purchased by the mortgagor himself in the name of his son, the defendant No. 2. Accordingly, the defendant No. 2 was made a defendant in the suit. The prayer in the plaint was for a decree for possession upon foreclosure of the mortgage, and also for "other relief" which according to law it might be deemed proper to grant.

The suit was defended only by defendant No. 2, and the principal ground of defence was that he was the real purchaser of the property mortgaged; that since the date of his taking possession under the purchase, he has been in exclusive possession of it and that his father has nothing to do with it.

He further alleged that this purchase took place before the application under Regulation XVII of 1806 was made to the District Court, and therefore the suit could not be decreed inasmuch as no notice had been served upon him.

* [Sec. 86.—In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to

Decree in foreclosure suit. the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but,

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.]

There are other questions in the case, but the lower Court has found all of them in favour of the plaintiffs. It has been found that the mortgage was executed; that the money covered by it was really advanced to the father; and that the notice was served upon the mortgagor, defendant No. 1. But the lower Court dismissed the suit upon the ground that the plaintiff failed to prove that the defendant No. 2, the son, was the *furzi* or *benamidar* of the father, defendant No. 1.

There was a further contention before the lower Court on behalf of the plaintiffs, viz., that supposing, for want of notice upon defendant No. 2, no decree absolutely foreclosing the mortgage could be made in this suit, there was nothing to prevent that Court from making a decree under s. 86 of the "Transfer of Property Act" of 1882. With reference to this contention the Subordinate Judge says that there was no prayer to this effect in the plaint, nor would the words "other relief" include it. He accordingly refused to accede to this prayer, which was made at the time of the last hearing. The Subordinate Judge, therefore, dismissed the suit altogether.

Against this decision the plaintiffs have appealed. The evidence adduced by the defendant No. 2 to prove that he was separate from his father is, as remarked by the lower Court, hardly satisfactory; and it being a presumption of Hindu law that the members of a family, and especially such members as these, namely, father and son, are joint, I should be inclined to presume that the purchase was made by the joint family. But as my learned brother is not prepared to go to this length, I would not press this view of the case to deprive the mortgagor of his right of redemption. It is, however, quite clear to us that the lower Court was in error in dismissing the suit altogether. We are of opinion that the lower Court was not right in refusing to make a decree in this case under s. 86 of the "Transfer of Property Act."

Our attention has been drawn to a decision in *Ganga Sahai v. Kishan Sahai* (I. L. R., 6 All., 262). In that case the question was whether the procedure part of the "Transfer of Property Act" would apply to mortgages executed before the Act came into operation. This question was referred to a Full Bench, and the majority of the Judges were of opinion that this question should be answered in the affirmative. The Chief Justice, however, dissented from the view taken by the majority of the Judges.

Section 2 of the "Transfer of Property Act" says: "In the territories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect (a) the provisions of any enactment not hereby expressly repealed, (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force, (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or [587] any relief in respect of any such right or liability; or (d) save as provided by section fifty-seven and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction: and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist law." We are concerned only with clause (b) [c?] of this section. I think that the words "or any relief in respect of any such right or liability" have preserved to a mortgagor of the description under consideration the right which he had under the Regulation of 1806, viz., to pay off the mortgage money, and thus prevent the mortgage being foreclosed within one year from the date of notice. That being so, it seems to me that the procedure laid down in the "Transfer of Property

Act" will apply, but it will not affect this right. Section 2 does not say that nothing herein contained shall apply to any transaction entered into before the Act was passed, but it says, "nothing herein contained shall be deemed to affect any right or liability." Therefore, the procedure laid down in the Act may be applied subject to this restriction that it should not be so applied as to affect the rights saved by s. 2. With this qualification, if I may be permitted to say so, I agree with the majority of the Judges of the Full Bench. Therefore, applying the provisions of the "Transfer of Property Act," in the way mentioned above, I think that the plaintiffs in this case are entitled to a decree in the terms of s. 86 of that Act. In this view of s. 2 of the "Transfer of Property Act," my learned colleague agrees. We, therefore, direct that a decree be drawn up in the manner provided by s. 86, substituting "one year" for "six months" mentioned therein. But as in this case the plaint was not properly drawn up, and as no application was made in the lower Court (in proper time) to amend the plaint so as to include in it an express prayer for a decree under s. 86 of the "Transfer of Property Act," we think that each party should bear his own costs in this as well as in the lower Court.

Appeal allowed.

NOTES.

[In proceedings instituted after the Transfer of Property Act, 1882, came into force, the procedure laid down in that Act was required to be followed:—6 All., 262; 12 Cal., 436. In 11 Cal. 582 the proceedings had been instituted before that Act; but this decision was not approved of by TREVELYAN, J., in 12 Cal., 583, F.B. (Mr. Justice MITTER was a party to it). See also 19 Mad., 382; 14 Cal., 451; 599, 23 Bom., 119, 22 Bom., 624.

In 13 Cal., 50 this case was distinguished on the ground that all the parties were not before the Court]

[588] APPELLATE CIVIL.

The 21st May, 1885.

PRESENT.

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE GHOSE

Kowsulliah Sundari Dasi and another... ..Defendants

versus

Mukta Sundari Dasi and othersPlaintiffs*

Admission made by one co-sharer evidence against the others—

Evidence Act (I of 1872), s. 18.

In a suit between a zamindar and his *ijaradars* for rent, a person, who was one of several *jotedars* in the mehal, was called as a witness for the zamindar, and admitted the fact that an arrangement existed whereby he and his *co-jotedars* had agreed to pay rent to the zamindar direct; this suit was decided in favour of the zamindar.

The *ijaradars* then brought a suit against the *jotedars*, amongst whom was the witness abovementioned, to recover the sum which the *jotedars* ought to have paid to the zamindar direct, and which the *ijaradars* had been decreed to pay. The *jotedars* disclaimed all

*Appeal from Appellate Decree No. 2389 of 1883, against the decree of F. J. G. Campbell, Esq., Officiating Judge of Furridpore, dated the 8th of May 1883, reversing the decree of Baboo Jagut Durlav Mozumdar, Rai Bahadur, Subordinate Judge of that District, dated the 13th of September 1881.

liability to pay rent to the *ijaradars*; in this suit the evidence given by the *jotedar* in the zamindar's suit was received as evidence on behalf of the plaintiffs against all the defendants. Held, that the evidence was admissible.

THIS was a suit for arrears of rent. The zamindar of Sultanpore had given an *ijara* lease of his *mehal* to Mukta Sundari Dasi and others. There was a *jote jumma* in the *mehal* held by four co-sharers. Default having been made in the payment of rent on account of this *jote*, the zamindar brought a suit against the *ijaradars* for the amount. In that suit the *ijaradars* resisted the claim, on the ground that they had nothing whatever to do with the said *jote*, the tenants being, by an arrangement, directly under the zamindar. The *ijaradars*, however, failed in their contention, and had to satisfy the decree obtained against them by the zamindar. The *ijaradars* therefore brought this suit against the *jotedars*—(1) Durga Churn Ghose, (2) Kowsulliah Sundari Dasi, (3) Annoda Sundari Dasi, (4) Shyama Sundari Dasi. Defendants Nos. 2 and 3 alone filed written statements describing themselves as 5-annas [589] and 2-annas sharers respectively of the *jote*, and contending that they by arrangement were the *khas* tenants of the zamindar, disclaimed all liability to the plaintiffs whom they had never acknowledged as their landlord. The written statement also alleged that defendant No. 1, a co-sharer to the extent of a 2-anna share, was on unfriendly terms with the female defendants and largely indebted to the zamindar in whose favour he had deposed in the former suit. The Subordinate Judge disbelieved the arrangement set up by the plaintiffs and dismissed the claim. On appeal, the District Judge, mainly relying, it would seem, on the admission made in the evidence of one of the present defendants (defendant No. 1), who was a witness on behalf of the zamindar in the suit between the zamindar and the *ijaradars*, that he and his co-sharers had paid rent to the zamindar under an arrangement between them and the plaintiffs, decreed the plaintiffs' claim. It was contended by the defendants on appeal to the High Court that the admission in the evidence of one of the *jotedars*, made in the former suit in which none of them were parties, could not be accepted as legal evidence against the others.

Baboo *Girja Sunkur Mojoomdar* for the Appellants.

Baboo *Issur Chunder Chackrabati* for the Respondents.

The Court (GARTH, C.J., and GHOSE, J.) delivered the following Judgments:—

Garth, C. J.—In this case the plaintiffs took an *ijara* lease from the zamindar of certain property, in which was included a tenure, which had been held by the defendants at a certain rent for a great many years.

The plaintiffs' case was that, under an arrangement which they made with the defendants some time ago, the defendants were to pay, and have always paid, their rent and cesses to the zamindar instead of to the plaintiffs, and that these payments had always been received by the zamindar on the plaintiffs' account and placed to their credit.

This being the arrangement, the plaintiffs say that the defendants, in breach of it, did not pay to the zamindar the rents or cesses, which they ought to have paid for the years 1283 to 1287, and consequently the zamindar brought a suit against [590] the plaintiffs to recover those rents and cesses, and recovered the amount.

This suit was then brought by the plaintiffs to recover from the defendants the sums which, according to the arrangement, they ought to have paid to the zamindar; and the lower Appellate Court has held that the arrangement relied upon has been proved, and that the plaintiffs are entitled to recover the sums claimed from the defendants.

But it has been contended by the appellants (amongst other things) that, in coming to this conclusion, the lower Appellate Court has admitted and acted upon certain evidence, which was not legally admissible.

It appears that in the suit which was brought by the zamindar against the plaintiffs, one of the defendants was called as a witness on behalf of the zamindar, and spoke to the existence of the arrangement on which the plaintiffs rely. This deposition, made in the former suit, has been given in evidence in this suit and received by the Court below.

It is contended by the defendants that this was wrong. It is said that the statement of one of the defendants might have been received as an admission *against himself only, but not as against the other defendants.*

I think, however, the lower Court was right. Where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence as against the others.

The rule is thus laid down in *Taylor on Evidence*, Vol. I, 1st edition, p. 489, s. 525 :—

“When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.”

[See also *Kemble v. Farren* (3 C. & P., 623), *Lucas v. De la Cour* (1 M. & S., 249).]

[391] The principle of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the others, and this rule, as I take it, is enacted, though in a somewhat concise form, in s. 18 of the Indian Evidence Act.

As this is the only point of law raised which is worthy of notice, I think that the appeal should be dismissed with costs.

Ghose, J.—I concur in dismissing the appeal, as I think there was sufficient evidence in point of law to justify the finding of the Court below.

Appeal dismissed.

NOTES.

[The admission of a person having a joint interest with another can be used against such other :—11 Cal., 588.

See (1911) 39 Cal., 995, where MOOKERJEE, and CARNDUFF JJ., fully discussed and the principles underlying the rule, referring also to English cases like *In re Whiteley and Roberts' Arbitration* (1891) 1 Ch. 558.]

[11 Cal. 591]

ORIGINAL CIVIL.

The 2nd June, 1885.

PRESENT :

MR. JUSTICE PIGOT.

Malchus.... .Plaintiff

versus

Broughton and another.....Defendants.

Will—Construction—Charitable gift—Cypres doctrine—Lapse.

A testator directed his executor to set apart a sum of Rs. 7,000 to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of Armenian or other Christian religion. The testator died in 1867. In 1864, the St. Paul's School, Calcutta, was removed to Darjeeling. In the St. Paul's School, Calcutta, the fees for day-scholars and day-boarders were Rs. 8 and Rs. 10, respectively. In the St. Paul's School, Darjeeling, there were no day-scholars nor any day-boarders, and the cost of a regular boarder would be about Rs. 400 per annum.

Held, that the gift did not lapse, being a general charitable bequest, and that under the circumstances it must be executed *cypres*

ON the 20th day of June 1859, Nicholas Isaac Malchus, an Armenian inhabitant of Calcutta, made and published his last will and testament, whereby, after making several pecuniary and other bequests, he directed as follows in the 5th clause of his will :—

"I direct my executor to invest the sum of Company's rupees seven thousand in the purchase of Company's paper and to [592] stand possessed thereof in trust by means of the income of the same to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, to be from time to time nominated for that purpose by the trustee for the time being of this my will, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of the Armenian or other Christian religion, and such income to be paid to the Governors, Trustees or Managers of the school for the time being for the purpose of such education, and I direct that no boy shall be eligible for admission to the benefit of this provision at an earlier age than seven, or at a later age than twelve, nor shall he continue the enjoyment thereof after he shall have attained the age of seventeen, though entitled to its benefit up to then, and whenever a vacancy shall occur either by removal of any such boy at the age aforesaid, his earlier death, or from any other cause, the Trustee for the time being of this my will shall fill up the vacancy by appointing some other boy of the character and qualifications hereinbefore in that behalf stated, and each boy admitted to the school shall be subject to the government and discipline thereof."

The last clause of the will, so far as is material for the purposes of this report, ran as follows: "I do hereby nominate and appoint my said wife executrix and trustee of this my will during her life, and after her decease or renunciation of such office I hereby nominate and appoint the Administrator-General of Bengal for the time being the executor and the trustee of this my will."

The testator died on the 23rd of December 1867, leaving a widow, and the plaintiff, his only son, him surviving. The widow obtained probate of the will and administered the estate until her death in February 1881, when the Administrator-General of Bengal took upon himself the administration of the estate.

In September 1863, the St. Paul's School, Calcutta, was closed by order of the Committee of the school. It had for some years previously been a failure financially from want of success in competing with other schools newly established in Calcutta, and the Committee thought it would be desirable to give up the school in Calcutta and establish one in the hills either at Hopetown or [593] Darjeeling. This was done. The Committee sold the Calcutta property, and with the proceeds purchased some lands in Darjeeling, where, in March 1864, they established the school thenceforward known by the name of the St. Paul's School, Darjeeling. This proceeding was always referred to by the school authorities as the transfer of St. Paul's School from Calcutta to Darjeeling.

During the year 1877, Mrs. Malchus paid the interest on the Rs. 7,000, namely, Rs. 280, to the Governors and Trustees of St. Paul's School, Darjeeling, for the education of one boy. From the year 1877 no payments were made either by Mrs. Malchus or by the Administrator-General. On the 11th of February 1884, the plaintiff instituted the present suit for the construction of the will of the testator so far as it related to the bequest contained in the 5th paragraph; for a declaration that the St. Paul's School, Calcutta, had ceased to exist at the time of the testator's death; and that the legacy of Rs. 7,000 had lapsed and fallen into the residue of the estate of the said testator to which the plaintiff was entitled, for accounts and for general relief. The defendants were the Administrator-General and the Venerable Archdeacon Atlay, who was appointed by the governing body of St. Paul's School, Darjeeling, under the provisions of Act XXI of 1860, under which Act the school had in 1867 been registered as a society. From the evidence it appeared that the fees at the St. Paul's School, Calcutta, ranged from Rs. 8 and Rs. 10 per month for day-scholars and day-boarders to Rs. 35 and Rs. 40 per month for regular boarders. At the St. Paul's School, Darjeeling, there were none but boarders, the average cost for each being about Rs. 400 per annum.

Mr. O'Kinealy (the Advocate-General, Mr. G. O. Paul, with him) for the Plaintiff.—The plaintiff's contention is that the gift of Rs. 7,000 has lapsed and fallen into the residue. This contention involves two questions: *first*, whether the St. Paul's School, Calcutta, was in existence at the death of the testator in 1867; *secondly*, if not, whether this is a gift which the Court will execute *cypres*? As to the first question, it is submitted on the evidence that the school pointed out by the testator was not in existence at the death of the testator. The St. Paul's School, Darjeeling, is not the [594] St. Paul's School, Calcutta, merely transferred to Darjeeling. It is entirely different in its aims and in its character. As to the second question, this is not a gift which the Court will execute *cypres*—*Clark v. Taylor* (1 Drew, 642); *Russell v. Kellett* (3 Sm. and G., 264); *Fisk v. Attorney-General* (L. R., 4 Eq., 521).

Mr. Hill (Mr. Stokoe with him) for the Trustees and Governors of St. Paul's School, Darjeeling.—This is a general charitable gift and cannot fail in any case. (He was stopped on this point.) My clients are entitled to the fund. It was given to St. Paul's School, and the mere transfer of the school from Calcutta to Darjeeling was immaterial so far as the bequest was concerned. Even if the Court were disposed to think the gift should be executed *cypres*, we are the parties entitled, as the St. Paul's School, Darjeeling, is the successor

of, and resembles more nearly than other institutions, the school mentioned by the testator.

Mr. *White* (Mr. *Allen* with him) supported the contention of the other Defendants.

The Judgment of the Court was delivered by

Pigot, J.—The plaintiff claims in this suit that the legacy under para. 5 of the testator's will has lapsed. It has been argued by his counsel that the legacy was intended for St. Paul's School, Calcutta, that the school came to an end; and following the principle laid down in *Clark v. Taylor* (1 Drew, 642); *Russell v. Kellett* (3 Sm. and G., 264), and *Fisk v. The Attorney-General* (L. R. 4 Eq., 521), the object of the bequest having disappeared, it must lapse, and that he, as son of the testator, becomes entitled to the fund. Now the question depends, as has been all along admitted by counsel on both sides, entirely on the construction of para. 5 of the will.

Counsel are not at issue on any question of law.

I think, on looking at all the terms of this paragraph of the will, I must hold that the intention of the testator was not to make a gift either to or for the benefit of the school but for the furtherance of the education of the sort of persons described in the paragraph as "two or more boys, natives of Calcutta, of poor and [595] indigent parents, or fatherless children, of the Armenian or other Christian religion."

In the first place there is no bequest of the money to the school at all. There is simply a direction that the trustees, or rather the executors, shall invest Rs. 7,000 in Company's paper, stand possessed thereof, and by means of the income provide a fund for or towards the education of boys of the description mentioned at St. Paul's School, Calcutta. *

Not merely is there no bequest to the school, but the will contains directions as to what the boys are to get as objects of the testator's bounty, that is education; and that education they are to have, by its being paid for at St. Paul's School, Calcutta. It appears to me that to bring the case within the scope of the cases cited it would be necessary that the money should pass to the institution, which, it is suggested by the plaintiff's counsel, was the object of the bequest. That is not what is done in this paragraph, I think that the name of the school is introduced in two places in the will—once with the object of directing that the education contemplated shall be obtained there. He appears to use a reference to St. Paul's School, Calcutta, in a subsequent part of the will as an indication of the standard of education he wishes the objects of the bounty in that part of the will to receive, and I so use it here. Holding, therefore, that the bequest is not to an institution such as the school, the case does not fall within the authorities cited, and therefore I cannot hold that the legacy has lapsed. It is not necessary now to decide the question argued by Mr. *O'Kinealy*, and discussed by Mr. *Hill*, as to whether the St. Paul's School at Darjeeling is a continuation of the school which existed in Chowringhee twenty years ago. I must have done so had I been with the plaintiff in his construction of the 5th para. of the will, as I am not, and having regard to the view I entertain of the other part of the case, it is not necessary to determine this question. It appears to me, that whether or not the Darjeeling school is the same institution as existed in 1863 in Calcutta, if it be the case that the education there given cannot under the circumstances be given to children answering the description of the objects of the testator's bounty, that the doctrine of *cypres* must come in, and it appears * [596] on facts admitted that that is so. The object of the testator, as I understand it, was to provide education for two or more boys, natives of

Calcutta, children of poor and indigent parents, or fatherless children, of the Armenian or other Christian religion.

Now it is clear that this small endowment, on the face of it, is insufficient to provide the expenses of even one boarder at the Darjeeling school as it now stands. It was insufficient to defray the expenses of one boarder in the school at Calcutta as it was in 1862-63. I cannot but suppose that the testator, when he fixed the purpose to which the fund was to be applied, knew the circumstances of the charges made at the school at that time, as given in evidence here, and knew that the fund could not be applied for children to board at the school. I think, taking all the facts into consideration, that he must have contemplated the education of children as day-scholars only or as day-boarders such as were attending school at that time, and for such purpose I think the fund must now be applied.

The character of the education given at St. Paul's School, Darjeeling, is, I am satisfied, such as the testator would have wished, that I hold to have been an education at a school where religious teaching was imparted according to the form of belief of the English Protestant Church. I do not intend to exclude the possibility such as has been suggested by Mr. *Hill*, that should there be found some other fund, and the persons at whose disposal such fund is should be willing to supplement the fund in this suit, so as to provide for the education of the boys in Darjeeling. If that could be done, no doubt, the object of the testator would be amply satisfied. That can be inquired into in the reference which I must order. When I say I conclude that the testator contemplated at best day-boarders only, though he has not actually specified that class, I do so on the assumption that he can get nothing better than that sort of education for the available income.

There must be a reference to the Registrar to report on the question in what manner the wishes of the testator can be best carried out, having regard to the decision I have come to.

Attorney for Plaintiff : *H. H. Remfry.*

Attorney for Defendants : *Carruthers and O.C. Ganqooly.*

NOTES.

[This case was affirmed by GARTH, C. J. and WILSON J. on appeal, (1886) 13 Cal., 193.]

[597] PRIVY COUNCIL.

The 13th and 17th February and 4th March, 1885.

PRESENT :

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH AND
SIR A. HOBHOUSE.

Abdul Wahid Khan.....Defendant

versus

Nuran Bibi and others.....Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mahomedan law—Deed of Compromise—Construction—Estate limited to take effect in favour of a person after another's death.

It is not consistent with Mahomedan law to limit an estate to take effect after the determination, on the death of the owner, of a prior estate by way of what is known to English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate

The parties to a *solanamah*, or compromise, were, on the one side, the widow of a Mahomedan, she being in possession of villages in Oudh, which had belonged to him, and of which the summary settlement of 1858 had been made with her, and, on the other side, two brothers alleged to be his sons. By the compromise, which was made in the course of proceedings at regular settlement, it was agreed that the widow should, during her lifetime, continue to hold possession, and remain proprietor, without power of alienation, and that after her death the two sons should possess each one-half of the property.

Held, that on the true construction of the compromise, the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her lifetime.

APPEAL from a decree (24th August 1882) of the Judicial Commissioner of Oudh, reversing a decree (30th June 1881) of the District Judge of Rae Bareilly.

The decree of the District Judge, Sayyid Mahmud, dismissed this suit which was to obtain possession of a share (8 annas 7 pies) in talukas Aidari, in the Rae Bareilly district, and Lewari, partly in that district and partly in that of Partabgarh, formerly belonging to Mouazzam Khan, who died on the 22nd of January 1850, leaving a widow named Gauhar Bibi, and also Abdus Subhan and Abdul Rahman, who claimed to be his legitimate sons. With Gauhar Bibi, who was in possession at the annexation of Oudh (13th February 1856), the summary settlement was made, and after the general confiscation (15th March 1858) [598] followed by the restoration, and the summary settlement of that year, the settlement of the villages was again made with her. She continued in possession till her death on the 18th October 1875.

In the course of proceedings at the regular settlement, litigation took place between the alleged sons on the one side, and Gauhar Bibi on the other, resulting in a compromise contained in petitions filed on the 28th of April 1866 in the Court of Pandit Madho Pershad, Extra Assistant Commissioner of Settlement in the Sultanpur district. This gave rise to the main question on this appeal which turned on its construction.

Abdus Subhan died in 1868, and Abdul Rahman in 1874. Gauhar Bibi, before her death, made a gift, dated 30th April 1874, of the talukas to the

daughter of Abdul Rahman, named Muradi Bibi, who remained in possession till her death in January 1881, her husband Abdul Wahid Khan, the present appellant, becoming her representative.

Nuran Bibi, the principal plaintiff in the suit, claimed as the sister of Abdus Subhan, and half-sister of Abdul Rahman, alleging that these brothers were among the heirs of Mouazzam, having been in possession down to 1262 F., or 1854 A.D., the *kabuliat* having been made out in their names, and that afterwards, in 1263 F., "as a step suggested by the exigencies of the times, the *kabuliat* for the estate was executed in the name of Gauhar Bibi." The plaint also alleged that by the compromise of 28th April 1868, the brothers' rights, each to one-half of the estate of Mouazzam Khan, had been admitted, and that it had been agreed that Gauhar Bibi should retain possession during her lifetime, without power of alienation, and that after her death the sons should share the estate equally. The cause of action had arisen on the death of Gauhar Bibi, the termination of the *kabza harati*, or life possession, the interests of the two brothers having passed on their deaths to Nuran Bibi. The defence, among other defences, besides disputing the legitimacy of Nuran Bibi, was that the compromise of 1866 created only rights contingent upon the brothers surviving Gauhar Bibi, whereas they had died before her, so that no estate had passed to Nuran Bibi.

[599] Two issues to the following effect, besides others on other points, were fixed in the Court of First Instance, viz., "what rights, if any, did the brothers possess in the estate, was their interest vested or contingent; and did the fact of their dying in the lifetime of Gauhar Bibi divest their heirs of all right to inherit?" Also, "was the deed of 30th April 1874 executed by Gauhar Bibi in favour of Muradi Bibi valid?"

For the purposes of this report, the position of the co-plaintiffs and the co-defendants, as well as the previous litigation, sufficiently appear in their Lordships' judgment.

The District Judge was of opinion that, this being a suit relating to succession, it must be decided according to the rules of the Mahomedan law, as required by s. 3 of the Oudh Laws Act XVIII of 1876, also that the parties being Sunnis, the law of the Hanifesa School was applicable. He translated in his judgment the petitions, dated 28th April 1866, which set forth the terms of the compromise. Abdus Subhan's was as follows, as translated in the judgment:—

"I, executant, put it down in writing that my mother, the defendant, may remain during her lifetime, as hitherto, proprietor and possessor of the said taluka, and may manage the *ilaka* through *karindas* (agents). But without necessity with the especial view of destroying my rights she may not alienate any property, and after her death I, executant, and my elder brother Abdul Rahman, may become possessors and appropriators of the *ilaka*, situate in the districts of Sultanpur and Partabgarh. And during the life of the defendant I shall not disobey her in any way."

And Gauhar Bibi's as follows:—

"I, executant, with a view of foresight, have settled in this manner that during my lifetime, I myself continue possessor and proprietress as hitherto, and manage the said taluka through *karindas* (agents); and without necessity, with a special view of destroying the rights of these two young men, I may not alienate any property of the *ilaka* situate in the districts of Sultanpur and Partabgarh. After my death the two young men, Abdul Rahman Khan and Abdus Subhan Khan, are both heirs [600] and owners of the whole *ilaka*; they may both become in half-shares possessors and appropriators."

Upon these, the District Judge decided that Gauhar Bibi's rights were not so far qualified as to divest her of the proprietorship, and that any interest given to Abdus Subhan and Abdul Rahman must be regarded as contingent upon the event of their surviving Gauhar Bibi; and that, under the Mahomedan law, the expectant right of an heir-apparent was not regarded as a vested interest, and could not pass to a third party, so long as it had not actually come into operation by the death of the existing owner.

This principle of Mahomedan law was uniform in its application to matters of succession, whether in virtue of bequest, or inheritance, or family arrangement. His finding, then, was that both Abdul Rahman and Abdus Subhan, having died in the lifetime of Gauhar Bibi, they never acquired any vested rights in the estate, such as, under the Mahomedan law, could form the subject of inheritance. He added his opinion that the deed of gift, executed by Gauhar Bibi on 30th April 1874, was valid, having been followed by actual possession.

On appeal, the Judicial Commissioner reversed this decree, giving his reasons as follows:—

"It appears to me that the effect of the compromise was to give Gauhar Bibi a life-interest in the estate. The District Judge has held that under the Mahomedan law the expectant right of an heir-apparent cannot pass by succession, but this is the case to a limited extent only. A son's son, for instance, cannot succeed if there are sons alive, but if there are no sons alive, the son's son does succeed, and the expectant right of the son has passed to the grand-son. On the death of Abdul Rahman and Abdus Subhan their heirs took their place, and had a right to the property on Gauhar Bibi's death. I cannot agree with the District Judge that, on the death of Abdul Rahman and Abdus Subhan, the family arrangement lapsed, and Gauhar Bibi became sole owner."

Mr. J. T. Woodroffe and Mr H Cowell, for the Appellant, contended that the judgment of the District Judge was correct, and that the suit should be dismissed. The Judicial Commissioner had erred in holding that the compromise of 1866 had cut [601] down Gauhar Bibi's rights in the talukas to a life-estate. The settlement of 1858 having been made with Gauhar Bibi (all previous titles to the talukas having been swept away by the effect of the confiscation of Oudh lands in that year), from Gauhar Bibi, descent would have had to be traced, if this had been a question of proving title by descent. This was material, although the main point for consideration was what construction was to be put on the *solenamah* of 1866, for it must be construed with reference to the position of the parties, as well as with regard to Mahomedan law. Under the compromise, Abdus Subhan and Abdul Rahman took no transferable interest, unless and until they should survive Gauhar Bibi. But they had died before Gauhar Bibi's interest in the talukas came to an end, and had never received any immediate, or present, estate—that alone being the kind of estate that could pass by inheritance to any sharer claiming through them. It followed that Nuran Bibi took no share through the brothers. The Mahomedan law disallowed the creation of transferable estates dependent as to their coming into operation upon events uncertain as to the time of their happening. Any uncertainty attending the transfer of property, as to the time when possession should be taken, was contrary to the spirit of the Mahomedan law. Reference was made to *Hedaya* (Hamilton), Vol. III, book 26, (of Sulh, or Composition), chap. 1, *Macnaghten's Principles of Mahomedan Law*, p. 124, also *Precedents*, p. 21; *Hedaya* (Hamilton), Vol. II, book 16 (of Sale), chap. 15; *Baillie's Digest of Mahomedan Law*; *Hanifesa Code, Law of Sale*, chap. 1; *Jeswunt Singjee Ubby Singjee v. Jet Singjee Ubby Singjee* (3 Moo. I. A. 245); *Banee Khujooroonissa v. Mussamut Roushun Jehan* (L. R., 3 I A. 291), *Nawab Mulka Jahan Sahiba v. Deputy Commissioner of Lucknow* (L. R.,

6 I. A., 63). Also in regard to the question of the sons' position in the family to *Khajah Hidayatoolah v. Rai Jan Khanum* (3 Moo. I. A. 295).

Mr. T. H. Cowie, Q. C., and Mr. C. W. Arathoon, for the Respondent, argued that the true effect of the compromise was to admit, on the part of Gauhar Bibi, the existence of an estate in Abdul Rahman and Abdus Subhan, they conceding to her the right of [602] possession during her life. The widow stipulating that she should remain in possession for life, admitted the right of the brothers to inherit as co-sharers in the paternal inheritance; and unless that right could not pass to their heir, or representative, Nuran Bibi's title was made out. It was, however, a right sufficiently definite to pass by inheritance. Moreover, as to the argument that Gauhar Bibi was entitled to the talukas, as the settlement had been made with her, the rights of a talukdar were not vested in her, and she did not come within the provisions of the Oudh Estates Act I of 1869, afterwards enacted. The settlement only indicated her undisputed right to possession. The result of the compromise of 1866 was that she, being left in possession, agreed to be content with it for her life, recognizing the sons' right to succeed after her death by a title which they had never abandoned.

Mr. J. T. Woodroffe, in reply, argued that the sons' rights being, as they were stated to be by the compromise, the admission in favour of the widow must be construed with reference to the antecedent rights which she possessed. Gauhar Bibi, by the effect of the settlement made with her of these few villages (probably too few to rank as the taluka of a talukdar), was in the position of, a talukdar without a *sanad*; and although she was not a talukdar within the meaning of Act I of 1869 (the Oudh Estates Act, 1869, s. 3), still she came within the scope of the letter dated 10th October 1859, in the schedule to that Act. In the settlement proceedings of 1858 the Government restored the lands of Oudh, the amnestied owners and claimants coming in upon their old titles.

Reference was made to *Prince Mirza Jehan Kudr Bahadur v. Nawab Afsur Bahu Begum* (L. R. 6 I. A., 76), and also to *Zohoorodeen Sirdar v. Baharoolah Sircar* [W. R. (for 1864), p. 185], the latter case showing that, according to Mahomedan law, a gift was held invalid where the donor was to remain in possession during his lifetime.

Their Lordships' Judgment on a subsequent day (March 4th) was delivered by

[603] Sir R. Couch.—The main question in this appeal arises upon the construction of an instrument of compromise, dated the 28th of April 1866, consisting of two parts, one part being executed by one, and the other by the other of the parties to the compromise. It was made in a suit instituted in the Court of the Extra Assistant Commissioner, Settlement Department, in the district of Sultanpur. In order to construe it, it is necessary to see what was the position of the parties when it was made. Between 1821 and 1825 one Mouazzam Khan acquired the *ilaka* Aidari, consisting of seven villages, now in the Rae Bareilly, but formerly in the Sultanpur district, and about the year 1849 he purchased, in the name of his sons, Abdul Rahman and Abdus Subhan, the *ilaka* Lewana, consisting of eleven villages, in the district of Parbhargarh. Mouazzam Khan died on the 22nd of January 1850, leaving three widows, Gauhar Bibi, Mussamat Chameli, and Mussamat Bakhtawar, and two sons, Abdul Rahman, the son of Chameli, and Abdus Subhan, the son of Bakhtawar. It was admitted that Gauhar Bibi was his lawfully married wife, but it was contended, on behalf of the appellant, that Chameli and Bakhtawar were never married to him, and that their sons were therefore illegitimate.

Mussamat Bakhtawar had also a daughter, Mussamat Nuran, the respondent, who it was contended was not Mouazzam's daughter, having been born only three months after her mother first entered his harem. In 1855 or 1856, before the annexation of Oudh, a settlement of the whole estate was made with Gauhar Bibi, and a *kabuliat* executed in her name, and from that time until her death she remained in possession of it. In April 1858, shortly after Lord Canning's Proclamation on the 15th of March 1858, by which all the estates in Oudh were confiscated to the Government, a summary settlement of the estate was made with her. No *sanad* was granted to her, and her name is not entered in the list of persons who were to be considered talukdars within the meaning of Act I of 1869 (the Oudh Estates Act). On the 31st of January 1866, Abdus Subhan brought a suit in the Court of the Extra Assistant Commissioner, Settlement Department, against Gauhar Bibi, to recover one-half of the village of Sarai Mahesa, one of the villages in [604] Aidari. In the plaint the tenure is described as talukdar without a *sanad*, and Gauhar Bibi is named as talukdar. The ground of the claim is stated to be that Mouazzam Khan, during his lifetime, caused the *kabuliat* of the village in suit, together with the entire taluka, to be executed in the name of the plaintiff and Abdul Rahman, so that in virtue thereof they continued in possession during their father's lifetime, and after their father's death they held continuous possession till 1263 F. In the middle of 1263 F., when British rule was established, the entire taluka was settled with strangers for non-payment of the arrears of Government revenues; after 1266 F. (1859), on the re-occupation of the province, the settlement of the entire taluka was made with the defendant in the absence of the plaintiff.

The plaintiff did not rely upon any title in the sons as heirs of their father. He relied upon the *kabuliat*, and the possession under it, as evidence that their father in his lifetime made them real owners of the estate, and that they were not *furzidars*. He would have had to prove this, there being, according to the law in India, no presumption in their favour from the fact of their being sons of Mouazzam. It does not appear in the record of the present suit what defence was made by Gauhar Bibi. Possibly no formal defence was made before the compromise was come to. Her case would be that in 1855 or 1856 a settlement of the estate was made with her and a *kabuliat* executed in her name, and she had ever since been in possession of it, and, further, that in April 1858, after the confiscation, the Government had made a summary settlement with her. The compromise was made by two petitions to the Settlement Court, one by Abdus Subhan, and the other by Gauhar Bibi. The former is in these words.—

“Whereas the petitioner has instituted a suit in the Settlement Court against his mother, Mussamat Gauhar Bibi, for proprietary right in half of taluka Sarai Mahesa, in pergunnah Rokha, in the Sultanpur district. Now, an amicable settlement having been made between the petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court; therefore I, the declarant (*man mukr*) commit to writing that (my) mother, defendant, shall during her lifetime continue as heretofore (*ba dastur*) to hold possession, of, and be mistress of, the taluqa, and manage the estate [605] through agents, but she shall not, without any special emergency, alienate any property so as to deprive me of my right, and that after her death I, the declarant, (*man mukr*) and my step-brother, Abdul Rahman, shall possess and enjoy each one-half of the entire *alaka*, situate in the districts of Sultanpur and Partabgarh, and that so long as the defendant may be living I shall obey her.”

The petition of Gauhar Bibi is similar to this, with the addition, after the names of Abdul Rahman and Abdus Subhan, of the words, “shall become successors to, and proprietors of, the said *alaka*.” Thereupon the Court, on the 28th April, made an order dismissing the suit.

Abdus Subhan died on the 25th of February 1868, and Abdul Rahman on the 10th of March 1874, leaving a daughter, Muradi Bibi. On the 30th of April 1874, Gauhar Bibi executed a deed of gift in favour of Muradi Bibi, and on the 18th of October 1875 Gauhar Bibi died, leaving Muradi in possession of the entire estate. There had been some litigation between Mustafa Khan, the nephew of Mouazzam, and Gauhar Bibi, but it is not necessary to notice those suits, nor a suit brought by him against Muradi Bibi after Gauhar Bibi's death.

The suit, which is the subject of this appeal, was brought on the 1st of November 1880, by Mussamat Nuran Bibi, Sardar Prem Singh, and Mahomed Taha Khan, the latter two being said to be purchasers from Nuran Bibi of a share of the estate, against Abdul Wahid Khan, the husband of Muradi Bibi, Mussamat Shaluka, one of the two widows of Abdul Rahman, and other defendants who were mortgagees of the estate. The claim was to recover possession of 8 annas 7 pie share of the estate by virtue of inheritance from Abdul Rahman and Abdus Subhan, and the ground of it is stated to be that, by virtue of the transfer of the property effected by Mouazzam Khan in his lifetime, by causing a *kabuliat* to be executed, both the sons remained in proprietary possession of the estate down to 1262 F., and that under the deed of compromise, Abdus Subhan's right to one-half of the estate and Abdul Rahman's to the other half having been admitted, it was settled that Gauhar Bibi should retain possession of the estate during her lifetime, without power of alienation, and that after her death both the sons would take the estate half and half. The respondents, in the reasons in their [606] case in this appeal, put the same construction upon the compromise, and in the argument their counsel contended that it was a recognition of right of inheritance in respect of what would have been the sons' rights, supposing they had succeeded in the suit.

Their Lordships are of opinion that the compromise cannot be construed as admitting the right which was claimed by either of the parties. In Abdus Subhan's petition it is stated that Gauhar Bibi sued for proprietary right, and if she is to be considered as admitting the proprietary right which the sons sued for, they must be equally considered as admitting her proprietary right. These rights are inconsistent, and, as both could not have been admitted by the compromise, neither can be considered as having been. Further, Gauhar Bibi is not merely to have possession of the estate during her life; she is to be mistress (or, as the District Judge has translated the petition, proprietor) of the taluka. During her life, the whole interest in the estate is to be in her. Then comes the question. What is the interest which is given by the compromise to the sons? To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs, and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomedan law. The suit was tried in the first instance by the District Judge of Rae Bareilly, a Mahomedan, who held that the interest, if any, created by the compromise, must be regarded as future, and contingent upon the event of Abdul Rahman and Abdus Subhan surviving Gauhar Bibi. After giving his translations of the petitions, which substantially agree with those which have been quoted from the record, he says:—

“ From these words in the application it is clear, to my mind, that the parties to the compromise intended that Gauhar Bibi should continue to be the proprietress and possessor of the estate as before, and without any limitations or restrictions which would divest her of ownership during her lifetime. The words *ba dastur malik wa kabz*, which occur in both applications, leave no doubt upon this point.”

Further on, he says,—

“But it is clear to me that her (Gauhar Bibi) proprietary rights were not qualified in any such manner as to divest her, wholly or partially, of the [607] incidents of ownership. The arrangement contained in the compromise would be called by the Mahomedan lawyers ‘a tauris,’ or ‘making some stranger an heir,’ and cannot be regarded as creating a present or vested interest. The words of the compromise do not bear any such construction, as the plaintiffs seek to put on them, and if they do create any interest, such interest must be regarded as future, and contingent upon the event of Abdul Rahman and Abdus Subhan surviving Gauhar Bibi. Under the Mahomedan law, a mere possibility, such as the expectant right of an heir-apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest, or transfer so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan law is uniform in its application to matters of bequest, inheritance, or otherwise.”

There was an appeal from this decision to the Judicial Commissioner, who reversed it, holding that on the death of Gauhar Bibi the estate became the property of the heirs of Abdul Rahman and Abdus Subhan, that Gauhar Bibi had not the absolute right to alienate the estate, and that her gift to Muradi Bibi was invalid. He said it appeared to him that the effect of the compromise was to give Gauhar Bibi a life interest in the estate, and, on the death of Abdul Rahman and Abdus Subhan, their heirs took their place and had a right to their property on Gauhar Bibi's death. He seems to have thought that this was in accordance with the Mahomedan law, but it is not clear that he did so.

Their Lordships do not take this view of the compromise. In *Mussamut Humeeda v. Mussamut Budhun* (17 W R., 525), in which judgment was given by this Committee on the 26th March 1872, the High Court of Calcutta had held that, by an arrangement between the plaintiff, a Mahomedan widow, and her son, an estate was vested in the plaintiff for life, and, after her death, was to devolve on her son, by way of remainder, but their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. They thought that expressions from which it might be inferred that the plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that [608] the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan, which passed to their heirs on their death in the life-time of Gauhar Bibi.

It is unnecessary to consider the other questions raised in this appeal, and their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and to order the appeal to him to be dismissed with costs. And the respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant : Messrs. *Barrow and Rogers.* •

Solicitor for the Respondents. Mr. *T. L. Wilson.* •

NOTES.

[MAHOMEDAN LAW—ESTATES IN REMAINDER— •

In *Akbar Ali v. Abdool Ali* (1907) 9 Bom. L R., 295 (see also 32 Bom., 172 on appeal therefrom), RUSSELL, J., noticing the conflict between this case and 17 I. A., 201 and ascertaining from the records further facts as regards the latter, stated, at p. 302, “I am of

opinion that the first line of the headnote in 11 Cal., 597 is stated too broadly. In my opinion, it should be stated that Mahomedan law does not recognise vested estates in remainder with all their consequences."

Life interests can be created under the Shiah law, and the contingent remainder limited thereupon can be alienated and can be attached and sold in execution.—(1907) 32 Bom., 172; 9 Bom. L. R., 1152 on appeal from 9 Bom. L. R., 295. Such interest is heritable :—*ibid.*; *contra*, (1906) 28 All. 633; (1906) A. W. N., 146. 3 A. L. J., 367; These rules do not apply to Hindus, (1908) 30 All., 406; (1908) A. W. N., 165. 5 A. L. J., 423.

This case was explained in (1907) 32 Bom., 172 as having determined the rights under a particular deed, and as having neither affirmed nor disaffirmed the invalidity of estates in remainder under the Mahomedan law; on the authority of 17 I. A., 201 it was there stated that such estates can be created.

The chance of succession of a Mahomedan heir is not transferable, 12 I. A., 91 at 101; 11 Cal., 597; nor is it releasable :—(1907) 9 C. L. J., 50, (1906) 31 Bom., 165. 8 Bom., L. R., 781; (1905) 30 Bom., 804. 7 Bom., L. R., 742; (1889) 11 All., 456 (expectant heir cannot sue to set aside deed); *Wilson's Anglo-Mahomedan Law*, III Edn., (1908) 254.]

[11 Cal. 608]

APPELLATE CIVIL.

The 8th April, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Noor Ali Mian Khondkar.....Defendant

versus

Ashanullah.....Plaintiff.

Notice, Substituted service of—Beng. Act VIII of 1869, s. 14—Regulation V of 1812, s. 10—Evidence of substituted service, Nature of—Burden of proof.

Proof of the validity of substituted service required by s. 10, Regulation V of 1812, is stricter than that necessary under the terms of s. 14 of Bengal Act VIII of 1869.

Ram Chunder Dutt v. Jogesh Chunder Dutt (19 W. R., 358, 12 B. L. R., 229), distinguished.

Where the only evidence in support of substituted service was the statement of the serving peon that he had searched for the tenant and could not find him, *held*, that such evidence was sufficient, under the terms of s. 14 of the Rent Act, to throw the onus upon the defendant to show by cross-examination or otherwise that the search was not properly made.

[609] THIS was a suit for enhancement of rent. On the part of the defendant, it was urged, among other things, (i) that the service of notice was not good in law; (ii) that the land in question was held under a *pottah* of the 21st Assin 1176 B. S. or more than a century old; (iii) that a uniform rent had been paid for at least a period of twenty years, giving rise to the presumption laid down by s. 4 of Bengal Act VIII of 1869.

*Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice FIELD, one of the Judges of this Court, dated the 20th of June 1884, in appeal from Appellate Decree No. 782 of 1883, against the decree of Baboo Rajendra Coomar Bose, Additional Sub-Judge of Mymensing, dated the 16th of January 1883, reversing the decree of Baboo Khetter Pershad Mukherji, First Munsif of Attiah, dated the 19th of March 1882.

The Munsiff found that the *pottah* was forged, that there was no reliable evidence to create a presumption under s. 4, that there was nothing wrong with the service of notice, it having been affixed at the usual place of residence after due search.

On appeal, the Subordinate Judge held, on the authority of *Ram Chunder Dutt v. Jogesh Chunder Dutt* (19 W. R., 353; 12 B. L. R., 229), that in order to render valid a substituted service it was incumbent on the plaintiff, under the provisions of s. 14 of the Rent Act, to show, not merely that a search had been made, but also the nature of the search, and that the defendant had actually kept himself out of the way when the notice was affixed to his house. The Subordinate Judge further relied on *Bissonath Sircar v. Tara Prosonno Mozoomdar* (22 W. R., 482); *Buroda Kant Roy v. Raj Churn Burnoshil* (24 W. R. 381); and *Rama Rai v. Sridhur Pershad Narain Sahai* (4 C. L. R., 397), and set aside the Munsiff's decree.

On appeal by the plaintiff to the High Court, the value of the suit being under Rs. 50, the case came up before a single Judge, Mr. Justice FIELD, who was of opinion that the case of *Rām Chunder Dutt v. Jogesh Chunder Dutt* did not apply to the present case, and proceeded to observe: "The law applicable to the service of notice in the present case is to be found in s. 14 of Bengal Act VIII of 1869 and is as follows: 'Such notice * * * shall, if practicable, be served personally upon the under-tenant or ryot. If for any reason the notice cannot be served personally upon the under-tenant or ryot, it shall be affixed at the usual place of residence.' Now, the words for any reason can scarcely, I think, be limited to mean when the person to be served is keeping out of the way, because there may be other reasons [610] besides this, which may render the service of the notice impracticable. I think, therefore, that the decision, or rather the observation in the decision of their Lordships in the Privy Council, do not conclude the matter before me in the present case. I have already said that I do not consider the Subordinate Judge was justified in assuming that the peon had failed to make the necessary inquiries, there being no evidence that he had not made these inquiries, and no question being put either to the peon or to the man who went with him to point out the person to be served, to bring these matters out in cross-examination. Both the witnesses declare that there was a search. What the nature of the search was we do not know. A proper cross-examination would have elicited the facts."

He, therefore, set aside the judgment of the lower Appellate Court on this point, and both the Courts below being agreed on the merits of the case, decreed the plaintiff's claim.

The defendant appealed under s. 15 of the Letters Patent; it was mainly contended on his behalf that there was no *bond fide* attempt made to effect personal service of the notice, and it was for the plaintiffs to prove why personal service was impracticable, and in support of this contention the following cases were cited:—

Ram Chunder Dutt v. Jogesh Chunder Dutt (19 W. R., 353; 12 B. L. R. 229); *Bissonath Sircar v. Tara Prosonno Mozoomdar* (22 W. R. 482); *Buroda Kant Roy v. Raj Churn Burnoshil* (24 W. R., 381); *Rama Rai v. Sridhur Pershad, Narain Sahai* (4 C. L. R., 397).

Baboo Hari Mohn Chackrabatti for the Appellant:

Baboo Rashbehari Ghose and Baboo Basant Coomar Bose for the Respondent.

The Judgment of the Court (GARTH, C.J., and MITTER, J.) was delivered by

Garth, C.J.—In this case I entirely agree with the learned pleader, who has argued the case for the appellant, that if the question before us had been merely one of fact this Court would not have been justified in interfering with the finding of the [611] lower Court. We have always in this Bench adhered most strictly to that rule. Unless we could see that the lower Court had either committed some error of law, or had been under some misapprehension of law, we have always refused to interfere.

But it seems to me that, in this case, the judgment of the Subordinate Judge has proceeded upon a misapprehension of the law.

The question was, as to whether the notice of enhancement was properly served under s. 14 of the Rent Law (Bengal Act VIII of 1869); and it seems that two witnesses were called to prove the proper service. One was the peon who was employed to serve it, and the other was the person who had to identify the defendant and the house in which he lived.

The first of these witnesses stated in evidence that *after search* he was unable to find the defendant; and, therefore, he effected the service by posting up the notice on his house. This witness, it appears, was not cross-examined as to this fact; his evidence was supported by the other witness whom I have mentioned; and when the defendant himself was called, he does not say that he was at home when the service was effected, nor, in fact, does he profess to know where he was at that time. This is not a case, therefore, where the defendant has tried to prove that the service was irregular, and the only objection taken to the evidence was, that the peon did not sufficiently explain the nature of the search which he made to find the defendant. If there had been any real reason for supposing that the search was not properly made, and that no sufficient pains were taken to discover the defendant, and serve him personally, that ought surely to have been made the subject of cross-examination.

The Munsiff found upon this evidence that the service was sufficient; but the view of the Subordinate Judge was this. In the first place he seems to have thought that it was necessary, in cases of this kind, that the witness who came to prove the notice should not only show that he had made search for the defendant, and could not find him, but that he should also go on to explain the various means, which he had taken to find him.

In this, he would seem to have dealt with the proof more [612] strictly than the law requires; but if that had been the sole ground upon which he based his finding, I should have doubted whether we ought to interfere: but what he afterwards goes on to say serves to satisfy us that the Subordinate Judge was under a misapprehension of the true meaning of s. 14 of the Rent Law, under which the service of the notice was made, and that his decision was more or less based upon that misapprehension.

He has referred, in support of his view, to the judgment of the Privy Council in a case of *Ram Chunder Dutt v. Jogesh Chunder Dutt* (19 W. R., 353; 12 B. L. R. 229).

In that case the suit was brought to enhance the rent of a tenant; and one defence to the suit was that no notice of enhancement had been served. The case was appealed to the Privy Council, and was decided in the defendant's favour upon other grounds. But at the close of their judgment these words occur:—

“Their Lordships desire to say that they have great doubt whether the evidence sufficiently shows that the notice to enhance was properly served. If it had been necessary to determine that point, the evidence must

have been necessarily looked at to see if any presumption could have been raised that Ram Charan Dutta was keeping out of the way at the time when it was attached to the door. Their Lordships are of opinion that in case of substituted service, that is, service substituted for the personal service which the statute requires, wherever it is prescribed, the Courts should take care to be satisfied that the condition on which alone substituted service is good, exists, namely, that the person who ought to be served is keeping out of the way."

It does not appear from this report in the Weekly Reporter, to what provision, as regards the service of notice, their Lordships were alluding, but from the report of the same case, in 12 B. L. R., 229, it appears that the enactment to which they referred was Regulation V of 1812, s. 10. From that report it appears that Mr. Leith, the counsel for the plaintiff, relied upon that enactment only.

[613] Section 9 of the Regulation provides that no cultivator or tenant of land shall be liable to pay enhanced rent, unless under some written engagement with his landlord, *or unless a formal written notice has been served upon him to pay enhanced rent*; and then s. 10 provides that until such notification has been duly served, no greater rent shall be exigible by process of distress, nor recoverable by suit in Court, than the cultivator or tenant was bound to pay under his previous engagement, and then it goes on to say as regards the service of the notice that—

"In all practicable cases the required notification shall be served personally on the tenant, *but if he shall abscond, or conceal himself, so that it cannot be served personally upon him*, it shall be affixed at his usual place of residence."

It is evidently to that enactment that their Lordships refer, when they say, in their judgment, that it must be shown *that the tenant is keeping out of the way to avoid service*.

Now it is important to note that the language of this condition is very different from that of s. 14 of the Rent Law. That section enacts that "such notices (that is to say, notices to enhance) shall be served by order of the Collector, in whose jurisdiction the lands are situated, upon the application of the person to whom the rent is payable, and shall, if practicable, be served personally upon the under-tenant or ryot; *and if for any reason the notice cannot be served personally upon the under-tenant or ryot*, it shall be affixed at his usual place of residence."

Under s. 10 of the Regulation of 1812 the substituted service can only be resorted to "*when the tenant absconds or conceals himself, etc.*," whereas under s. 14 of the Rent Law, the substituted service may be made, "*if for any reason the notice cannot be served personally*."

And there is doubtless good reason for this difference in the two enactments. Under the Regulation of 1812 the mere service of the notice to pay enhanced rent of itself rendered the tenant liable to pay the enhanced rent mentioned in the notice, whereas, practically speaking, the notice given under s. 14 of the Rent Law only enables the landlord to bring a suit against the tenant to establish his right to the enhanced rent, and in that [614] suit the question whether any and what enhancement ought to be allowed is duly considered and tried.

In the first case, therefore, there is every reason why personal service should be a condition precedent to the enhancement, and should not be dispensed with, *except in the case of the tenant absconding, or concealing himself*, or, in the words of the Privy Council, *keeping out of the way to avoid service*, whereas in the last case, where the notice is merely a preliminary step to

bringing a suit, it was probably thought reasonable that personal service of it should be unnecessary, if, *for any reason*, the tenant could not be personally served.

Whether this was the view of the Legislature or not, it is certain that the language of the two enactments is very different; and it is obvious that the lower Appellate Court has made a mistake in applying to this case, where the question arose under s. 14 of the Rent law, the more stringent rule which was laid down by Regulation V of 1812.

The mistake, however, was one for which the Subordinate Judge might well be excused, for in the report of the Privy Council case in the Weekly Reporter, it does not appear to what enactment their Lordships were referring, and we find, moreover, that in more than one instance in the High Court this decision of the Privy Council seems to have been misinterpreted in the same way.

In the present case it appears to us that the fact of the tenant not being found, although search was made for him, was a sufficient reason *prima facie* for affixing the notice at his place of residence. The witnesses were not cross-examined as to the sufficiency of the search, and the defendant, though called as a witness, does not pretend to say that he was at home at the time, or that notice might have been served upon him personally.

It is probable that but for the misapprehension of the law, into which the Subordinate Judge has fallen, he would have agreed with the Munsiff as to the sufficiency of the notice; but, speaking for myself, the only doubt I have had is, whether the learned Judge who decided this case ought not to have remanded it to the Court below, pointing out to the Subordinate Judge the mistake which he had made, and directing that the case should be re-tried.

[615] But my learned brother thinks—and I am disposed to agree with him—that this course would be almost superfluous; because, if we were to send the case back to the Subordinate Judge, with the observations which we have already made, we cannot doubt but that he will find the notice to have been sufficient.

We think, therefore, that the learned Judge was right in the view which he took, and that this appeal should be dismissed with costs.

Appeal dismissed.

NOTES.

["Their Lordships' observation (in 12 B. L. R., 229) was, however, made with reference to the wording of Bengal Regulation V of 1812, which did not contain any words corresponding to 'for any other reason, the summons cannot be served.' Under the C.P.C. (1882, 1908) the substituted service will be valid if any other reason is proved, 11 Cal., 608; but it will be necessary for its validity that there is *some* reason for the impracticability of the service"—*Hukm Chand* on Civil Procedure (1900), Vol. I, p. 689.]

[41 Cal. 615]

APPELLATE CIVIL.

The 13th May, 1885.

PRESENT.

MR. JUSTICE FIELD AND MR. JUSTICE GRANT.

Kali Chandra Singh and another.....Plaintiffs

versus

Rajkishore Bhuddro.....One of the defendants.

Co-sharers in an undivided estate—Suit for enhancement of a proportionate share of the rent by one co-sharer— Collection of rents separately.

A, an eight-anna sharer in an undivided estate, who collected his portion of the rent separately, brought a suit upon notice issued by himself against a tenant, in which he made the other co-sharers parties (defendants) to recover arrears of rent at an enhanced rate in proportion to his share.

Held, that such a suit was not maintainable, unless it could be shown that the co-sharers had refused to join as plaintiffs

Bidhu Bhusun Basu v. Kamaraddi Mundul (I. L. R., 9 Cal., 864), distinguished.

THE plaintiffs, who were the owners of an eight-anna share of an undivided estate, brought this suit for enhancement of rent, in proportion to their share. The other co-sharers were made parties (defendants) in the suit. It was not disputed that the rents in the plaintiffs' share were paid separately, but the contention was that the suit could not be maintained at the instance of the plaintiffs alone who were owners of a fractional share of the estate in which the holding was situate. The Munsiff held that *Gopal v. Macnaghten* (I. L. R., 7 Cal., 751) did not apply, and relying on the [616] authorities of *Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96), and *Kasheekishore Roy Chowdhry v. Alip Mundul* (I. L. R., 6 Cal., 149), dismissed the suit. The lower Appellate Court was of opinion that the question raised in the case was not decided in *Chuni Singh v. Hera Mahto* (I. L. R., 7 Cal., 633), and following, in addition to the authorities cited by the Court of First Instance, *Bharrut Chunder Roy v. Kally Das Dey* (I. L. R., 5 Cal., 574), and *Balaji Barkaji Pinge v. Gopal Bin Raghu Kuli* (I. L. R., 3 Bom., 23), upheld the decision of the Munsiff.

On appeal to the High Court, the plaintiffs' pleader, in support of his contention, referred to *Chuni Singh v. Hera Mahto* (I. L. R., 7 Cal., 633), and *Bidhu Bhusun Basu v. Kamaraddi Mundul* (I. L. R., 9 Cal., 864).

Baboo Grish Chunder Chowdhari for the Appellants.

Baboo Dwarika Nath Chuckerbutty for the Respondents.

The Judgment of the Court (FIELD and GRANT, JJ.) was delivered by

Field, J.—The question in this case is whether a co-sharer is entitled to maintain a suit for enhancement of his share of the rent, which, according to his allegation, was separately collected by him. We will assume for the purposes of our decision in this case that the share of the rent was, in this

* Appeal from Appellate Decree No. 2748 of 1883, against the decree of Baboo Rajendra Coomar Bose, Additional Subordinate Judge of Mymensingh, dated the 5th of July 1883, affirming the decree of Baboo Anand Nath Mozoomdar, Munsiff of Netrokona, dated the 1st of September 1882.

particular case, separately collected. The Courts below have held that such a suit is not maintainable. It has been pressed upon us by the learned vakil that the decision of the Courts below is wrong upon the authorities. He first pressed upon us the decision of the Full Bench in the case of *Chuni Singh v. Hera Mahto* (I. L. R., 7 Cal., 633). We think that the only observation necessary to make with reference to this case is that the very question we have now to decide was referred to a Full Bench; but was not decided, because, according to the opinion of the majority of the Court, this point did not arise in that case. Then the learned vakil relied upon the case of *Bidhu Bhusun Hasu v. Kamaraddi Mundul* (I. L. R., 9 Cal., 864), but in that case this point was not decided; the point decided was, whether the notice of enhancement was good. "The question we have to [617] decide in second appeal is," said CUNNINGHAM, J., "whether this notice was good. This question has, in our opinion, been decided in the affirmative by the observations of the Chief Justice in the Full Bench case of *Chuni Singh v. Hera Mahto*. We understand the meaning of the Chief Justice to be that a suit by a portion of the co-sharers for rent at an enhanced rate may be brought, provided the other co-sharers are joined in the suit either as plaintiffs or defendants; and that, in such a case, notice may be duly given by that portion of the co-sharers by which the suit is instituted."

On the other hand, there is more than one decision of this Court, in which it has been decided that such a suit cannot be maintained. In the Full Bench decision in the case of *Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96), the learned Chief Justice, after pointing out that a suit by one co-sharer for a *kabuliat* would not lie, proceeded as follows: "The right of one co-sharer to enhance the rent of his share separately must be governed by the same principle as his right to a *kabuliat*."

Then in the case of *Bharrut Chunder Roy v. Kally Das Dey* (I. L. R., 5 Cal., 574), it was held that one co-sharer, even if he made all the other co-sharers parties to the suit, cannot sue for separate rent. I may also refer to the case of *Jogender Chunder Ghose v. Hurrish Chunder Chattopadhyaya* (10 C. L. R., 331) in which, however, the other co-sharers were not made parties. I may observe that a similar view has been taken by the Bombay High Court in the case of *Balaji Barkaji Pinge v. Gopal Bin Raghu Kuli* (I. L. R., 3 Bom., 23).

We, therefore, think that the point in question is concluded by authority, and unless we were prepared to dissent from the decisions of this Court, we would not be justified in referring the question to a Full Bench, as we have been asked to do. Speaking for myself, I am not prepared to dissent from the decisions to which I have referred. It is contended that if all the co-sharers are made parties to the suit, no injustice can be done to any of the parties, and the observations of the Chief Justice in the Full Bench decision in *Chuni Singh v. Hera Mahto* were pressed upon [618] us. It may be observed that, although all the co-sharers have been made parties (defendants) in the present case, there is no allegation that they refused to join as co-plaintiffs. But can full justice be done, even if all the co-sharers are made parties to such a suit, i.e., a suit brought to enhance not the whole rent, but a fractional share of it? The Court could only decide upon a fractional enhancement; the other co-sharers are presumably not interested in that fraction; and so far as regards the other sharers and the shares belonging to them, upon the question of enhancement, the Court could not only not do full justice, but could absolutely do nothing. It would be competent to each of these sharers to bring afterwards against the tenant similar separate suits for the enhancement of

each of these shares of rent. Such a multiplicity of suits would be harassing to the tenant in the highest degree. It has been held that a suit to set aside the sale of a *putni* taluk as regards a share only is not maintainable by a single shareholder; but that the suit must be by all the shareholders to set aside the sale as regards the entire taluk. A similar decision was given when five lessees of a Government estate brought separate suits to set aside the sale of that estate for arrears of Government revenue, and there are in the books numerous other cases to show that a suit of this kind, affecting only a fraction of the interest belonging to a number of persons, cannot be maintained unless two conditions are complied with, namely, first, that all the parties interested are before the Court; and, secondly, that the whole of the subject-matter can be affected by the decree so as to prevent multiplicity of suits.

We are, therefore, of opinion that the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[All co-sharers are necessary parties in a suit for relief by any co-sharer in respect of his own share:—20 Cal., 107; 4 Cal., 96; 5 Cal., 574, 11 Cal., 615; 8 Cal., 353; 17 Cal., 538 (under Bengal Tenancy Act, sec. 188); 15 Cal., 40 (suit in ejectment).]

One cannot be made plaintiff against one's consent, and a co-sharer, being entitled to be plaintiff, cannot be made defendant except on his refusal to be plaintiff.—7 Cal. 242; 7 All., 326; 11 Cal., 618, 14 Mad., 489, 17 Cal., 160; 1 C.W.N., 659; 221.]

[619] APPELLATE CRIMINAL.

The 13th May, 1885.

PRESENT.

MR. JUSTICE MITTER, MR. JUSTICE MACPHERSON AND
MR. JUSTICE PRINSEP.

Matuki Misser.....Appellant

versus

Queen-Empress..... Respondent.*

Causing disappearance of evidence of an offence—Omitting to report a sudden unnatural or suspicious death—Indian Penal Code (Act XLV of 1860),

ss. 176, 201—Criminal Procedure Code (Act X of 1882), s. 45.

Before an accused can be convicted of an offence under s. 201 of the Indian Penal Code, it must be proved that an offence, the evidence of which he is charged with causing to disappear, has actually been committed, and also that the accused knew or had information sufficient to lead him to believe that the offence had been committed.

Empress of India v. Abdul Kadir (1 L. R., 3 All., 279) followed.

Held (per PRINSEP and MACPHERSON, JJ).—It is not necessary in order to support a conviction under s. 176 of the Indian Penal Code against a person falling within the provisions of s. 45 of the Criminal Procedure Code, for not giving information of an occurrence falling under clause (d) of that section, to show that the death actually occurred on his land, when the circumstances disclosed show that a body has been found under circumstances denoting that

* Criminal Appeal No. 277 of 1885, against the conviction and sentence passed by J. W. Badcock, Esq., Sessions Judge of Bhagulpore, dated the 9th of April 1885.

the death was sudden, unnatural, or suspicious, the finding of the body being a fact from which a Court might reasonably infer, in the absence of evidence to the contrary, that the death took place there

Held (per MITTER, J.).—It is necessary to secure a conviction in the latter case to prove that the death took place or occurred in the village or on the land of the accused, and the finding of a body there does not of itself afford that proof.

In this case the appellant and one Bhatu Chowkidar were charged with offences under ss. 176 and 201 of the Indian Penal Code.

The facts were as follows :—

On or about November 16th one Mussamat Bhulkia went into a field belonging to one Ghogan, the nephew of the appellant. On Ghogan finding her there it was alleged by the prosecution that he had slapped her twice, and that she fell down and the next day was found lying dead in a field not far from that in [620] which she was, where she was alleged to have been hit. The prosecution further alleged that the death was caused or accelerated by the slaps, and that the appellant, in order to screen his nephew, induced Sangli, the deceased's son, to burn the corpse, and prevented any report being made. As a matter of fact, the corpse was burnt on the night of the day on which it was found, and no report was made to the Police till the 25th November, when Bhatu gave information to a Sub-Inspector in a neighbouring village. An enquiry then took place, which resulted in Ghogan being put on his trial under s. 304 of the Penal Code and discharged for want of sufficient evidence. Before the Sessions Court, Matuki, the present appellant, took the objection that as Ghogan had been discharged it must be held that no crime had been committed, and that a charge therefore under s. 201 would not lie, and he relied upon the decision in *Empress of India v. Abdul Kadir* (I. L. R., 3 All., 279) as an authority for this proposition, but this objection was overruled by the Court following the case of *The Queen v. Hardut Surma* (8 W. R., Cr., 68).

The nature of the evidence adduced in support of the charges and the finding of the Sessions Judge were as follows :—

Two witnesses, women, deposed to the fact of Ghogan assaulting Bhulkia, and their evidence, which had been held untrustworthy in Ghogan's case, was accepted by the Sessions Judge as reliable. Other witnesses deposed that they heard a rumour to the effect that Ghogan had hit Bhulkia, but two witnesses who helped to burn the corpse stated that they had not heard any such rumour. Bhatu stated to the Police that on the day the body was burnt he heard that Ghogan had hit Bhulkia. The Sessions Judge came to the conclusion that both charges were proved, being of opinion that the appellant had a strong motive for concealing the death and disposing of the body, and that Bhatu would naturally act under his order as he was a Brahmin and an influential man.

He accordingly, agreeing with one of the assessors as to the charge against Bhatu under s. 201, convicted him and sentenced him to six months rigorous imprisonment, and, agreeing with both assessors, has convicted him of the charge under s. 176 and sentenced him to an additional term of one weeks simple imprisonment.

[621] In the case of the appellant both the assessors found him not guilty on both charges, but the Sessions Judge, disagreeing with them, convicted him and passed similar sentences to those passed on Bhatu.

This appeal was, therefore, preferred by Matuki Misser against the conviction and sentence, no one appeared on either side at the hearing.

The Judgments of the High Court (MITTER and MACPHERSON, JJ.), before whom the appeal was heard, were as follows :—

Macpherson, J.—The appellant has been convicted under ss. 201 and 176 of the Penal Code. Under the former section he has been sentenced to six months rigorous imprisonment, and under the latter to simple imprisonment for one week. The conviction under s. 201 cannot, I think, stand in the absence of proof that the offence, the evidence of which he caused to disappear, was committed. The evidence of the two women who deposed to having seen Ghogan Misser give two slaps to the woman Mussamut Bhulkia is, I think, wholly untrustworthy, and there is no other evidence to denote that any offence was committed; nor is there any proof that the appellant had, at the time when the body was disposed of, any knowledge or information which would lead him to believe that the offence of murder or culpable homicide had been committed.

The conviction under s. 176 is, I think, good. Under s. 45 of the Criminal Procedure Code, every occupier of land is bound to communicate forthwith to the nearest magistrate, or to the officer in charge of the nearest police station, any information which he may obtain respecting the occurrence in the village in which he occupies land [for this is the meaning which I put on the word "therein" in clause (d) of that section] of any sudden or unnatural death, or of any death under suspicious circumstances. Section 176 of the Penal Code makes penal any *intentional* omission to furnish such information. It is proved that the dead body of Mussamut Bhulkia was found in the field of the appellant under circumstances alone consistent with the supposition that the death was sudden, unnatural and suspicious, that the appellant knew it was true, [622] and that so far from giving information he directed the chowkidar and relative of the deceased to dispose of it. There can be no question that he had "information" within the meaning of s. 45 and that his omission to communicate it was intentional. But there is no proof that death actually occurred in the village, that is to say, in the field where the body was found. The question then arises, is proof of this fact essential to a conviction? Under the circumstances, I think not. If a person finds on his land the dead body of a fellow-villager under circumstances denoting that the death was sudden, unnatural or suspicious, he is, I conceive, in possession of "some information" respecting the occurrence of a death in his village which he is bound under s. 45 to communicate. The finding of the dead body on his land is a fact from which a Court might reasonably infer, in the absence of any evidence to the contrary, that death took place there. There is no evidence which I can accept in the present case as to the cause of death, but it is beyond question a case of death under suspicious circumstances. The section also provides for a case of sudden death. Assuming that there is proof that a death was sudden and the body is found in the field of A, must the prosecution prove that the deceased did not drop down dead in the adjoining field of B, which is in the next village, and that it was not removed to the field of A after death? Such proof would be impossible in ninety-nine cases out of a hundred.

The words "the occurrence therein" are governed by the general words "any information which he may obtain respecting," and the present case seems to me to come well within the section. I would, therefore, uphold the conviction under s. 176.

Mitter, J.—I entirely agree with my learned brother that the conviction under s. 201 of the Indian Penal Code cannot stand. I concur in the reasons given by him for coming to that conclusion. .

But I regret that I am unable to assent to the proposition that, in order to support the conviction under s. 176 of the Indian Penal Code, the proof of the fact that death actually occurred in the village where the body was found is not essential.

Under clause (d) of s. 45 of the Code of Criminal Procedure, an occupier of land in a village is bound to communicate [623] to the nearest magistrate, etc., the occurrence in it of any sudden or unnatural death or of any death under suspicious circumstances. It seems to me, therefore, essentially necessary for a conviction to prove that the death *took place or occurred* in the village. The finding of the body in the village, standing by itself, does not in my opinion afford this proof. It seems to me that this circumstance alone does not *necessarily* lead to the inference that the death took place in the village. It is equally consistent with the death having taken place in another village and the body having been subsequently removed to the appellant's village.

Then, again, rejecting, as we do, the evidence of the two women who depose to having seen Ghogan Misser give two slaps to the woman Mussamut Bhulkia as wholly untrustworthy, there is no evidence to prove that her death was sudden. If there were any such evidence it might have been open to us to infer that this sudden death took place in or near the fields where the body was found.

I am of opinion, therefore, that there being no proof of the death of Mussamut Bhulkia having taken place in the appellant's village, all the requirements of s. 45 of the Code of Criminal Procedure have not been fulfilled, and consequently the conviction under s. 176 of the Indian Penal Code also should be set aside.

The Judges having disagreed upon the question as to whether the conviction under s. 176 was right or not, the question was referred to Mr. Justice PRINSEP, who delivered the following judgment:—

Prinsep, J.—There is no question that the appellants are persons who fall within the category set forth in s. 45 of the Code of Criminal Procedure, that a body was found on their land showing unmistakable signs of an unnatural death or a death under suspicious circumstances, and that they have neglected to communicate to the nearest magistrate or nearest police station any information regarding the same.

The only question is, whether it has been shown that the death occurred on the lands of the appellants.

The object of the law is clearly that the earliest information should be communicated by those who are in the best position to obtain the same, or who, from their connection with the land, are [624] in some authority, and should accordingly be made responsible for this duty, in order that an inquest may be held. The necessity for enforcing strictly the performance of such a duty is too obvious to call for remark. The law requires that the death should have occurred on the land with which the particular person is connected in the manner set forth. I do not understand this to mean that this should be proved by the direct evidence of eye-witnesses, but there must be something amounting to proof of the fact. Thus, if a man were found with his throat cut in a field, it may fairly be presumed that he died there so as to place an obligation on a person in the position of the appellants to give information of the death. In the words of s. 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. It would be for the appellants

to rebut such a presumption. They have not only failed to do so, but their conduct in having the body hurriedly burnt so as to destroy all trace of the cause of the unnatural or suspicious death would, in some degree, tend to confirm this presumption. It would practically defeat the object of the law, viz., to assist public officers, whose duty it is to trace out the cause of suspicious homicides, if there were such difficulties in the way of fixing responsibility on persons connected with land on which the body of a person, to all appearances murdered, were found—if before such a person were convicted for a neglect to perform the duty prescribed by s. 45 of the Code of Criminal Procedure, it were necessary to prove that the murder took place, or that the murdered person actually drew his last breath, on that land. The finding of the body on that land would, in my opinion, ordinarily raise the presumption that death had taken place on that spot so as to impose an obligation on a person occupying one of the positions in relation to the land, described in s. 45, to communicate information regarding the matter. If he neglected to give this information, and was prosecuted for such misconduct, he should be prepared to justify the omission.

I would therefore not interfere.

Appeal allowed in part

NOTES.

[See (1890) 14 Mad , 400 , *Ratanlal*, 784]

[625] APPELLATE CIVIL *

The 3rd June, 1885.

PRESENT

MR JUSTICE MITTER, AND MR JUSTICE AGNEW

Kali Prasanna Rai and another..... Plaintiffs

versus

Dhananjai Ghose.....Defendant.*

*Rent suit—Abatement of rent—Diluvion—Transferee of tenant,
Right of, to abatement.*

A tenant has a right to, and can claim an abatement of, rent where the area of the land, the subject of his tenure, has been diminished by diluvion, and such right passes to a purchaser on a sale of the tenure

Prosunno Moyee Dossee v. Doya Moyee Dossee (22 W. R. 275) distinguished.

IN this case the plaintiffs sued to recover the rent in respect of two khadas of land held by the defendant for the years 1286 to 1288 and a portion of the year 1289, together with the road and public works cesses, alleging that the defendant was an auction-purchaser of the rights of the original tenants. The defendant pleaded that the rent claimed was that due on account of four khadas of land formerly held by his predecessors; that out of that amount $2\frac{1}{2}$ khadas had been washed away by the river previous to the year 1286; and that out of the remaining $1\frac{1}{2}$ khadas the plaintiffs had

* Appeal from Appellate Decree No. 2885 of 1883, against the decree of F. W. V. Peterson, Esq., Judge of Jessore, dated the 9th of August 1883, modifying the decree of Baboo Krishna Nath Rai, Munsif of Magura, dated the 5th of May 1883.

taken possession of some 3 pakhis and let them out to another tenant from whom they had recovered rent, and accordingly they were only entitled to recover rent from him in respect of the balance of the 4 khadas in his possession.

The Civil Court Amin was deputed to measure the lands, and found the amount in existence to consist of some 32 bighas.

The first Court held that there was no sufficient evidence to prove that the original holding comprised 4 khadas, and that none of the land had been washed away since 1286. That Court also found that the plaintiffs had, between the years 1280 and 1285, sued the defendant three times for rent, and the objection [626] now raised had not been taken in any of those suits, and disbelieving the defendant's case gave the plaintiffs a decree for the full amount claimed.

The lower Appellate Court modified that decree, holding that there was sufficient evidence given by the defendant and on his behalf to show that the original holding amounted to 4 khadas, that half the lands had been lost by diluvion, and that there was no evidence to rebut that given on behalf of the defendant, and consequently there was no reason to disbelieve that portion of the defendant's case. It also held that the lower Court was wrong in concluding that the previous rent suits had been brought against the defendant as they, as a matter of fact, had been brought against his predecessor, and it considered that the defendant had failed to prove that any of the 32 bighas found by the Amin still to be in existence was in the possession of other tenants of the plaintiffs. It consequently held that the defendant was bound to pay rent for so much of the tenure as was now in existence at the admitted rate, namely, 8 annas a bigha, and gave the plaintiffs a decree for the rent for the years claimed at that rate in respect of the 32 bighas together with the cesses in respect thereof.

The plaintiffs now specially appealed to the High Court, upon, amongst others, the following grounds:—

(1) That the defendant being an auction-purchaser at the rent claimed after the alleged diluvion, he could not claim for any abatement of rent on account of such diluvion.

(2) That the question of abatement ought to have been made the subject of a separate suit, and ought not to have been entertained in this suit.

(3) That the evidence on the record was not legally sufficient to prove the exact quantity of land comprised in the tenure when first created, and how the rent was then assessed on the same.

Baboo *Rashbehari Ghose* and Baboo *Girja Sunkur Mozoomdar* for the Appellants.

Baboo *Gurudas Bannerjee* for the Respondent.

[627] The Judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

Two points have been argued in this case: the first of these is, that the District Judge is in error in supposing that there is absolutely no rebutting evidence against that adduced by the defendant to show that there was a diminution in the quantity of land contained in his tenure.

The District Judge, it appears to us in the passage referred to above, referred to such evidence as measurement papers, zamindari papers, and other papers of a similar nature. It is not alleged before us that there is any such evidence on the record. There is nothing in the judgment from which we can

say that the District Judge has not taken into consideration the circumstance that the defendant's predecessor-in-title did not claim any abatement upon the ground of diluvion. It is quite possible that the District Judge thought that the predecessor-in-title of the defendant was not aware of his rights. We are, therefore, of opinion that there is no force in this objection.

The second point that has been argued before us is, that the defendant, as an auction-purchaser, has no right to claim any abatement which may have accrued to the predecessor-in-title of the defendant, whose rights he purchased in execution of a decree.

In support of this contention the decision in *Prosunno Moyee Dossee v. Doya Moyee Dossee* (22 W. R., 275) has been cited. That case is clearly distinguishable from this. There the right to the abatement depended upon a contract between the landlord and the original tenant, which provided that there should be an abatement of rent if on measurement at a time fixed by that agreement the quantity of land was found to be less than that stated in the agreement. The original tenant did not claim any abatement for about six years after the accrual of the right, but continued to pay the usual rent, and he then sold to the defendant.

It was held in that case that it was doubtful whether the right to enforce the terms of that contract passed by the sale of the tenure. But in this case the right to abatement did not depend [628] upon any contract, but upon the general law by which a tenant can claim abatement on account of the diminution of area by diluvion, and that such right we think passes with the sale of the tenure.

We are, therefore, of opinion that this ground is also not valid. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also 13 C.L.R., 55, where the *kabuliyat* precluded recovery.]

[11 Cal. 628]

ORIGINAL CIVIL.

The 3rd June, 1885.

PRESENT.

MR. JUSTICE PIGOT.

Mackertich.Plaintiff

versus

Rebeiro.....Defendant.

Trustee delaying in assigning the legal estate—Costs—Cestuis que trust, Conveyance by, and suit by purchaser to compel trustee to join in the conveyance.

A trustee who acts unreasonably in delaying to join in a conveyance, though guilty of no actual misconduct, further than that shown by an unwarrantable delay in doing that which he is bound to do, will be made to pay the costs of a suit brought against him for the purpose of compelling him to do his duty, notwithstanding that neither an offer to pay such costs as he might incur attending the conveyance, nor a tender of a release from his position as trustee, has ever been made to him, he, however, will still be allowed his costs attending the conveyance when completed.

* Original Civil Suit, No. 89 of 1885.

THIS was a suit brought by a purchaser from certain *cestuis que trust* to compel the defendant, the sole trustee of a marriage settlement, to execute and register two conveyances of certain property, the subject of the settlement, and asking that he might be ordered to pay the costs of the suit.

Under and by virtue of a marriage settlement dated the 21st June 1856, of which the defendant was the sole trustee, a certain house, No. 10, Gomes Lane, in the town of Calcutta (which under the powers given to the trustee by the settlement had been purchased with the funds originally forming the corpus of the settlement) was held in trust for the benefit of Charles Watkins (the intending husband), and Rosalea Sarah Timmins (the intending wife), the income, therefore, being payable to the wife for life, and on and after her death to the husband for life, and after his death to such child and children of the marriage as the [629] said husband and wife should by deed jointly appoint; and in default of such appointment, as the survivor of them should by deed, will or codicil appoint; and, failing any such appointment, in trust for all the children of the marriage in equal shares, who, being sons, should attain twenty-one years, or being daughters, should attain that age or marry.

The intended marriage recited in the above settlement was duly celebrated, and the issue of this marriage were three in number, viz., Alexander Thomas, who died in March 1861, a minor and unmarried, Emeline Adeliza and Charlotte Frances, both of whom survived their parents. In April 1861 and in June 1883, the husband and wife respectively died, neither of them having ever exercised the power of appointment given to them under the settlement.

The two surviving children (who were married previously to the death of the last surviving parent), being entitled to the property, the subject of the settlement of 1856, entered into separate arrangements with the plaintiff for the sale to him of their moieties of the house No. 10, Gomes Lane. Correspondence to the following effect passed between the plaintiff and the defendant on the subject of the sale, viz, on the 21st August 1884 the plaintiff, through his attorney, gave formal notice to the defendant of his intended purchase of one moiety of the property from Charlotte Frances and asked for his approval of the conveyance, (it did not, however, appear that any conveyance was then sent to the defendant). On the 6th September 1884, having received no reply to this letter, the plaintiff's attorney wrote to the defendant threatening legal proceedings unless he consented to join in a conveyance. On the 5th December 1884, the plaintiff's attorney wrote to the defendant, enclosing a copy of the draft of the proposed conveyance between Emeline Adeliza and the plaintiff, and called upon him to fix an early date for execution and registration of the document, at the same time mentioning that the contemplated conveyance from Charlotte Frances was to the same effect as the draft sent. On the 16th December 1884, a letter reminding the defendant of the last before mentioned letter was further sent by the plaintiff's attorney; and on the same day an answer was received from the defendant to the effect that he [630] was then unwell, but would place the draft conveyance before his attorney as soon as he felt better. On the 30th December 1884, the attorney for the plaintiff again wrote to the defendant, giving him two days time in which to execute the conveyance, and in default threatening immediate legal proceedings. On the 6th January 1885, the defendant's attorney wrote to the plaintiff's attorney, stating that the defendant had "some time ago" left a draft of the conveyance with him, but that it had been mislaid, and he desired that a fresh copy might be furnished. On the 7th January 1885 a duplicate of the draft was sent to the defendant's attorney, and on the 15th January 1885 the attorney for the plaintiff again wrote to the defendant's

attorney, asking whether the defendant was prepared to execute the conveyance. No answer having been received to this letter, and the two surviving children of Mr. and Mrs. Watkins having, on the 8th and 24th November 1884, separately executed conveyances of their respective moieties of No. 10, Gomes' Lane, the plaintiff, on the 27th February 1885, filed the present suit for the purposes set out above, and asking that the defendant should be directed to pay the costs of such suit.

The defendant put in a written statement, stating that he had not been directly requested to sign the conveyances by his *cestuis que trust*, that no formal release from his position as trustee had ever been offered to him; nor had any offer been made to pay such costs as he might incur in the matter; that until such a release was granted, and the conveyances approved on his behalf, he was under no obligation to execute the conveyances, he not having entered into any agreement with the plaintiff to that end.

At the hearing the only question raised was that of costs.

Mr. *Hill* (with him Mr. *Gasper*) for the Plaintiff cited *Jones v Lewis* (1 Cox, 199), on the question of costs.

Mr. *Bonnerjee* (with him Mr. *Sale*) for the Defendant contended that there had been no unreasonable delay on the part of the defendant, the matter having been in the hands of his attorney, that the trustee would not be bound to take any notice of any communication coming from the assignee and not [631] from the *cestuis que trust*, that up to the 11th December there had clearly been no default on the part of the trustee; that the tone of the attorney's letters was peremptory and hostile.

[Mr. *Hill* here stated that he was instructed to say that the *cestuis que trust* had communicated with the defendant, but he was not able to give the exact date of such communication.]

Mr. *Bonnerjee* then, on the question of costs, cited *Goodson v. Ellisson* [3 Russ., 583 (589)] contending that the trustee was entitled to his costs of and attending the conveyance, and should not be asked to pay the costs of the suit, inasmuch as there had been no unreasonable delay on his part.

Pigot, J.—I regret very much that Mr. Rebeiro, through his own negligence and obstinacy, though through no actual misconduct, (further than the delay he has shown in doing what he was bound to do), should be brought into Court, and that it should be necessary for me to award costs against him. The position of a trustee is undoubtedly a thankless one, and this Court therefore is, and has always been, most anxious to see that he sustains no loss in carrying out a trust, and is always prepared to show to him every consideration in discharge of the duties he is good enough to perform.

In this case I regret to say that I cannot, gladly as I would avail myself of the opportunity, find any excuse permitting me to relieve Mr. Rebeiro from paying the costs of this suit. There appears to be no excuse whatever for the delay in the execution of the deed which he was bound to execute. It appears that he was fully informed, after a conversation with the *cestuis que trust*, of the assignment many weeks before, when, on being pressed to execute the conveyance two months before the filing of the plaint, he had instructed his attorney to consider the papers and advise him in the matter. He then resumes the obstinate silence which he had preserved during the greater part of the period between the 21st August and the 11th December. It would be a very serious inconvenience to *cestuis que trust*, desirous of disposing of their property, if the purchaser had before him the prospect of such a long, troublesome process of extracting from the trustee a deed as has occurred in this case. For [632] these reasons, I am bound to hold that the trustee must pay the costs of the suit. That question is the only one discussed in the suit, for it is not

seriously contended that the defendant is not bound to execute the conveyance. The question of costs is divided by Mr. Bonnerjee into two heads—one that the trustee should get his costs; the other, that he should not have to pay them. I think he must pay them. He is entitled to his costs of and attending the conveyance, but as his conduct has been unreasonable, and led to the suit, he must suffer for it by paying the costs of this suit.

Suit decreed.

Attorney for Plaintiff: Baboo Netyedoss Dey.

Attorney for Defendant: Baboo G. C. Chunder.

NOTES.

[The English Law is thus stated in *Codefrol on Trusts* (1907) III Edn, p. 582:—"When trustees hold the trust property for persons who are absolutely entitled, and the trustees have no active duty to perform, either because the trust was originally created as a mere matter of convenience, or because it has been fully performed or has come to an end, it is the duty of the trustees to convey or transfer to the beneficiaries or as they direct, and a wrongful refusal so to do makes them liable to the costs of an action to compel a conveyance or transfer or petition for a vesting order under Trustee Act (Eng) 1893 ss 35 (sub-s, ii, d,) and 38; *Payne v. Barker*, Bridg. 24; *Jones v. Lewis*, 1 Cox 199; *Willis v. Hiscox* 4 M. & Cr. 197, where the trustee set up an adverse title; *Hampshire v. Bradley*, 2 Coll 34; *Re Knox's Trust*, 1895, 1 Ch 542, 1895, 2 Ch. 483 C A., where the costs of a petition for a vesting order were borne by a recusant trustee, and if the beneficiary has conveyed his beneficial interest to a third person, the latter is equally entitled to call for a conveyance of the legal estate, *Angier v. Stannard*, 3 M. & K 566

If *cestus que trust* are to consent to a sale, the trustee must not, without cause, refuse to sell and convey to a purchaser proposed by them, *Palaviet v. Carew*, 32 Beav. 564."]

[11 Cal. 632]

APPELLATE CIVIL.

The 3rd June, 1885.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE GHOSE.

Nobokrista Mukherji.....Plaintiff

versus

The Secretary of State for India in Council and others.....Defendantsⁱ

Chowkidari chakran lands—Decision of Commission under Bengal Act VI of 1870, final and conclusive—Civil suit—Beng. Act VI of

1870, ss. 58, 60, 61.

The words "final and conclusive," used in s. 61 of Beng. Act VI of 1870, must be taken to be used in their ordinary and literal sense.

Where, therefore, a Commission has been appointed under s. 58 for the purpose therein mentioned, and such Commission has ascertained and determined that certain lands are chowkidari chakran lands, in the absence of fraud or non-compliance by the Commissioners with the provisions of the Act, their decision is conclusive evidence in any civil suit of the fact that the lands are what they have found them to be.

* Appeal from Appellate Decree No 1038 of 1884, against the decree of Baboo Kadar Nath Muzoomdar, Second Subordinate Judge of Midnapur, dated the 21st of March 1884, modifying the decree of Baboo Nundolal Kundoo, Second Munsiff of Ghattal, dated the 23rd of December 1883.

IN this case the plaintiff sued to recover *khas* possession of some 18 *bighas* of land upon the allegation that it formed a portion of the ordinary *mal* land of his zamindari and *dur-putni* taluk.

[633] In his plaint he alleged that the original tenant of the lands in suit had been one Jatadhur Mal, and that after his death his son, Ram Mal, and brother, Bungshi Mal, had obtained possession as tenants, that he thereupon instituted a suit against them for rent and ejectment, which was dismissed upon Bungshi Mal denying the relationship of landlord and tenant; that after succeeding in that suit Bungshi Mal collusively paid rent to one Ram Kumar Bagdi; and that Ram Kumar Bagdi ejected Bungshi Mal and got possession of the land.

The plaintiff accordingly instituted this suit against Ram Kumar Bagdi and Bungshi Mal for the relief above stated. Subsequently, the Secretary of State and one Protap Mal were added as defendants, as the former alleged that, with the exception of a small plot of $4\frac{1}{2}$ cottahs, the land in suit was chowkidari chakran land, which had been held by Ram Kumar during the time he held the post of chowkidar, but that upon his death it had passed into the possession of, and was now held by, Protap Mal, who had been appointed chowkidar in the place of Ram Kumar. The only issue in the case material for the purpose of this report was that raised upon the written statement of the Secretary of State, who alleged that under s. 58, Beng. Act VI of 1870, a commission had been appointed by the Lieutenant-Governor to determine the chakran lands of thana Chundurkona and Ghattal, and that the Commissioner so appointed had determined that the disputed lands were chowkidari chakran lands, and that inasmuch as under s. 61 of the Act the Commissioner's decision was final and conclusive, no civil suit would lie, and the suit must necessarily fail. The first Court held that the decision of the Commissioner, appointed under Beng. Act VI of 1870, was no bar to the institution of the suit, but dismissed it upon the merits. Upon appeal, the lower Appellate Court upheld the cross objection taken by the Secretary of State, and held that the suit was barred by the decision of the Commissioner.

The plaintiff now specially appealed to the High Court.

Baboo Taruck Nath Sen for the Appellant.

Baboo Unnoda Proshad Banerjee (Senior Government Pleader) for the Respondent, the Secretary of State.

[634] The Judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

The only question for us in this appeal, as argued before us, is, whether or not when certain lands have been determined by a Commission appointed by the Lieutenant-Governor of Bengal under s. 58 of Beng. Act VI of 1870, to be chowkidari chakran lands or other lands before the passing of that Act assigned for the maintenance of an officer to keep watch in any village and to report crimes to the Police, the matter can be re-opened in a civil suit, or whether the order of the Commission is final and conclusive for all purposes as to the character of the lands so described in it.

The plaintiff-appellant sued to eject the defendants on the ground that the lands were *mal* lands of his zamindari, and that in a suit for rent and ejectment brought by him against Bungshi Mal, defendant No. 2 and others, his title as landlord had been repudiated, that of the chowkidar having been set up.

The defence raised was that the lands were chowkidari chakran lands, and it was shown that they had been so described under s. 61 of Beng. Act VI of 1870.

The lower Appellate Court held that consequently the jurisdiction of the Civil Court to try the suit was excluded.

After careful consideration of the Act, we are constrained to come to the opinion that the words "final and conclusive" in s. 61 must be taken in their ordinary and literal sense, and correctly express what was intended by the Legislature.

Section 60 provides that in making an inquiry into the question, the Commission shall exercise, as far as may be necessary, all the powers conferred by Regulation VII of 1822, and the Regulations and Acts amending the same upon a Collector making a settlement of land revenue.

We must assume, therefore, that the proceedings take place with full notice to all parties concerned, and we think that in the face of the provision of s. 61, a party dissatisfied with the order cannot sue to set it aside, except upon the ground of fraud or of non-compliance by the Commission with the provisions of the Act.

The present suit was not ostensibly brought to set aside the [635] order of Commission. On the contrary, no allusion is made to it in the plaint. It was, therefore, not quite correct for the lower Appellate Court to hold that there was no jurisdiction to try the suit, but it would be correct to say that so long as that order stands it affords conclusive evidence in support of the plea raised for the defence that the lands are chowkidari chakran. The result is the same so far as the present appeal is concerned, and it must be dismissed with costs.

We may observe that it is not quite clear whether the lower Court has appreciated the distinction between "chowkidari chakran lands" as defined in s. 1 of the Act, and the "other lands assigned," referred to in ss. 58 and 61. If the lands in question are of the former description, the zamindar will apparently, if a Panchayet has been appointed, be entitled to claim possession from the Collector under s. 50. If they belong to the latter description, or if no Panchayet has been appointed, the zamindar has no present right in them. But in any case his present suit fails.

Appeal dismissed.

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NOTES.

[In (1905) 2 C.L.J. 306, MOOKERJEE, J. expressed doubts as regards this case, "If it were necessary, however, to decide the general question as to how far an order regularly made under sec. 61 of Act VI of 1870 B.C. is conclusive in a litigation in the Civil Courts, we should be disposed to attach considerable weight to the argument that when sec. 61 makes the order final and conclusive, it has reference only to the appellate jurisdiction which could be otherwise exercised by the superior Revenue authorities under the first clause of sec. 29 of Reg. VII of 1822 and has no reference to the jurisdiction possessed by the Civil Courts under clause (6) of that section." In (1911) 9 I.C. 322 (Cal.) N. CHATERJEE, J., citing also 2 C.L.J. 107; 302, said, "In the circumstances of that case it was not necessary to decide that point. I think that upon the authorities cited above, I must hold that if the proceedings under sec. 61 are conducted in compliance with the provisions of Regulation VII of 1822, which are applicable to proceedings under Act VI of 1870 B. C., and after full notice to all the parties concerned, then the order under section 61 is final and binding upon the Civil Courts."

The order is not binding where there was no notice of the proceedings.—2 C.L.J., 306; 9 I.C., 322.]

[11 Cal. 636.]

APPELLATE CRIMINAL.

The 29th May, 1885.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS

Adu Shikdar.....Appellant

versus

Queen-Empress...Respondent :

Confession made to a Police officer—Evidence Act—(Act I of 1872, s. 27) —Murder, charge of, when body is not forthcoming—Theft, intention to convict.

No judicial officer dealing with the provisions of s. 27 of Act I of 1872 should allow one word more to be deposed to by a Police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him.

Section 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence

Empress of India v. Pancham (1 L. R., 4 All., 198), *Queen-Empress v. Babu Lal* (1 L. R., 6 All., 509), discussed and commented on

[636] Thus, when a Police officer deposed that an accused had told him that he had robbed K of Rs. 48, whereof he had spent Rs. 8 and had got Rs. 40, and that he had made over the Rs. 40 to him,

Held, that the statement that he robbed K of Rs. 48 was not necessarily preliminary to the surrender of the Rs. 40, and was inadmissible in evidence against him.

When also a Police officer deposed to the fact that the accused, who was charged with murder, had stated to him that he and K had stolen some hides from C, and upon such statement he had sent for C and recorded his information, and when it appeared that C had already informed the Police of the fact of the theft, though the witness was not aware of it,

Held, that the statement was inadmissible upon the ground that it would be most dangerous to extend the provisions of s. 27, and allow a Police officer, who is investigating the case, to prove an information received from a person accused of an offence in the custody of a Police officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another Police officer.

Although, under some circumstances, a charge of murder may be sustained, when the body of the person said to have been murdered is not forthcoming, still, when that is the case, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted.

When an accused charged with murder was alleged to have taken a boat from a place where it had been secured by its owner, and after proceeding some distance in it had abandoned it, and when he was charged with the theft of the boat,

Held, that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping.

* Criminal Appeal No. 299 of 1885, against the order of J. P. Bradbury, Esq., Officiating Sessions Judge of Backergunge, dated the 14th of March 1885.

IN the case out of which this appeal arose the prisoner was tried upon five charges, viz., 1st, with the murder of one Ram Kristo Rishi; 2nd, with causing grievous hurt to the same person with a cutting instrument; 3rd, with robbery by voluntarily causing hurt to the same person in order to commit theft; 4th with the theft of a boat belonging to one Ammuddin; and 5th, with the theft of 19 hides from the house of one Raj Chunder Rishi. The first four offences were alleged to have been committed on the 14th November 1884, and the last on the 11th November, and the prisoner was convicted on all five charges and sentenced on the first to transportation for life.

[637] He now appealed to the High Court against both the conviction and the sentence. The facts of the case as deposed to, so far as they are material, were as follows.—

Ram Kristo Rishi, who was alleged to have been murdered, cohabited with one Dhonmoni, who was called as a witness for the prosecution, at a village named Hogla, though his native village was Babla, about 1½ hour's journey from Hogla. On the night of the 29th Kartic, corresponding with the 13th November, he left Hegla for Barisal, and Dhonmoni deposed that he had told her he was going there to sell hides, and that he would be back in about three days.

Ram Kristo Rishi and the accused started together in a boat hired by the former from one Kamaruddin. It was found that Ram Kristo had hired the boat, stating that he wanted it for the purpose of going to fetch his niece from Jhallokiti, which reason was manifestly false.

On their way to Barisal, Ram Kristo, who was an opium-smoker, stopped at a shop belonging to one Tarini Das, and pledged with Ishan Das, the manager, a silver key chain for twelve annas, of which he took eight annas in cash, and the rest in opium. This was on the evening of the 29th Kartic. They then apparently went on to Barisal where, on the 30th Kartic, Ram Kristo sold 21 hides for Rs. 50 to one Rahim Buksh, a butcher. The price was paid in cash, and no entry appeared in the books of Rahim Buksh as to who sold the hides, but it was clearly proved that Ram Kristo did, and, though it was attempted to be proved that the accused was with him when the sale took place, that portion of the evidence was disbelieved by the Sessions Judge and the assessors, and their opinion was confirmed by the High Court. It was proved, however, that the prisoner had a meal at the house of Rahim Buksh, the butcher, in Barisal, on the evening of the 30th Kartic, and that he knew of the sale of the hides.

Ram Kristo was never seen alive again after the evening of the 30th Kartic, and his body was never found.

Upon his not returning to Hogla when expected, Dhonmoni went in search of him to Nulchitta and Barisal, and not finding him or any trace of him lodged a complaint with the Police, [638] and an enquiry was instituted by the head constable into the matter.

Suspicion resting upon the accused, he was arrested, and the case was subsequently handed over to Prosono Kumar Mookerjee, a Sub-Inspector of Police, who was called as a witness at the trial, and who, amongst other statements, made the following—

"I began enquiry into the disappearance of Kristo Rishi on the 3rd December. I got no clue till the 7th December. I got hold of Adu on the 3rd December. The head constable of Kiwari outpost, Nobin Ghose, made over his papers to me at the outpost, and I sent a constable for Adu who was

at home, or at least was not with the head constable. On the 7th December I obtained from Adu's wife some information about the hides Kristo Rishi was said to have sold at Barisal, and I then interrogated Adu about the hides again. He again denied all knowledge of them, but when confronted with his wife and told of what she had said, he acknowledged the truth of her statement and made other statements. He said he had robbed Kristo Rishi of Rs. 48 whereof he had spent Rs. 8 and had Rs. 40. These he bade his wife bring forth, she got them from their house, and handed Rs. 40 to Adu, who handed the Rs. 40 to me. He then said that on his way back from Barisal he had left a boat in the Gopalpur "Bhorani Khal," and I sent Bidu and Goribulla Chowkidar to search there for it. Next day, the 8th December, they brought to me the smaller of the two boats lying outside the Court just now, which the witness Ammuddin of Mogor has since claimed as his. Adu also told me of Kristo Rishi's having pledged the key-chain with Ishan Das of Amrajuri on their way to Barisal, and I then proceeded with Adu to Amrajuri on the 8th December, and obtained the key-chain produced from the witness, Ishan Das. Further, in consequence of what he said, I traced the witness Jossim and his family. They, in the first instance, denied that Kristo Rishi had gone on to their homestead. They said that he had come alongside the broken bank and had spoken with them, had told them his name, Kristo Rishi, his place of abode Babla, and that Adu had wounded him, and that then the tide had washed him away. All this they told me on the 20th December. On the 22nd the [639] Inspector took up the enquiry, and I remained with him for a while. The Rs. 40 I got from Adu are now lying on the table in front of me. It was from Adu's statements to me that I discovered the theft of hides from Raj Chunder Rishi of Birchakathi. Adu told me on the 7th December that he and Kristo Rishi had stolen the hides, and I sent for Raj Chunder Rishi, and on the 8th December recorded his information of the theft. Hogla and Babla are about two dandas journey apart. Amrajuri is three dandas journey from Hogla, and on the way from Hogla to Barisal. The Gopalpur creek is about three dandas journey to the east of Hogla and joins the Shirsha creek. Mogor is one day's journey from Hogla and contiguous to Shujaabad."

On the 17th November Kamaruddin's boat, in which Ram Kristo and the accused were alleged to have travelled to Barisal, was found in the Kaligera river, a few hours journey from Barisal. It was suggested by the prosecutors that the 19 hides stolen from Raj Chunder Rishi were amongst those sold by the deceased at Barisal, and the prisoner was charged with the theft of them. It was also proved that Raj Chunder had previous to Adu's arrest, lodged a complaint with the Police of the theft of the hides, but it was alleged that Prosono Kumar Mookerjee did not know of the theft at the time he questioned the accused. In consequence of the statement made by the accused, the key-chain and keys were discovered with Ishan Das, and they were identified by Dhonmoni.

The boat belonging to Ammuddin was found by the Police in consequence of the prisoner's statement, and though Ammuddin never reported its loss, he identified it, and stated that he had left it chained to a tree in a creek from which it had been taken away, as he missed it on the 1st Aughran, when he found the branch of the tree had been broken off and the boat taken away.

The most important evidence called for the prosecution was that of two brothers named Jasim and Muzuddin, and their mother Asmem Bibi, who stated that on the night of 30th Kartic they heard a disturbance near their homestead, a village close to Ammuddin's village. The river flowed past their house

which was on the way from Barisal to Hogla. They asserted that shortly [640] after the disturbance a man came to their yard, called out to them, and in reply to questions said his name was Kristo Rishi of Babla, and told them that "that thief Adu" had wounded him, and left him after robbing him of Rs. 50. They came out of their house, found the man with his bowels protruding through a gash in his stomach, and that he died at their feet. They then stated that to avoid trouble they had thrown the body into the river.

The whole of this story was disbelieved by the Sessions Judge and the assessors owing to serious discrepancies, and the Judge characterised it as a fabrication concocted by the Police, and in this view the High Court agreed.

The accused persistently denied that he had ever gone to Barisal with the deceased, and alleged that his statement had been extracted from him by the Police ill-using him, and he denied the truth of it at the trial.

As stated above the Sessions Judge convicted the prisoner on all charges, being of opinion that the prisoner's statement to the Police Inspector was admissible in evidence, and coupled with the other facts, deposed to proved his guilt; but inasmuch as the body of deceased was not found, and there was no evidence to show in what way the accused had caused his death, he sentenced him to transportation for life.

No one appeared on the hearing of the appeal.

The Judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

Norris, J. (after setting out the facts and detailing the evidence continued). —I am inclined to think that the Judge has attached too little weight to the evidence as to the circumstances under which the accused made his statement, but, however that may be, I am of opinion that so much of the statement as related distinctly to facts thereby discovered was admissible in evidence, not as a confession, but as evidence of the facts thereby discovered.

Now it seems to me that no facts deposed to were discovered by the prisoner's statement, "that he had robbed Kristo Rishi of Rs. 48, whereof he had spent Rs. 8 and had Rs. 40." Upon this point the Sessions Judge says: "According to STRAIGHT, J, in *Empress of India v. Pancham* (I L. R., 4 All. 198) and *Queen-Empress v. Babu* [641] *Lal* (I L. R., 6 All, 509) the evidence of Adu's statement that he had robbed Kristo Rishi of Rs. 48 is inadmissible, but STUART, C.J.'s opinion in the first case is in favour of its admission in explanation of the delivery of the money, and the case of *The Queen v. Pagaree Shaha* (19 W. R. (Cr.) 51) is a distinct authority therefor. Section 27, Act I of 1872, moreover legalises the reception of any statement of an accused whether amounting to a confession or not, which leads to the discovery of a material fact, and it is clear that the confession of the robbery was the necessary preliminary of the surrender of the Rs. 40, and it is impossible to separate them. Had he not confessed the robbery Adu would not have made over any money to the Sub-Inspector, and the surrender of the money must necessarily have been accompanied or immediately preceded by some explanatory statement. I have accordingly received the evidence thereof." Now I cannot agree with the Judge, when he says "the confession of the robbery was the necessary preliminary to the surrender of the Rs. 40," still less can I agree with him when he says "it is impossible to separate them," by which I suppose he means "impossible to separate this part of the prisoner's statement from what preceded and followed it."

I emphatically endorse the observation of STRAIGHT, J., in *Queen-Empress v. Babu Lal* (I. L. R., 6 All, 509) where he says "No judicial officer dealing with such provisions should allow one word more to be deposed to by the Police

officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. Section 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence, " and I must respectfully but firmly express my dissent from the observations of STUART, C.J., in *Empress of India v. Pancham* (I. L. R., 4 All., 198) where that learned Judge says: " But I have no doubt in my own mind that statements by Police officers embodying and including what may be understood as a confession or admission of guilt by an accused [642] person are not wholly inadmissible, but may be received and applied so far as they prove merely corroborative circumstances and not an absolute confession of guilt."

I am also of opinion that the prisoner's admission that he had assisted Ram Kristo in the theft of Raj Chunder Rishi's hides was inadmissible. The fact of the theft of these hides was already known, though not to the Sub-Inspector, and I think it would be a most dangerous thing to extend the provisions of s. 27 and allow a Police officer who is investigating a case to prove an information received from a person accused of an offence in the custody of a Police officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another Police officer.

Now, considering the whole oral evidence, and accepting the prisoner's admissions (subject to what I have said I think ought to be rejected) as true, how does the case stand?

I think it may be taken to be proved that the prisoner and Ram Kristo left Hogla in company on the night of 29th Kartic in Kamaruddin's boat, that on the way Ram Kristo pawned the chain and keys to Ishan Chunder Das; that they continued their journey to Barisal where they arrived on 30th Kartic, and where Ram Kristo sold 21 hides for Rs. 50, which he received in cash, to Rahim Buksh, that the prisoner, though not actually present at the sale, knew of it, and knew that Ram Kristo had received Rs. 50, that they left Barisal in company, that at some period he quitted Kamaruddin's boat, took Ammuddin's boat, travelled a certain distance in it, then abandoned it and walked home, and that Ram Kristo has not since been heard of. This is all that I think can be taken to be proved, even accepting the prisoner's admission as true.

I do not think that is sufficient to convict the prisoner of murder.

In *Russell on Crimes*, 4th edition, Vol. I, p. 770, it is said: " It has been considered a rule that no person should be convicted of murder unless the body of the deceased has been found " And a very great Judge says: " I would never convict any person of murder or manslaughter unless the facts were proved to be done, or at least the body be found dead. But this rule, it seems, must [643] be taken with some qualifications, and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the Court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea, and the jury being of that opinion, the prisoner

was convicted, and (the conviction being unanimously approved of by the Judges) was afterwards executed.

But where upon an indictment against the prisoner for the murder of her bastard child, it appeared that she was seen with the child in her arms on the road from the place where she had been at service to the place where her father lived, about 6 in the evening, and between 8 and 9 she arrived at her father's without the child, and the body of a child was found in a tide-river near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to show that it was not the body of such child, it was held that she was entitled to be acquitted, the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was unless there were evidence to show that her child was actually dead."

I will not go so far as to say that under no circumstances, in this country, could a charge of murder be sustained without proof of the finding of the dead body, but considering the well-authenticated instances of the subsequent appearance in the flesh of persons said to have been murdered, and whose death has been [644] deposed to by eye-witnesses, the production of bones, alleged to be those of a man, and discovered to be those of a woman, and the numerous false charges which are brought against innocent people, I should require the strongest possible evidence as to the fact of the murder if the dead body were not forthcoming; that evidence is, I think, wanting here

If the evidence of Jasimuddin, his brother, and mother, as to Ram Kristo's dying declaration is put on one side, as I think it ought to be, there is no evidence to support the charges of grievous hurt and robbery.

With regard to the charge of stealing Ammuddin's boat, I do not think it can be sustained, as there is not only no evidence that the prisoner intended to convert it to his own use, and make it permanently his own property, but the evidence is entirely the other way.

The charge of the theft of the 19 hides from Raj Chunder Rishi's verandah rests entirely upon the prisoner's statement to Mookerjee, which I have already said, I think, was inadmissible.

Thus, in my opinion, all the charges against the prisoner fail, and he must be acquitted of them all and discharged from jail.

Appeal allowed.

NOTES.

[The statement of the accused is admissible when leading to the discovery of any fact (Evidence Act, 1872, sec 27) and this is equally the case even though the further assistance of the accused is necessary.—14 Bom., 260; 25 Cal., 417, 2 Sind L. R., 27. 10 Cr. L. J., 239; see also 12 Mad., 153, 15 Bom., 344.]

[11 Cal. 645]
APPELLATE CIVIL.

The 26th May, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE GHOSE.

Rashbehari Mukherji and another.....,...Plaintiffs

versus

Sakhi Sundari Dasi.....Defendant.*

Ijmal mehal—Practice of separate leases by several co-sharers—Suit for enhancement by one out of a number of co-sharers, when maintainable.

The mere fact of there being other co-sharers in an undivided *mehal* is not sufficient to put the plaintiff out of Court in a suit for enhancement in respect of a particular plot of land, and the proper issue in such a case is, whether the defendant-tenant has been holding under the plaintiff separately or under a joint lease from the plaintiff and his co-sharers in the *mehal*.

[645] *Guni Mahomed v. Moran* (I. L. R. , 4 Cal. , 96) , *Jogendro Chunder Ghose v. Nobin Chunder Chottopadhyya* (I. L. R. , 8 Cal. , 353), distinguished.

THIS was a suit for rent, at an enhanced rate, for Rs 1,287, with interest and cesses in respect of a certain plot of land in an undivided *mehal*. The defendant, Sakhi Sundari Dasi, denied having ever held under the plaintiffs, and further contended that the suit must fail as there was another co-sharer in the *mehal* who had not been made a party. A *kabuliat*, which purported to have been executed by the defendant's father in favour of Government, and a survey *chitta* were put in evidence by the plaintiff. The Munsif was of opinion that, although it might appear from the *kabuliat* that the plaintiffs were the full owners of the tenure held by the defendant, the survey *chitta* went to show that the plaintiffs had only a half share in certain plots of land held by the defendant, and dismissed the suit with this observation " I find the *kabuliat* to be true and genuine, but consider that it was simply for payment of rent separately, and that it did not determine the original tenure, and split it into two, so that it could be enhanced by the sharers separately (see I. L. R. , 4 Cal. , 96).

On appeal, the District Judge declined to interfere with the decision of the lower Court, and relied on the following authorities—*Guni Mahomed v. Moran* (I. L. R. , 4 Cal. , 96) , *Rani Saratsundari Devi v. Watson* (2 B. L. R. , 159) ; and *Jogendro Chunder Ghose v. Nobin Chunder Chottopadhyya* (I. L. R. , 8 Cal. , 353).

Against that judgment the plaintiff appealed to the High Court.

Baboo Bipradas Mukerji and Baboo Pran Nath Pundit for the Appellant.

Baboo Jogendro Nath Bose for the Respondent.

The Judgment of the Court (GARTH, C.J., and GHOSE, J.) was delivered by

Garth, C.J.—This was a suit to enhance the rent of a tenure.

* Appeal from Appellate Decree, No. 2414 of 1883, against the decree of J. G. Charles, Esq., Additional Judge of 24-Pergunnahs, dated the 18th of June 1883, affirming the decree of Baboo Bepin Chunder Roy, Munsif of Diamond Harbour, dated the 30th of June 1882.

One of the answers made by the defendant was that the tenure could not be enhanced, because the plaintiffs had only an undivided share in it, and that another person, named Guru-[646]pershad, was entitled as a co-sharer, so that the plaintiffs could not, in a suit brought by them alone, without joining Gurupershad, enhance the rent of the tenure.

The only issue that appears to have been raised in the first Court was (to use the language of the Munsif), "are the plaintiffs co-sharers, and can they enhance?"

Both Courts have found this question in the affirmative; and upon that finding have dismissed the suit.

We have now heard the case fully argued on appeal. It has been contended by the appellants that there was no legal ground for the conclusion at which the lower Courts have arrived and, having examined the evidence, we are led to believe that the lower Court's judgment is founded upon some misapprehension both of law and fact.

In the first place it seems to have been assumed—and so far as we can see erroneously assumed—that the two Full Bench decisions of this Court, *Guni Mahomed v. Moran* and *Soorja Proshad Mytse v. Joynarain Hazra* reported in I L. R., 4 Cal., 96, and the case of *Jogendro Chunder Ghose v. Nobin Chunder Chattopadhyaya* in I. L. R., 8 Cal., 353,—are applicable to the present case.

In these cases it was an established fact that the tenant had originally held a tenure under several co-sharers at an entire rent, and that afterwards an arrangement was made by which the tenant paid a proportion of his rent severally to each of the co-sharers. It was held that under these circumstances, although each co-sharer could enforce from the tenant the payment of rent separately, he could neither sue for a *kabuliat* for such rent nor bring a suit to enhance it, because such suits would be inconsistent with the continuance of the original joint tenure.

Now let us see what the facts are in the present case.

Some fifty years ago, it appears that the defendant's father took from the Government a *jote* of some 5 bighas of land. This land formed part of an estate numbered 312, which was then in the hands of the Government, and the defendant's father gave the Government a *kabuliat* for the land at a rent of 7 rupees.

The defendant at the trial denied this *kabuliat*, and said that her father had never held under it; but the lower Courts have [647] both found that the *kabuliat* was genuine; and that her father did hold under it.

This *kabuliat*, so far as we can see, is the earliest evidence of the defendant's father's title to the property, and we find no ground for assuming that at the time when the *kabuliat* was given the defendant's father possessed any other estate or tenure in the land.

That being so, it would follow, in the absence of evidence to the contrary, that these 5 bighas of land, which have apparently been in the possession of the defendant and her father ever since, formed a separate holding, at first under the Government, and afterwards under the person or persons to whom the Government conveyed the estate of which the 5 bighas formed a part.

Then it also appears that the Government afterwards settled this estate, No. 312, with the plaintiffs' predecessors-in-title and there would have been no reason to suppose that any third person was interested in the defendants' tenure, but for a measurement *shutta* which was put in evidence by the plaintiffs,

and from which it would appear that another person, one Gurupershad, had in some way or other acquired an interest with the plaintiffs in the estate.

From this *chitta* the lower Courts appear to have drawn the inference, not only that at the present time the defendant is holding under the plaintiffs and Gurupershad jointly, but that at the time when the *kabuli* was given, 50 years ago, the defendant's father was holding under some joint tenure, which has continued to exist up to the present time, and upon this assumption the lower Courts have held that the Full Bench cases, to which I have referred, are applicable here, and that the plaintiffs have no right to sue for an enhancement of the defendant's *jumma*.

Now we are unable to find any legal ground for the inference which the lower Courts have drawn. We can discover no evidence, nor any reason to suppose, that at the time when the *kabuli* was given there was any joint tenure in existence, under which the defendant's father was holding and if, (as we decided in the Full Bench cases, before mentioned) the giving of a separate *kabuli* by a tenant to one landlord is inconsistent with [648] the continuance of a joint tenancy by the same tenant under several landlords, the fact of this separate *kabuli* having been given to the Government would rather tend to show that at that time the Government, and the Government alone, were the owners of the land included in the *kabuli*.

It no doubt appears that the defendant's holding is larger now than five bighas, and it may be that either from the Government or from the plaintiff's predecessors in title, or by some other dealings with the property which have not yet come to light, Gurupershad or others may have obtained a share in the lands which the defendant now holds, but if this is so, it by no means follows that the defendant does not hold a share from the plaintiffs at a separate rent, or that such rent may not be enhanced in this suit.

Co-sharers in *jumali* properties may, and often do, make separate leases to the same or different tenants of their undivided shares, and, as at present advised, we can see no valid reason why the rent of such holding should not be enhanced.

It is true that in one case, to which we were referred, it would seem that a learned Judge of this Court had expressed an opinion that the enhancement clauses of the Rent Law did not apply to separate leases of undivided properties; but the opinion which he expressed appears to have been somewhat extrajudicial, and at present we are not aware of any authority which is opposed to enhancement in such cases.

We think, therefore, that the case must be remanded to the Munsiff's Court, to ascertain, in the first place, with due regard to the observations which we have made, whether the defendant now holds under the plaintiffs separately, or under a joint lease from the plaintiffs and others. In the latter case it might be advisable, if there is no objection to that course, that the plaintiff's co-sharers should be made parties to this suit.

If there should appear to be no objection to the suit proceeding, the Court will then have to deal with the question of enhancement.

The costs in this and the other Courts will abide the result.

Suit remanded.

NOTES

[See also the following cases — 4 Cal., 96; 8 Cal., 353; 17 Cal., 538; 17 Cal., 695, 19 Cal., 593; 19 Cal., 610]

[649] APPELLATE CIVIL.

The 1st June, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Nur Kadir.....Plaintiff

versus *

Zuleikha Bibi One of the defendants.*

*Mahomedan law—Hizanut—The custody of female minors before puberty—
Mother's right.*

By the Mahomedan law, the mother is entitled to the custody of a female minor, who has not attained her puberty, in preference to the husband.

THIS was a suit for the recovery of possession of a wife. The plaintiff's case was that one Mehr-un-nissa, who was a minor, had been given in marriage to him with the consent of her agnatic kinsman, Asmat Ali. The Munsiff dismissed the suit on the grounds that the fact of marriage (*aqd*) by *ijab qabul* had not been proved, that the girl was a minor, and had not attained her puberty, and that even if there had been a marriage, the girl (who in her evidence denied the fact) was free on her attaining puberty to annul the contract entered into with the consent of a kinsman of the degree of Asmat Ali. On appeal, the Subordinate Judge, without adverting to the question of puberty, found the marriage proved, and directed the mother of the girl to send her to the plaintiff's house. The appeal to the High Court from that decree (the suit being laid at Rs. 49) was heard by Mr. Justice FIELD who observed: "The only point that I decide is, that according to the view taken by the Munsiff upon the facts of this case, the plaintiff is not entitled to that which he asks, viz., the possession of the girl. The appeal is decreed with costs."

Thereupon the plaintiff preferred an appeal under s. 15 of the Letters Patent.

Baboo Akhil Chunder Sen for the Appellant.

Baboo Soshi Bhushan Dutt for the Respondent.

[650] The Court (GARTH, C. J., and MITTER, J.) delivered the following Judgment:—

This was a suit brought by the appellant, a Mahomedan, for the recovery of possession of his minor wife, Mehr-un-nissa. It is not disputed that defendant No. 2, Masraf Ali, and defendant No. 3, Asraf Ali, are agnates of the same degree with Mehr-un-nissa's father. The minor girl, it is also admitted, is living with her mother Zuleikha Bibi, defendant No. 5.

The plaintiff's case is, that Asmat Ali gave Mehr-un-nissa in marriage to him, and promised to send her to the plaintiff's house in the month of Jeyt following the marriage. According to this arrangement Mehr-un-nissa not having been sent to the plaintiff's house, the plaintiff has brought the present suit.

* Appeal under s. 15 of the Letters Patent, against the decree of C. D. Field, Esq., one of the Judges of this Court, dated the 23rd of June 1884, in appeal from Appellate Decree No. 814 of 1883, against the decree of Baboo Raj Chandra Sanyal, Rai Bahadur, Sub-Judge of Chittagong, dated the 16th of February 1883, reversing a decree of Moulvi Tofail Ahmad, Khan Bahadur, Munsiff of North Patia, dated the 29th of March 1882.

On behalf of the defendants, both the factum and the validity of the marriage were denied.

The Munsiff dismissed the suit, upon two grounds, viz. (1) that the marriage was not established; and (2) that even if it took place, Mehr-un-nissa, according to the Mahomedan law, being quite at liberty to cancel it on her attaining puberty, the alleged husband was not entitled to the custody of his minor wife until that period had arrived.

The Munsiff's judgment was set aside by the Subordinate Judge, who came to the conclusion that the marriage upon the evidence was established. As regards the second ground, upon which the Munsiff's judgment was based, he says that, until the marriage was actually cancelled, the plaintiff was entitled to the custody of his minor wife. It may be noticed here that there was no appeal against the finding of the Munsiff, that Mehr-un-nissa had not yet attained the age of puberty. The Subordinate Judge therefore did not, and could not, with propriety have come to a different conclusion upon that point.

Accepting then the facts found by the lower Courts, as correct, (as we are bound to do in second appeal) the question of law that arises is, whether the Subordinate Judge is right, according to the Mahomedan law, in removing the minor wife from the custody of her mother, and decreeing the plaintiff the possession of her person. In other words the question for decision is, whether, according to the Mahomedan law, the husband or the [631] mother is entitled to the custody of the minor wife, before she attains the age of puberty. This question was considered in an elaborate judgment of Mr. Justice NORMAN, in the matter of *Khatija Bibi* (5 B. L. R., 557). After reviewing the authorities before him, the learned Judge came to the conclusion that, according to the Mahomedan law, the effect of the contract of marriage is to place the wife under the dominion of the husband, but that notwithstanding her marriage, the right to the care and custody of a girl belongs not to the husband, but to her mother, until she attains the age of puberty. At page 435 in *Bailie's Mahomedan Law*, with reference to the question of *hizanut* or custody of a girl, it is laid down that "so long as a girl who is married has no desire, her mother's right to her custody does not cease, till she is fit for matrimonial intercourse." In reversing the judgment of the Subordinate Judge the learned Judge of this Court has taken the same view of the law. The appeal will therefore be dismissed with costs

Appeal dismissed.

NOTES.

[See (1904) 32 Cal., 444 (446), where this proposition was considered with reference to criminal law.]

[11 Cal. 651]
APPELLATE CIVIL.

The 9th June, 1885.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE WILSON
AND MR. JUSTICE NORRIS.

Uzir Christian.....Petitioner

versus

Eli Seba Christian and another.....Respondent and co-respondent.*

*Collusion—Divorce—Act IV of 1869, s. 13—Collusion in presentation of
petition for dissolution.*

Subsequently to the institution of a suit for dissolution of marriage, and on the same day on which the suit came on for hearing, the petitioner and the respondent each filed petitions, setting out that it was agreed between them that from that date the marriage between them should be dissolved; that neither of them should have any claim against the other, that each should marry again at pleasure, and prayed that dissolution of the marriage might be granted on these terms, each party bearing his own costs.

Held, that this amounted to collusion within the meaning of s. 13 of Act IV of 1869, and that the petition must be dismissed.

THIS was a suit brought on the 4th January 1883 by one Uzir Christian, in the Court of the Judge of Nuddea, for dissolu-[652]tion of marriage, on the ground of his wife's adultery with one George Christian, asking for damages as against the co-respondent.

The suit came on for settlement of issues on the 24th October 1884, and was heard *ex parte*. It appeared from the evidence then given that the petitioner was married to Eli Seba on the 14th June 1865, according to the rites of the English Church, that after the marriage he lived with the respondent for eight years, and that in 1873 she left his house to take service in Calcutta, and was subsequently discovered by the petitioner some time in the year 1878 living with George Christian in Entally in the 24-Pergunnahs, that on that occasion the petitioner requested the respondent to return and live with him, but she refused to do so, and that at the time of this discovery the petitioner had no funds to enable him to obtain advice. Subsequently to the filing of the petition for dissolution, and on the date fixed for settlement of issues, the petitioner and respondent filed the following petitions:—

"The petitioner Uzir Christian, of Ballabhpore states: I have instituted Original Suit No. 1 of 1884 against Eli Seba Christian and another. To-day is fixed for the settlement of its issues. The marriage tie that existed between the defendant and myself is broken from to-day. I have no claim of any other kind against her; she can now marry again if she chooses. I do not want anything as cost of that suit. I give up all. I also abandon the claim which I set up against George Christian. I have no more claim against him either. I therefore pray that the case be decided on the terms of the deed of compromise, making the parties pay their respective costs, and passing a decree dissolving the marriage."

* Divorce case No. 1 of 1884, referred by C. A. Kelly, Esq., District Judge of Nuddea, dated the 25th of October 1884.

"The petitioner, Eli Seba Christian, of Calcutta, states: My husband, Uzir Christian, instituted Suit No. 1 of 1884 against me for dissolution of marriage, and this day is fixed for the settlement of issues. My husband intends to divorce me for my bad character, and I agree to my being divorced. I have no objection to my husband marrying again, and I shall not make any claim against him in future for maintenance or for any other account. The relationship and tie of marriage, which existed [653] between us; henceforth, ceases and dissolves. My husband also has given up all the claims he had. I therefore make this petition and pray, with the consent of my husband, that the parties should bear their respective costs, and the case be decided, declaring the dissolution of the marriage between me and the plaintiff."

The District Judge gave the following judgment —

"In this case the petitioner, Uzir Christian, has sued for a dissolution of marriage. The case has been heard *ex parte*. I consider that there can be no reasonable doubt that 'adultery, coupled with desertion, without reasonable excuse, for two years or upwards' (vide s. 10 of Act IV of 1869) may be held to have taken place. Evidence has been taken, including that of the husband, Uzir Christian, himself, and I am satisfied on it that the woman Eli Seba, wife of the petitioner, (who has herself presented a petition through her pleader, which is in effect an admission of guilt), has been guilty of adultery with George Christian, who has been made co-respondent in the case, and that she has deserted her husband without reasonable excuse for several years. I also find that the petitioner has not been in any manner accessory to, or conniving at, the adultery in question, nor do I find that he has condoned the adultery in question, nor do I find that the petition is presented or prosecuted in collusion with either of the respondents, or that the petitioner has been guilty of delay or other misconduct as contemplated by the law. I accordingly pronounce a decree declaring the marriage between Uzir Christian and Eli Seba to be dissolved in the manner and subject to all the provisions and limitations in s. 17 of Act IV of 1869 made and declared. The papers will be submitted to the High Court for confirmation of the decree; each party to bear their own costs. The petitioner has abandoned his claim for damages."

The District Judge then sent up the case for the High Court for confirmation of the decree *visi*, and on the 9th June 1885 the case came on for hearing before the Chief Justice, Sir RICHARD GARTH, Mr. Justice WILSON and Mr. Justice NORRIS.

No one appeared for either party

[654] The Order of the Court was delivered by

Garth, C.J.—Having regard to the documents which appear on the record of this case, we find it impossible to confirm the decree of the Court below

*[Sec. 10:—Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the

When husband may petition for dissolution ground that his wife has, since the solemnization thereof, been guilty of adultery

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that since the solemnization thereof her husband has exchanged his profession of

*When wife may petition for a dissolution Christianity for the profession of some other religion, and gone through a form of marriage with another woman ; or has been guilty of incestuous adultery.

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et loco*,

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards]

The District Judge, we observe, has expressed an opinion that, in his view of the matter, there is no collusion between the parties. But we think he can hardly be aware what the law considers to be collusion in cases of this kind.

Section 13 of the Indian Divorce Act (IV of 1869) provides that in suits for dissolution, "if the Court finds that the petition is presented or prosecuted in collusion with either of the respondents, it shall dismiss the petition."

This is a similar provision to that which is contained in s. 30 of the English Divorce Act (20 and 21 Vict., C. 85), and it has been held in the English Courts that the word *collusion* in this section has a far wider meaning than *connivance*, and extends to cases where the original ground of the petition has not been connived at, but where the parties have subsequently agreed to use it as a means of divorce—so that collusion in this sense may exist, without any connivance at all [see *Lloyd v. Lloyd* (1 S. & T. 567); *Crewe v. Crewe* (3 Hag., 130) and other cases cited in *Browne on Divorce Causes*, 2nd edition, p. 92.]

Now here it appears upon the proceedings that after the petition had been filed the petitioner and respondent each presented a petition, in which they agreed that from that date the marriage between them should be dissolved; that neither of them should have any claims against the other, that each should marry again at pleasure; that the wife should have no claims against the husband for maintenance or otherwise; and then they pray for a dissolution upon those terms, each party paying his and her own costs.

This is clearly collusion according to the English authorities with which we entirely agree.

The decree, therefore, which has been pronounced by the Court below will be set aside.

Decree nisi set aside.

NOTES.

[This is how the English law is summarised in *Halsbury's Laws of England* (1911) XVI p. 489, para. 1001.—Collusion is not like condonation, a well-understood term; but it is held to exist where the initiation of a suit for dissolution of marriage is procured, or its conduct provided for by agreement or bargain between the spouses or their agents, as, for instance, an agreement not to defend even where the agreement is disclosed to the court, and where no one is able to indicate any fact which is being falsely dealt with or withheld, because the Court will not be hampered in ascertaining for itself whether there is danger of a husband or wife obtaining a divorce contrary to the justice of the case.]

[655] ORIGINAL CIVIL.

The 21st May, 1885.

PRESENT :

MR. JUSTICE PIGOT.

Bipro Doss Dey

versus

Secretary of State for India in Council.*

Discovery—Production of documents—Privilege—Solicitor and Client—Act XIV of 1882, s. 133.

Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor.

In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor.

THIS was an application by the plaintiff for an order that the defendant should produce before the Commissioner appointed to examine Major Hallett in the above cause, certain documents, numbered 5 and 6, set out in the second part of the schedule to the defendant's affidavit verifying his list of documents. In support of this application the plaintiff filed the usual affidavit as to the relevancy and materiality of the documents in question. The suit was brought for moneys claimed by the plaintiff in respect of certain Commissariat contracts which the plaintiff had entered into with the Government in 1879, and the documents, production of which was desired, were two letters, one dated the 23rd November 1883, from Major C. F. Thomas, Examiner of Commissariat Accounts, to Major Hallett, and Major Hallett's reply thereto, dated the 3rd of December 1883. In opposition to the application the defendant filed an affidavit of Major Thomas, the material portions of which are as follows:—

"(1) That on the 18th September 1883, Baboo Gonesh Chunder Chunder, the then attorney of the plaintiff, wrote a letter to my office (submitting on plaintiff's behalf certain re-charge bills and other documents), from which letter the following is an extract:—'Under the circumstances, I submit that my said client's claim cannot be rejected. If, however, you do not think fit upon these explanations to pass my client's said bill, you [656] will be pleased to return the same with all the vouchers and papers sent for its support to enable my client to adopt such measures as he may be advised.'

"(2) That on the 26th idem, I wrote to him asking for originals of some documents referred to by him in his letter above mentioned.

"(3) That on the 5th November 1883, the said Baboo Gonesh Chunder Chunder wrote another letter to my office forwarding some original documents alleged to be in support of the plaintiff's claim.

"(4) That on the 23rd November 1883, I addressed to Major Hallett a letter included in part II of the said schedule to defendant's affidavit of documents, sworn on the 12th day of February last, to which I received the reply, dated the 3rd December 1883, also referred to in the said part of the said affidavit.

* Original Suit No. 357 of 1884.

" (5) That in consequence of the threat by the said Baboo Gonesh Chunder Chunder, in his letter of 18th September 1883, of possible legal proceedings, and because the matter having been placed by the plaintiff in the hands of a solicitor, I regarded his taking such action as likely to lead to legal proceedings. I addressed my said letter to the said Major Hallett with a view to further possible litigation, in order that all such information might be submitted to the Solicitor of the Government of India, for advice as is usual when I have any reason for anticipating a law suit. After receipt of Major Hallett's said letter, I, on the 4th of January 1884, forwarded all the documents connected with the plaintiff's claim to my superior officer, the Controller of Military Accounts, that he might, in accordance with the practice in all such cases, submit the same to the said Solicitor to Government.

" (6) That I am informed and believe the Controller did so submit all such documents to the said Solicitor to Government with a letter, dated the 21st January 1884.

" (7) That on the 4th April 1884, the said Gonesh Chunder Chunder issued the usual notice of plaintiff's intention to sue Government, and in July the plaint herein was filed "

Mr. Hill for the Plaintiff.

[657] The defendant objects to produce these letters, on the ground of privilege, but they are not within the rule. In *Southwark Water Co. v. Quick* [L. R., 3 Q. B. D., 315 (323)], Lord Justice COTTON, citing COCKBURN, C. J., in *Friend v. London, Chatham and Dover Railway Company* (L. R., 2 Ex D., 437), lays it down that a document to be privileged must have come into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice. That is clearly not the case made on this affidavit. See also *Wheeler v. Le Marchant* (L. R., 17 Ch. D., 675). *Anderson v. Bank of British Columbia* (L. R., 2 Ch. D., 644).

The Advocate-General (Mr. G. C. Paul) for the Defendant contended that the letters were privileged—*Southwark Water Co v Quick* [L. R., 3 Q. B. D., 315 (323)].

Pigot, J.—I think the question in issue in this matter is more as to what is to be gathered from a fair construction of the words in the affidavit of Major Thomas, than any question of law at issue between the parties.

The case of *Southwark, &c, Water Co v. Quick* [L. R., 3 Q. B. D., 315 (323)] is relied on by the Advocate-General for the defendant, and also by Mr. Hill for the plaintiff.

I construe the affidavit thus.—The letters of which production is sought, were a letter by Major Thomas to Major Hallett, and Major Hallett's reply to it; the first being a letter written for the purpose of giving Major Hallett information with a view to possible future litigation. It does not appear that it, or the reply to it, was written for the purpose of being communicated to any solicitor. It is consistent with the terms of the affidavit that both letters were written without such a purpose, but that they were of such a nature, that they might, in the event of litigation, be communicated to a solicitor. This does not show enough to entitle the documents to protection. It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor; that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him to prosecute or defend an action, as COTTON, L. J., at page 322, or as BRETT, L. J., at p. 320, in [658] the case of the *Southwark and Vauxhall Water Co. v. Quick*, says (modifying the words of MELLISH, L. J., in *Anderson*

v. *Bank of British Columbia*), "merely for the purpose of being laid before the solicitor for his advice or consideration."

I think the affidavit does not show that these letters were written for the purpose—which I think means substantially "merely" for the purpose—of being communicated to the solicitor. It does not say that Major Thomas' letter was addressed to Major Hallett in order that it might be submitted to the solicitor of the Government, but that "all such information"—an ambiguous phrase as it is here used—should be submitted to him.

Nor would it, I think, be enough to protect these letters, if they were written with a view to possible future litigation, and with the intention that, in that case, they should be laid before a solicitor.

I think the plaintiff is entitled to the discovery sought with regard to the letters mentioned in paras 4 and 5 of Major Thomas' affidavit.

NOTES.

[See also (1890) 15 Bom., 7, 6 Bom., L. R., 131, (1905) 7 Bom., L. R., 709, (1894) 22 Cal., 105.]

[11 Cal. 658]

APPELLATE CIVIL

The 22nd May, 1885

PRESENT

MR JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Satish Chunder Rai Chowdhuri and another. Judgment-debtors

versus

Thomas and another Decree-holders.

Sale in execution of decree—Setting aside sale—Irregularity and injury—Civil Procedure Code, Act XIV of 1852, s. 311

Where an application is made to set aside a sale in execution of a decree on the ground of irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former, in the absence of evidence to show that the injury is the result of the irregularity.

Macnaghten v. Mahabir Pershad Singh (L. L. R., 9 Cal., 656, L. R., 10 1 A., 25) and *Lala Mobarak Lal v. Secretary of State for India in Council* (L. L. R., 11 Cal., 200) discussed.

THIS was an application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree on the ground [659] of irregularity. The application was made by the judgment-debtors (other than those who were minors) against Thomas, the decree-holder, and against the purchaser, Hem Chunder Chowdhry.

It appeared that the sale was fixed for the 20th of May 1884. On that day the judgment-debtors applied for a postponement, and the sale was postponed till the 26th of May 1884. On the latter date they had the sale again postponed till the 2nd of June 1884, on which day the property was sold. No proclamation of sale was issued except for the 20th of May 1884.

* Appeal from Order No. 7 of 1885, against the order of Baboo Parbatī Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 17th of September 1884.

The lower Court found that no irregularity had taken place ; that no fresh proclamation of sale was necessary under s. 291 of the Civil Procedure Code ; and that no damage had resulted to the judgment-debtor as the property had fetched an adequate price.

The minor judgment-debtors, who alleged that they had nothing to do with the postponement of the sale, appealed to the High Court.

Mr. H. Bell and Baboo Doorga Mohun Doss for the Appellant.

Baboo Srinath Doss for the Respondent.

The Judgment of the Court was delivered by

Field, J.—This is an appeal against the order of the Subordinate Judge of Mymensingh, refusing to set aside a sale on the grounds that there was irregularity in publishing or conducting such sale, and that the applicants had sustained substantial injury by reason of such irregularity.

The Judge in the Court below has found that there was no substantial injury proved in the case, nor was there any irregularity in publishing or conducting the sale. He did not enter into the question, whether, assuming that injury and irregularity had been proved, such injury was by reason of such irregularity.

It had been contended before us by the learned counsel for the appellants that there was irregularity. The judgment-debtors, appellants before us, are minors ; and the irregularity alleged is this. The sale was originally fixed for the 20th May 1884. On that date, an application was made by certain of the judgment-debtors (other than the minors, who are appellants before us) for [660] a postponement, which was granted to the 26th May. On this latter date the judgment-debtors again applied for a postponement, which was granted to 2nd June 1884. It is said that these postponements made a postponement of more than seven days, being, as a matter of fact, a postponement of twelve days, and that the subsequent sale without a fresh proclamation was a violation of the provisions of s. 291 of the Code of Civil Procedure. I should be disposed to agree with this contention and to say that there was an irregularity so far as regards the minors who were not parties to the applications for postponement. Then, is there evidence of substantial injury ? The Court below has found that substantial injury has not been proved. The evidence on this point has been read out and pressed upon us in order to induce us to come to a different conclusion, but I am not prepared to do so. But assuming that irregularity and injury have been proved, it is admitted that there is not evidence to prove that the injury was in consequence of, or by reason of, the irregularity. The case falls within the principle laid down in the case of *Macnaghten v. Mahabir Pershad Singh* (I. L. R., 9 Cal., 656, L. R., 10 I. A., 25). In that case their Lordships of the Privy Council said : "The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say "But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price. There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale." The effect of this decision of the Privy Council has since been twice considered by this Court, first, in the case of *Tripura Sundari v. Durga Churn Pal* (I. L. R., 11 Cal., 74), and again in the Full Bench case of *Lala Mobaruk Lal v. The Secretary of State for India in Council*

(I. L. R., 11 Cal., 200). In the latter case, [661] it was the opinion of the majority of the Court that their Lordships of the Privy Council did not intend to lay down any positive rule applicable to all cases. By this we understand it to be meant that their Lordships of the Privy Council did not intend to lay down any positive rule as to what may or may not be evidence of cause and effect in all cases, though they did lay down that in the absence of all evidence proved, injury cannot be presumed to be by reason of proved irregularity. There may be cases in which a reasonable presumption arising from proved facts or created by law would be good evidence that the injury was the result of the irregularity. Such cases would not be affected by the Privy Council decision, the effect of which, as we understand the meaning of their Lordships of the Privy Council, is this that there must be some evidence, and that in the absence of evidence to show that the injury is the result of the irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter has occurred by reason of the former.

In this case, assuming the irregularity and injury to have been proved there is no evidence that the latter is the result of the former.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This was followed in (1891) 18 Cal , 496 (499) , see (1901) 6 C. W. N. , 44 (publication of sale proclamation) , also see the Notes to 11 Cal . 200 *supra*]

[11 Cal 661]

APPELLATE CIVIL

The 18th June, 1885

PRESENT

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Gungaram Ghose Sirdar..... ..Plaintiff

versus

Kalipodo Ghose.... ..One of the defendants

Registration Act (III of 1877, s 50)—Registration Act (XVI of 1864)—

Registration, optional and compulsory—Unregistered document of which registration was optional under Act XVI of 1864.

Held, in the case of a document executed while Act XVI of 1864 was in force, the registration of which under that Act was optional and which was not registered thereunder, and of a document executed after Act III of 1877 had come into force, the registration of which was compulsory and [662] which was duly registered, both documents relating to the same property, that under the provisions of s 50 of Act III of 1877 the registered document took effect as regards such property against the unregistered document.

Held, also, that all that a person seeking the benefit of s. 50 of Act III of 1877 is required to prove is that his document is a document of the kind mentioned in the first clause of that section ; that it has been duly registered under that Act , and that it covers the same pro-

* Appeal from Appellate Decree No 3028 of 1883, against the decree of Baboo Baloram Mullick, Second Subordinate Judge of 24-Pergunnahs, dated the 21st of September 1883, reversing the decree of Baboo Aswini Coomar Guho, Second Munsif of Baraset, dated the 20th of January 1883.

perty as that covered by any unregistered document against which it is contended that his document shall take effect, and it is not necessary for him to show that he is claiming from a vendor common to both himself and the person claiming under the unregistered document.

Lachman Das v. Dyp Chand (I. L. R., 2 All., 851), and *Shib Chundra Chuckerbutty v. Joha Bux* (I. L. R., 7 Cal., 570; 9 C. L. R., 224) referred to and followed

IN this case there were six defendants, viz., No. 1 Kalipodo Ghose, No. 2 Mya Chand Ghose Sirdar, No. 3 Gunga Ram Ghose Sirdar, No. 4 Bholanath Ghose Sirdar, No. 5 Durga Ram Ghose Sirdar and No. 6 Bhubun Mohun Ghose. The plaintiff sued to set aside a *kut-kobala* or mortgage by conditional sale dated the 5th Assin 1272 B. S. (20th September 1865) which was alleged to have been executed by Mya Chand Ghose in favour of Kalipodo Ghose, and he charged that it was a forgery and had been fraudulently got up by all the defendants with a view to defeat his title to the lands, the subject matter of the suit.

The plaintiff's case was that the property covered by the deed originally belonged to one Kasamuddi who, on the 1st Bhadro 1272 (16th August 1865), sold it to Mya Chand Ghose, defendant No. 2. Subsequently defendant No. 2 sold 12 annas of the property to defendants Nos. 3, 4 and 5 by a registered, *kobala* dated the 9th Assar 1274 (22nd June 1867), and by another registered *kobala* he sold the remaining 4 annas to defendant No. 4.

On the 3rd Bhadro 1281 (18th August 1874) the defendants Nos. 3, 4, and 5 sold the property by a registered *kobala* to defendant No. 6, who in his turn on the 16th July 1878 sold it to the plaintiff by a registered deed in consideration of a loan of Rs 300, and an agreement by the plaintiff to reconvey the property on repayment of the loan. Subsequently the plaintiff advanced a further sum of Rs 200 to the defendant No. 6, and in [663] consideration of the aggregate sum of Rs 500 the defendant No. 6 executed an unconditional sale deed in favour of the plaintiff on the 17th Pous 1287 (31st December 1880) which was duly registered under the provisions of Act III of 1877.

The plaintiff further alleged that on the 28th April 1882 the defendant No. 1, Kalipodo Ghose, filed before the District Judge an application for foreclosure of the *Kut-kobala*, dated the 5th Assin 1272 (20th September 1865) purporting to have been executed by the defendant No. 2 in his favour, and caused the usual notice to be served on him. He therefore brought this suit, alleging that document to be spurious and collusive, and contended that, as it was unregistered, it could not affect his title, and he prayed to have it declared that it was a spurious and collusive document, that his title was unaffected by it, that the property was not subject to the charge it purported to create, and that the first defendant could not proceed with his foreclosure proceedings. The first defendant alone appeared and contested the suit. He alleged that the sale to the plaintiff was not a *bonâ fide* transaction, and stated that his *kut-kobala* was a genuine document, and that there was no necessity for its registration, inasmuch as the amount advanced upon it was less than Rs. 100. He also took other legal objections to the suit being maintainable, which are immaterial for the purpose of this report.

In his application for foreclosure it appeared that the defendant No. 1 alleged Rs. 61 to be due to him as principal and Rs. 365-15-10 as interest under his conditional sale.

The Munsif came to the conclusion that the plaintiff had proved his title as alleged in his plaint, and held that the *kut-kobala* of the 20th September 1865, under which the defendant No. 1 claimed, was not a genuine document. He accordingly gave the plaintiff a decree.

Upon appeal the Subordinate Judge reversed the Munsif's findings as to the genuineness of the defendant's *kut-kobala*, but upheld his decision as to the plaintiff's title. Upon these findings, and without going into the question as to whether the plaintiff was still entitled to succeed, inasmuch as the *kut-kobala* of the defendant No. 2 was not registered, he reversed the Munsif's decree and dismissed the suit with costs.

[664] The plaintiff now brought a special appeal to the High Court upon the ground, amongst others, that his deed being registered, and the defendant's unregistered, the defendant had no right to enforce his lien as against him, and that his title was paramount to that of the defendant.

Baboo *Bhobani Charn Dutt* for the Appellant

Baboo *Boudonath Dutt* and Baboo *Bachram Ghose* for the Respondent.

The **Judgment** of the High Court (MITTER and NORRIS, JJ) was as follows:—

The plaintiff brought this suit to recover possession of the property in dispute under a bill of sale executed by defendant No 6 on the 3rd Bhadro 1281. He was evicted by the defendant No. 1, who claimed a right in the property in dispute under a conditional bill of sale by the defendant No. 2 in the month of September 1865

It is not disputed that the property in suit became the property of one Kasamuddi by purchase on the 27th May 1865. Kasamuddi sold it to defendant No 2 in the month of August of the same year, and, a few months later, that is to say, in the month of September, defendant No 2 executed the conditional bill of sale in favour of the defendant No 1, the respondent before us.

After having executed this conditional bill of sale, defendant No 2, in the month of June 1867, sold the property in dispute to defendants Nos. 3, 4, and 5, and these defendants, in August 1874, sold it to the defendant No 6, the immediate vendor of the plaintiff appellant.

The Munsif decreed the plaintiff's suit being of opinion that the conditional bill of sale of September 1865 upon which the defendant, respondent, relied, was not a genuine instrument. The Munsif found that the plaintiff's title as set out above was established to his satisfaction.

On appeal the Subordinate Judge has upheld the finding of the Munsif as regards the plaintiff's title, but he has come to a conclusion different from that of the Munsif as regards the conditional bill of sale in favour of the defendant, respondent. The Subordinate Judge is of opinion that the aforesaid document [665] has been proved to his satisfaction. Having come to these conclusions he has dismissed the plaintiff's suit, inasmuch as the conditional bill of sale of the defendant No. 1 is of prior date to the conveyance in favour of the defendants 3, 4 and 5.

In this second appeal the only point that has been urged before us is that under s. 50 of the Registration Act of 1877, the plaintiff's conveyance must take effect against the conditional bill of sale of the month of September 1865 which is unregistered.

It has been held by a Full Bench of the Allahabad High Court in *Lachman Das v. Dip Chand* (I. L. R., 2 All., 851) that "in the case of a document executed while Act VIII of 1871 was in force, the registration of which under that Act was optional, and which was not registered thereunder, and of a document executed after Act III of 1877 had come into force, the registration of which under that Act was compulsory, and which was registered thereunder, both documents relating to the same property, under the provisions of s. 50 of

Act III of 1877, the registered document took effect as regards such property against the unregistered document, the provisions of s. 6 of Act I of 1868 notwithstanding."

This case has been followed by this Court in *Shub Chandra Chuckerbutty v. Joha Bux* (I. L. R., 7 Cal., 570 ; 9 C. L. R., 224). Now, the only difference between the case before us and the case before the Allahabad High Court is, that in the former the unregistered document was executed at a time when the Registration Act of 1871 was in force ; while in the case before us the unregistered document was executed when Act XVI of 1864 was in operation. But that is a non-essential difference because, according to the explanation to s. 50 of Act III of 1877, "cases where Act XVI of 1864 or Act XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, 'unregistered' means not registered according to such Act, and, where the document is executed after the first day of July 1871, not registered under Act VIII of 1871 or this Act." In this case therefore the defendant's mortgage deed having been executed when Act XVI of 1864 was in operation, the document in question is an "unregis-[666]tered document" within the meaning of s. 50 of Act III of 1877. No doubt, the words, "if duly registered" means registered under the Act of 1877, and, in this case, the plaintiff's document was registered under that Act. It is therefore quite clear that under s. 50, the plaintiff's *kobala* must take effect against the unregistered document of the defendant No. 1.

In the course of the argument a doubt arose in our minds whether s. 50 would entitle the plaintiff to a decree in this case against the defendant No. 1, because the plaintiff is not claiming directly from the same vendor. From the facts of the case given at the outset of the judgment, it is clear that the plaintiff is claiming directly from defendant No. 6 who was the purchaser of this property from defendants Nos. 3, 4 and 5, and they purchased it from defendant No. 2. The document in favour of defendant No. 1 was executed by defendant No. 2.

But we do not think that under s. 50 it is necessary for a person who seeks the benefit of it to show that he is claiming from a common vendor. The section does not say so. All that it says is, that "every document of the kind mentioned in clauses (a), (b), (c) and (d) of section 17, and clauses (a) and (b) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property." All that a person seeking the benefit of this section is required to prove is that his document is a document of the kind mentioned in the clause aforesaid, that it has been duly registered under the Act of 1877, and that it covers the same property as that covered by any unregistered document against which it is contended that his document shall take effect.

We therefore set aside the judgment of the lower Appellate Court, and restore that of the Court of First Instance with costs in all the Courts.

Appeal allowed.

• NOTES.

[An unregistered instrument whenever it may have been executed gives way to a document registered under the Act of 1877. —11 Cal., 661 ; (1913) 18 I. C., 724 (All.) ; 20 Bom., 158 ; see also 27 Bom., 452]

[667] APPELLATE CIVIL.

The 19th June, 1885

PRESENT :

Mr. JUSTICE PRINSEP AND MR. JUSTICE GRANT.

Bhalu Roy and others.....Defendants

versus

Jakhu Roy.....Plaintiff.*

Registration Act (III of 1877), s 50—Priority of unregistered mortgage over subsequent registered sale—Notice of prior conveyance.

It is only where notice of a prior conveyance, of which registration is not compulsory, is so clearly proved as to make it fraudulent on the part of a subsequent purchaser to take and register a conveyance in prejudice to the known title of another that the Courts will suffer the registered deed to be affected

Where, therefore, a defendant holding an unregistered mortgage of certain property, dated the 23rd March 1867, which was not compulsorily registrable, had obtained a decree thereon on the 4th January 1881; and the plaintiff holding an absolute deed of sale of the same property, duly registered and dated the 22nd June 1880, and having had notice of the mortgage claimed absolute possession of the property, irrespective of the mortgage,

Held, that the plaintiff's purchase was subject to the mortgage of which he had had notice, and that the plaintiff's suit to declare his absolute title to the property must be dismissed.

THE plaintiff, one Jakhu Roy, alleged that on the 3rd Chait 1274 F.S. (23rd March 1867) one Bhalu Roy executed a mortgage bond in his favour, charging certain lands in mouzah Bhaukat for an advance made, that after executing this mortgage Bhalu Roy disappeared and was missing for some years, that during this last-mentioned period, one Jabut Singh put forward an unregistered mortgage bond, dated the 1st Sawan 1272 F.S. (9th July 1865) said to have been executed by Bhalu Roy in his (Jabut's) favour, mortgaging the same property as that contained in the mortgage dated the 3rd Chait 1274 (23rd March 1867), and that Jabut Singh brought a suit on his mortgage bond against the wife and mother of Bhalu Singh, and on the 9th January 1872 obtained a decree thereon

The plaintiff further alleged that he thereupon brought a suit to have the mortgage bond of the 1st Sawan 1272 (9th July 1865), and the decree obtained thereon set aside, in which suit the Court, on the 25th July 1872, held that in the absence of Bhalu Roy the genuineness of the mortgage could not be properly determined [668] upon, and declared the decree of the 9th January 1872 obtained by Jabut Singh, in the absence of Bhalu Roy, to be void. That on the return of Bhalu Roy, Bhalu executed in his (Jakhu Roy's) favour a *kobala* of the property formerly mortgaged, which deed was duly registered, being dated the 30th Joist 1287 F.S. (22nd June 1880) and reciting the mortgage of the 3rd Chait 1274 (23rd March 1867), that in December 1880 the sons and heirs of Jabut Singh brought a fresh suit against Bhalu Roy (in which suit Jakhu Roy was no

* Appeal from Appellate Decree, No. 791 of 1884, against the decree of Baboo Kailash Chundra Mukerji, First Subordinate Judge of Shahabad, dated the 21st of February 1884, reversing the decree of Moulvie Abdul Aziz, Third Munsiff of Arrah, dated 8th of September 1882.

party) on the mortgage of the 1st Sawan 1272 (9th July 1865) and on the 4th January 1881 obtained a decree thereon; that in execution of this last decree the property was attached, and that a claim was filed objecting to this attachment by Jakhu Roy which was rejected on the 6th August 1881, and that thereupon he (Jakhu Roy) brought this present suit against Bhalu Roy and the heirs of Jabut Singh for the following purposes.—

(1) For a declaration that the mortgage bond of the 1st Sawan 1272 F. S. (9th July 1865) was spurious, and that no valid charge could be created on the land mentioned therein by the decree of the 4th January 1881;

(2) That the possession of Jakhu Roy under the deed of sale, dated the 30th Joist 1287 F. S. (22nd June 1880) might be confirmed,

(3) That the land covered by such deed of sale might be protected from sale in execution of the decree of the 4th January 1881, and

(4) That the order attaching this property, dated the 6th August 1881, might be set aside

The defendant denied the plaintiff's title and the genuineness of the deeds produced by him.

The Munsif found that the defendants' mortgage, dated the 1st Sawan 1272 (9th July 1865) and the *kobala* of the plaintiff, were both genuine documents, but that the plaintiff's mortgage of the 3rd Chait 1274 (23rd March 1867) had not been proved, and held that the defendants' mortgage bond, being earlier in point of time than the plaintiff's *kobala*, must prevail, he therefore dismissed the plaintiff's suit.

[669] The plaintiff appealed to the Subordinate Judge, who agreed with the findings of the Munsif, but further found, mainly from the recital in the *kobala*, that the plaintiff had previously been in possession of the land, and held that, as the plaintiff's *kobala* was registered, and as he had no notice of the defendant's mortgage, the *kobala* must prevail over the defendants' unregistered mortgage. he, therefore, set aside the order of the 6th August 1881, and confirmed the plaintiff's possession of the land, giving him a decree with costs.

The defendants appealed to the High Court

Mr. C. Gregory and Baboo Abinash Chunder Banerji, for the Appellants, contended that the plaintiff's purchase, being made subsequently to the suit and decree of the 9th January 1872, and the suit and decree of the 25th July 1872, was a purchase *pendente lite*, and therefore void, that he had purchased with notice of the defendants' mortgage; that it was not compulsory on the defendant to register his mortgage, and that at most the plaintiff's purchase was one subject to the mortgage; and that the recital in the *kobala* as to the plaintiff's previous possession was no evidence against the defendants.

Baboo Mohesh Chander Chowdhry for the Respondent

The Judgment of the Court (PRINSEP and GRANT, JJ) was as follows —

In execution of a decree obtained by a mortgagee, the plaintiff intervened stating that he was in possession of the mortgaged property by virtue of a registered deed of sale executed by the mortgagor, and that he was entitled to priority as against the previous unregistered mortgage held by the decree-holder. His claim has been disallowed, and accordingly the present suit has been brought.

It cannot be disputed that at the time the plaintiff purchased from the mortgagor, he had notice of the previously existing mortgage under an unregistered deed, because some eight years previously the plaintiff unsuccessfully sued to have this very mortgage set aside on the ground that it was a forged deed. No doubt, the terms of the Registration Act declare that a duly registered

deed relating to immoveable property, and not of certain excepted kinds, shall take effect as regards the property [670] comprised therein against every unregistered document relating to the same property and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. Now, the mortgage in the present case, though unregistered, was a perfectly valid deed, as registration was not compulsory. The question, therefore, remains whether we are bound to interpret the terms of s. 50 of the Registration Act strictly, even though, by doing so, we shall be enabling the holder of the registered document to perpetrate a fraud as against a person who, under ordinary circumstances, would hold a perfectly valid title. The same question has been considered and determined by the Courts in England and Ireland with regard to Registration Acts, the terms of which are as stringent as those of Act III of 1877, s. 50. In *Wyatt v. Barwell* (19 Ves. 439) the Master of the Rolls expressed himself thus "It has been much doubted whether Courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance, but they have said, 'We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we shall suffer the registered deed to be affected,'" and this principle has been recognised in many other cases (see *Tudor's Leading Cases*, vol II, p. 48). We are accordingly of opinion that plaintiff purchased subject to the unregistered mortgage held by the defendant of which he had notice, and that therefore the present suit to declare his absolute title must be dismissed. The judgment of the lower Appellate Court is set aside, and that of the first Court restored. The defendant will be entitled to costs in this and the lower Appellate Court.

Appeal allowed.

NOTES.

[Upon this point of priority being defeated by notice all the Courts are in agreement—13 Cal 70 (72), 8 All 540 (542), 16 Mad 148, 27 Bom 452, 6 C P L R. 112]

[671] APPELLATE CIVIL

The 23rd June, 1885.

PRESENT

SIR RICHARD GARTH, KT, CHIEF JUSTICE AND MR. JUSTICE GHOSE.

Jhabar MahomedPlaintiff

versus

Modan SonaharDefendant

Civil Procedure Code (Act XIV of 1882), ss 257a, 258—Adjustment of decree out of Court—Instalment bond—Consideration.

The provisions of s. 257a† of Act XIV of 1882 are intended to prevent binding agreements between judgment-debtors and judgment-creditors for extending the time for enforcing

* Small Cause Court Reference No 24 of 1885, made by Babop Jagabandhu Gangooly, Judge of the Court of Small Causes, Dinagepore, dated the 24th of April 1885.

†[Sec. 257 A —Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable

Agreement to give time to judgment-debt.

Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.]

Agreement for satisfaction of judgment-debt.

decrees by execution, without consideration and without the sanction of the Court; and are not intended to prevent the parties from entering into a fresh contract for the payment of the judgment-debt by instalments or otherwise.

THIS was a reference under s. 617 of the Civil Procedure Code made by the Judge of the Court of Small Causes at Dinapore.

It appeared from the proceedings that the plaintiff had some time in 1881 obtained a decree against the defendant, in execution of which the latter was arrested and brought up before the Court. On the 9th February 1882, a compromise was, however, effected between the parties out of Court, by which it was arranged that the defendant judgment-debtor should execute an instalment bond to the effect that, should he make default in payment of any instalment payable under the bond, the whole amount of the bond should become payable with interest. This instalment bond was duly executed, but the fact of the decree having been satisfied was not certified to the Court. The defendant, however, failed to pay an instalment at the due date, and the plaintiff, therefore, brought this present suit to recover the sum due under the bond. The defendant did not appear; the Judge of the Small Cause Court in deciding the case stated that the questions for his consideration were whether the plaintiff could recover under the bond, satisfaction of the judgment-debt not having been certified to the Court; and whether the failure to pay a judgment-debt was a valid consideration for the bond. On these points, after considering the following cases—*Pandurang Ramchandra Chowghule v. Narayan* (I.L.R., 8 Bom., 300), *Ganesh Shivram v. Abdullabeg* (I.L.R., 8 Bom., 538); *Davlatsing v. Pandu* (I.L.R., 9 Bom., 176); [672] and *Poromanand Khasnabish v. Khepoo Paramanick* (I. L. R., 10 Cal., 354)—he came to the following conclusions:—(1) that an agreement made under s. 257a of the Civil Procedure Code without the sanction of the Court, or an adjustment uncertified to the Court under s. 258, was invalid, (2), that there was nothing in s. 257a or 258 which would prevent plaintiff from bringing a suit on such an agreement or adjustment, (3) that non-satisfaction of a judgment debt for which a bond had been executed was a valid consideration for such bond; he, therefore, gave the plaintiff a decree contingent on the opinion of the High Court on the following questions.—(1), whether s. 257a of the Civil Procedure Code would bar the institution of a separate suit on the instalment bond, the bond not having been executed with the sanction of the Court, and (2) whether non-satisfaction of the judgment debt, for which the said bond had been executed, constituted a valid consideration for the bond?

No one appeared on the reference for either party.

The **Opinion** of the High Court (GARTH, C.J., and GHOSE, J.) was as follows:—

In our opinion the instalment bond, upon which this suit is brought, is not “an agreement to give time for the satisfaction of a judgment-debt,” within the meaning of s. 257a of the Code.

We agree with the Allahabad High Court, that the provisions of that section are only intended to prevent any binding agreements between judgment-debtors and judgment-creditors for extending the time for *enforcing decrees by execution* without consideration, and without the sanction of the Court.

Those provisions are not intended to prevent the parties from entering into a fresh contract for the payment of the judgment debt by instalments or in any other way; and any such fresh contract of course could only be enforced by a fresh suit.

We cannot agree with the view which the Bombay High Court has taken of this question, and we think that the law as laid down by the Full Bench of the Calcutta High Court, *viz.*, *Guman Das v. Prankishori Das* (5 B. L. R., 223) virtually remains unaltered.

NOTES.

[In the C. P. C., 1908, there is no provision corresponding to sec. 257 A of the C. P. C., 1882, as to the construction of which there had been difference of opinion, some Courts treating such agreements altogether unenforceable while the other Courts did not give effect to them only so far as they were set up as a bar to execution of the decree.—

Bombay.—27 Bom., 96, 22 Bom., 693, 21 Bom., 808, 16 Bom., 618, 15 Bom., 419, 11 Bom., 6; *contra* 25 Bom., 252.

Calcutta —35 Cal., 870 7 C.L.J., 543; 20 Cal., 32, 16 Cal., 504.

Madras —17 Mad., 382, 2 M.L.J., 221, 12 Mad., 61, *contra* 26 Mad., 19.

Allahabad.—25 All., 317 23 A.W.N. 45.

Oudh.—4 O.C. 284

Punjab—61 P.L.R., 1907 71 P.W.R., 1907 overruling 88 P.R., 1904.

Burma.—L.B.R. (1872-1892) Vol. I, 644 (645)]

[673] APPELLATE CIVIL.

The 11th June, 1885

PRESENT

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BEVERLEY.

Gend Lall Tewari and another.Plaintiffs

versus

Denonath Ram Tewari and othersSome of the Defendants.*

Civil Procedure Code (Act VIII of 1859), s. 246—Civil Procedure Code (Act XIV of 1882), ss. 281, 283—Limitation Act (XV of 1877), Sch. II, art. 11

—Limitation—Act (IX of 1871), Sch. II, art. 15—

Suit for possession—Estoppel.

In certain execution proceedings land was attached, but before the sale the judgment-debtors with the permission of the Court, sold the land to the plaintiffs. Previous to this sale, certain persons had come forward in the execution proceedings, and had claimed the land as having been sold to them by the father of the judgment-debtors, this claim was disallowed in

* Appeal from Appellate Decree No 2501 of 1883, against the decree of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 12th of July 1883, reversing the decree of Baboo Sadanand, Munsif of Hazaribagh, dated the 27th of June 1882.

November 1876. In 1881 the plaintiffs, alleging that they had been dispossessed by certain persons, amongst whom were the claimants in the execution proceedings, brought a suit to recover possession of this land against these persons the suit was decided against the plaintiffs in the lower Appellate Court, on the ground that they had failed to prove that they had been in possession of the land 12 years before suit

On appeal to the High Court the plaintiffs, appellants, contended that the claim of the defendants in the execution proceedings having been rejected, and they not having brought a regular suit within one year from the order of rejection to establish their right to possession, the defendants were prevented by that order from contending that the plaintiffs had not been in possession at the time of that order

Held, that the order did not operate as an estoppel against the defendants; and even if it could so operate, it would not do so until the time had run out, within which they could have brought a suit to establish their right to possession, and that such time had not expired.

THIS was a suit to recover possession of 38 bighas of land, from which the plaintiffs alleged they had been dispossessed, and for a certain sum for mesne profits.

The plaintiffs stated that a four-anna share in Mouzah Phulwaria originally belonged to Tika Ram Tewari and Janki Ram Tewari (defendants 14 and 15); and that in execution of a decree obtained in 1876 by Denonath Ram Dobey against these persons, this four-anna share in Mouzah Phulwaria was attached and directed to be sold, that previously to the sale taking place the judgment-[674] debtor (having obtained the leave of the Court under s. 305 of Act X of 1877), sold on the 16th August 1878 to the present plaintiffs the four-anna share in this mouzah and put them in possession thereof, that previous to this sale, and at a time when the property was attached, certain persons, defendants 1 to 11, and defendants 12 and 13, had filed objections to the attachment, alleging that parts of the land attached belonged to them, having been sold to them by the plaintiffs' vendor's father, these objections were, however, disallowed on the 23rd November 1876, and no suit was brought by them to establish their right to possession within one year from this order; that on the 15th Assar 1937 Sumbut the plaintiffs went to the mouzah for the purpose of making settlements with their tenants, but were opposed by the defendants 1 to 13, and forcibly dispossessed by them. The plaintiffs, therefore, brought this suit to recover possession.

The defendants put in the same defence to the suit as they had brought forward in the execution case, and their evidence being disbelieved, the Munsif gave the plaintiffs a decree for possession. Defendants 1 to 6 appealed to the Subordinate Judge, and the main point discussed was that of the onus of proof; the defendants contending that it was for the plaintiffs to prove their possession or the possession of their vendors within 12 years immediately preceding the suit. whilst the plaintiffs, respondents, contended that, as the defendants admitted the title of the plaintiffs' vendors, it was for the defendants to prove their right to the land, and that assuming the plaintiffs failed to show their possession within 12 years, yet they were still entitled to succeed, inasmuch as the claim made by the defendants in the execution proceeding, had been disallowed, and no suit had been brought by them within one year from that date. The Subordinate Judge held that the onus was on the plaintiffs, and that they had failed to show that they or their vendors had ever been in possession, the defendants having been in possession when the plaintiffs came to settle the lands, and that the fact that the defendants had not brought a regular suit within one year from the rejection of their claim in the execution department, would not relieve the plaintiffs from the onus of proof of possession; he therefore reversed the decision of the Munsif.

[678] The plaintiffs appealed to the High Court on the ground that the claim of the defendants having been rejected in the execution department, and they having brought no regular suit for possession within one year from that order rejecting their claim, the Court should have held that the plaintiffs' vendors had been in possession of the property in 1876, and that the defendants were debarred by the order of the 23rd November 1876 from contending that the plaintiffs were not then in possession.

Mr. *Amir Ali* and Baboo *Taraknath Sen*, for the Appellants, in support of the contention cited the case of *Krishnaji Vithal v. Bhaskar Rangnath* (I. L. R., 4 Bom., 611).

Mr. *Sandel* and Baboo *Jogendra Chunder Ghose* for the Respondents.

The Judgment of the Court (GARTH, C. J., and BEVERLEY, J.) was as follows:—

This was a suit brought by the plaintiffs to recover possession of certain lands, which, on the 16th of August 1878, they had purchased from the defendants 14 and 15.

In the first Court they obtained a decree, but on appeal to the Judicial Commissioner, he held that neither the plaintiffs, nor those under whom they claimed, had been in possession of the land in question within 12 years before suit. For this reason the suit was dismissed.

On appeal to this Court it has been contended that the lower Appellate Court was wrong upon this ground.

In the year 1876, before the plaintiffs' purchase, one Denonath Ram Dobey obtained a decree against the defendants 14 and 15, and under that decree attached in execution the lands which are now in dispute, as being the property of those defendants. Upon this, the defendants 1 to 13, claiming the lands as their own, objected in the execution proceedings under s. 246 of the Procedure Code of 1859, that the lands should be released from attachment. That claim was heard and rejected.

After this, in the year 1878, by permission of the Court, the lands attached were sold by the present defendants, 14 and 15, (the judgment-debtors in the former suit) to the plaintiffs in this suit. Nothing further was done by the present defendants 1 [676] to 13 to prevent the sale to the plaintiffs, nor to renew their claim to the attached property.

Under these circumstances the present plaintiffs contend that, as between them and the defendants 1 to 13, the order which was made in the execution proceedings in 1876 debars those defendants from contending that the defendants 14 and 15 were not in possession of the lands in question at the time when the order was made. It is said that, having regard to the terms of s. 246, the claim of the defendants 1 to 13 would not have been disallowed, unless it had been found by the Court that the lands attached were in the possession of the judgment-debtors, and that whatever the form of the order may have been, it could but have had that meaning; and as the defendants 1 to 13 did not bring any suit to establish their right within a year from the date of the order, the effect of it cannot be disputed now.

In support of this contention we have been referred to several authorities, and, amongst others, to a case of *Krishnaji Vithal v. Bhaskar Rangnath* (I. L. R., 4 Bom., 611). In that case one V had obtained a decree against Waman and had attached certain lands as being Waman's property. In this state of things Waman's five brothers applied to remove the attachment under s. 246 of the Code. Their application was rejected on the 24th of July 1875, and the property was sold by the Court to K on the 17th of February 1876.

Waman's brothers (the plaintiffs) then brought the suit on the 17th of March 1877, against V and K (the judgment-creditor and the auction-purchaser) claiming the lands as the ancestral property of themselves and their brother (the judgment-debtor in the former suit), and praying that they should be confirmed in possession of their shares of the property, inasmuch as it was not liable to be sold in execution for their brother's private debts.

The Subordinate Judge held that their suit not having been brought within one year from the date of the order of the 24th of July 1875, was barred by art. 15 of the Limitation Act of 1871, which imposes a limitation of one year upon suits to set aside an order of a Civil Court in any proceeding other than a suit.

[677] The District Judge on appeal held that the suit was not brought to set aside the order of 1875, but the sale of the property, which took place in 1876, and as that sale was not confirmed within one year before the suit was brought, he considered that the suit was not barred, and ordered it to be tried on the merits.

The case was then appealed to the High Court, and it was held by the Chief Justice and Mr. Justice MELVILL, [in accordance with other cases decided in the Bombay Court, and with *Settiappan v. Sarat Singh* (3 Mad. H. C., 220)] that the effect of the last clause of s. 246 of the old Code of 1859, was to exclude a party to an investigation under that section from any other remedy than the one thereby provided for him, namely, a regular suit to be brought to establish his right within a year of the time when the order is made against him in the execution proceedings.

The same Court also considered that the Subordinate Judge was right as to the period of limitation for such a suit, although by the Limitation Act of 1871, the last clause of s. 246 was repealed, they held that art. 15, relating to suits *to set aside an order of a Civil Court*, was substituted for the special limitation in s. 246, which had been repealed, and consequently that any suit by a party defeated in the execution proceedings "*to establish his right*" must be brought within a year from the date of the order.

The result of this decision, and of others to the same effect, seems to be that any suit of any description, which may be brought by any party to execution proceedings under s. 246 of the Civil Procedure Code of 1859 "*to establish his right*," must of necessity be a suit "*to set aside an order*" within the meaning of art. 15 of the Limitation Act of 1871.

This view of the law is opposed to a long series of reported cases in this Court, which have decided that a suit brought by a party defeated in execution proceedings under s. 246 of the old Code, is not a suit, or at any rate, not necessarily a suit to set aside "an order of a Court" within the meaning of art. 15 of the Limitation Act of 1871, and that the proper period of limitation in such case depended upon the real nature of the suit itself, as provided for by other articles in the Limitation [678] Act. See *Koylash Chunder Paul Chowdhry v. Preo Nath Roy Chowdhry* (I. L. R., 4 Cal., 610); *Luchmi Narain Singh v. Assrup Koer* (I. L. R., 9 Cal., 43); *Gopal Chunder Mitter v. Mohesh Chunder Borul* (I. L. R., 9 Cal., 230; 11 C. L. R., 363); *Bessessur Bhugut v. Murli Sahu* (I. L. R., 9 Cal., 163; 11 C. L. R., 409); and *Brajomohun Bhutto v. Radika Prosunno Chunder* (13 C. L. R., 139). We are of course bound by these authorities here, and we entirely agree with them. *If the present plaintiffs or their vendors, the defendants 1 to 13, were bound to bring a regular suit under s. 246 for the purpose of establishing their title, and so relieving themselves from the effect of the order of 1876, there is still ample time for bringing such a suit.*

But the plaintiffs, appellants, say that the mere fact of the order having been obtained operates as a *res judicata* as between them and the defendants 1 to 13, and estops those defendants from denying that the defendants 14 and 15, the plaintiffs' vendors, were in possession of the property in question at the time when the order was made.

We think that the order can have no such effect. Even in the view which other High Courts appear to have taken of s. 246, the order would not operate as an estoppel against the defendants 1 to 13, until the time for bringing a suit to establish their right (whatever that expression may mean), had elapsed, and that time, we have seen, according to the authorities decided in this Court, has not yet arrived.

But, apart from this question of limitation, there is nothing, as far as we can see in the order itself, which could create any estoppel of the kind.

There are certainly some authorities in this as well as the other High Courts which seem to favour such a view of the section, but I cannot help thinking that this subject has not been sufficiently considered, and that in any question which may arise under the corresponding sections of the present Act (278 to 288) which are somewhat differently worded from s. 246 of [679] the old Act, it may be well to consider what the words "suit to establish the right to the property" really mean.

I cannot help thinking that the construction which has sometimes been put upon s. 246 of the old Code may not only have been productive of injustice but may have tended to defeat the intention which the Legislature had in passing the section.

I presume the object was to induce persons who have any claim to property which has been attached to come forward at once and dispose of their claims in the execution proceedings, instead of lying by and allowing the property to be sold, and then afterwards to bring suits against the auction-purchaser.

Unless a purchaser sees his way to buying property at auction, with a fairly good title, he is naturally indisposed to bid anything like its full value, and hence the very general complaint that property at execution sales is too often sold at a frightful sacrifice.

But if, when a claim is made in execution, and the claimant fails, he is driven to the inconvenience of having to bring a suit to establish his right, within a year from the time of his failure, instead of having his 12 or some other number of years within which to bring his suit, as he would have had if he had made no claim at all, it would be folly, in the great majority of cases, to make any claims in execution proceedings.

Such claims are often very imperfectly tried, and the more so, because they are not subject to appeal. A claimant, therefore, runs great risk in trying them in that way, besides subjecting himself unnecessarily to the inconvenience of the one year's limitation.

In the present case we see our way very clearly, and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[The decision reported above should be deemed to be no longer good law.]

STATUTORY CHANGE—

The language of section 246 of the Code of 1859 was different from that of section 283 of the Code of 1882.

Section 246 simply said—"The order which may be passed under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

Section 283 of the Code of 1882, (Order 21, rule 63 of the present Code), provided, "The party against whom an order under sections 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

And article 11 of the Limitation Act, 1908, provides a period of 1 year from the date of the order as the limitation for such a suit.

The combined effect of these two provisions has been held to be that unless the suit is brought as provided by Or. 21, rule 63 of C. P. C. 1908 and art. 11 of the Limitation Act 1908, the party against whom an order is made cannot assert either as plaintiff or as defendant in any other suit or as a party to any other proceeding the right denied to him by the order, see 27 Cal., 714, 721; 22 Bom., 640, 18 Bom., 260, 29 Mad., 225, 16 C. W. N. 882; 15 I. C. 683. See also 1 C. W. N. 24.]

[680] APPELLATE CIVIL

The 17th June, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE GHOSE.

Ram Lakhi, and after her death her sons, Ambica Charan

Sen and others. Defendants

versus

Durga Charan Sen.....Plaintiff.*

*Hindu law—Joint family property, suit to recover—Purchaser of a share
of joint family property—Limitation Act, 1877,
arts. 127, 136 and 144.*

In a suit for a share of a joint family property where the claimant is out of possession the material issue is when did the possession of the defendant become adverse to the plaintiff or the person under whom he claims by purchase.

Per GARTH, C. J.—The onus lies upon the purchaser of a share in a joint family property whose vendor is out of possession to show that the exclusion, if any, took place within twelve years of the institution of the suit.

The rule of limitation applicable to a suit by a purchaser of a share in a joint family property whose vendor is out of possession at the date of the sale is art. 136† of sch. II, Act XV of 1877

* Appeal from Appellate Decree No. 2472 of 1883, against the decree of Baboo Nobin Chunder Gangooly, First Subordinate Judge of Decca, dated the 14th of June 1883, reversing the decree of Baboo Kalidhona Chatterji, Second Munsiff of Munshigunge, dated the 5th of January 1883.

† [Art. 136.—

Description of suit	Period of limitation.	Time from which period begins to run.
By a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale.	Twelve years	When the vendor is first entitled to possession.]

Per GHOSE, J.—The rule applicable to such a suit is art. 144.*

THIS was a suit for possession of a third share of a parcel of land and dwelling house situate within an 8 annas share of *taluk* Ram Rudra Sen. The plaintiff had purchased the share from one Shiba Durga who professed to have inherited the property from her husband, Ram Moni, a member of a joint family. The Munsif considered it unnecessary to go into the merits of the case, and dismissed the suit on the ground that neither the plaintiff nor his vendor had been in possession within 12 years. On appeal, the Subordinate Judge found that the property was the joint ancestral property of Ram Moni and others; that the plaintiff had purchased the share from Ram Moni's widow, and decreed the appeal on the ground that the defendants had failed to show under art. 127,† sch. II of the Limitation Act that the exclusion from the joint family property was known to the plaintiff's vendor more than 12 years ago. The Subordinate [681] Judge relied on the authority of *Obhoy Churn Ghose v Govind Chunder Dey* (I. L. R., 9 Cal., 237).

The defendants appealed to the High Court

Baboo *Kashi Kant Sen* for the Appellants.

Baboo *Okhl Chunder Sen* for the Respondent.

The **Judgments** of the High Court (GARTH, C.J., and GHOSE, J) were as follows —

Garth, C.J.—The only point in this case, upon which we had any doubt, was with regard to limitation.

The suit was brought by the plaintiff to recover possession of a one-third share of a property, which consisted of the dwelling house of the defendants Nos. 8, 9 and 10. There is no doubt that this house formed part of the joint family property of a Hindu family, of which there were several co-sharers. The plaintiff was not one of the family, but bought the share in question on the 17th of Pous 1288 from one Shiba Durga, who was the widow and sole heiress of Ram Moni, who was one of the co-sharers.

So far as the plaintiff's title is concerned, the lower Appellate Court has found in his favour. But it was contended, on the part of the defendants, that the plaintiff is barred by limitation.

The defendants say that, after the death of Ram Moni, which occurred some 25 or 30 years ago, Shiba Durga left her husband's house, and has since lived with her father.

But the Subordinate Judge says that this of itself does not show that she was excluded from the joint family property, and he has held that the plaintiff, who purchased the property from her, is as much entitled to the benefit of art. 127 of the Limitation Act as Shiba Durga would have been. That article

[Art. 144. —

Description of suit	Period of limitation	Time from which period begins to run
For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years	* When the possession of the defendant becomes adverse to the plaintiff.]

† [Art. 127 :—

By a person excluded from joint-family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.]
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provides that "a suit brought by a person, excluded from joint-family property, to enforce a right to share therein, must be brought within twelve years from the time when the exclusion becomes known to the plaintiff." The Subordinate Judge considers that this rule not only applies to members of the joint family but to any stranger who may purchase a share in the joint property from any member of the family.

[682] That is not, in my opinion, the intention of art. 127 ; and I think that any stranger purchasing joint-family property from a member of the family is in the same position as regards limitation as the purchaser of any other property.

Under art. 136 "the purchaser of a property, when the vendee was out of possession at the time of the sale, must sue to recover it within twelve years from the time when his vendor was first entitled to possession." If then the plaintiff purchased when his vendor was out of possession, he comes within that art. 136 , if his vendor was not out of possession when he purchased, the question of limitation does not arise

I conceive that in art. 127 the Legislature intended to make an exception from the general rule of limitation in favour of Hindus and others, to whom the law of joint-family property more specially applies in this country.

Those persons often leave their houses for long periods of time to seek employment in some distant place, and their relatives may take steps to exclude them from their family property without their knowing it. It has, therefore, been considered right to allow them to bring a suit under such circumstances, to enforce their right within twelve years from the time when they first know of their exclusion.

But this reasoning would not apply with equal force to strangers, who purchase joint-family property, and ought to make enquiries into the title of their vendors before they make their purchase.

That art. 127 does not apply to such persons is shown, I think, by the fact that the limitation is to run from the time when the exclusion becomes known to the plaintiff. Now, who is meant by the plaintiff in this sentence ? The plaintiff there, I conceive, must mean the member of the joint family who has been excluded from possession, and the expression would not be applicable to a person purchasing from such member. If it was intended to apply to a purchaser from that member, this strange result would follow: that the member of the joint family who sold to the stranger might have known of his own exclusion more than twelve years before the stranger brought his suit, and yet the stranger would not be barred if he, the stranger [683] (who would be the plaintiff), was not aware of the exclusion of his vendor. The stranger would then have twelve years to sue from the time when he was first aware of the exclusion.

The Subordinate Judge in this case appears to have considered that the onus is upon the defendants, in the first place, to show when Shiba Durga was excluded from possession, and in the next place, to show that the plaintiff heard of the exclusion within twelve years before suit. I think this is wrong. The plaintiff, in my opinion, is bound to show, that he brought his suit within twelve years from the time when Shiba Durga was excluded from possession ; and consequently from the time when she was first entitled to bring a suit to recover it. It may turn out, of course, that Shiba was never excluded from possession ; and in that case the plaintiff may be in time. But the issue which the lower Court will have to try is this, whether Shiba was excluded from possession, and, if so, when, and the onus will be upon the plaintiff to show that she was excluded, if at all, within twelve years before this suit.

The case will be remanded for retrial upon this point, and both parties will be entitled to adduce further evidence upon it. The costs in both Courts will abide the result.

Ghose, J.—I concur in the judgment delivered by my lord. I desire to add that the article of the Limitation Act truly applicable to this case is No. 144 of sch. II, and in this view it will be necessary for the lower Appellate Court to determine when did the possession of the defendant become adverse to the plaintiff or the person under whom he claims by purchase. Whether the case is dealt with under art. 144 or art 136 referred to in the judgment of the Chief Justice, the enquiry will be one and the same, *viz.*, when was Shiba Soondari excluded.

Case remanded.

NOTES.

[ART. 127 OF THE LIMITATION ACT, 1908.—'PERSON'—

All the High Courts are now agreed in interpreting the word 'person' in the article as meaning some person claiming a right to share in joint family property on the ground that he is a member of the family to which the property belongs. Consequently, it has been held that this art. 127 is not applicable to alienees from members of a joint family. See 18 Cal. 642, 14 Cal. 544; 12 Mad. 292, 23 Bom. 137, 9 M.L.T., 397. 9. I.C., 495.]

[684] PRIVY COUNCIL.

The 6th March, 1885 .

PRESENT

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE

Shookmoy Chandra Das. . . . Defendant (and another)

versus

Monoharri Dassi Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Will—Construction of will—Perpetuity—Void disposition of profits only of an estate during an indefinite period—Accumulations—Account as among members of family.

The Hindu law does not allow such a disposition of property as would have been made by a testator whose intention was to give to his descendants the profits only of his estate for their benefit, and for the maintenance of religious services, but not to dispose of the estate itself.

The testator directed that his estate should remain intact, providing for religious services to be kept up by his family from the profits of the estate, his will being that "his heirs, sons, sons' sons, great-grandsons, and so on in succession should be entitled to enjoy such profits." There were clauses for the accumulation of the profits of a certain portion of the estate, and forbidding alienation.

Held, that according to the true construction of the will taken altogether, the testator's intention was not to pass the estate. This was confirmed by the clauses against alienation, and for the accumulation, as long as the family should remain joint, of a certain share of the profits; another portion being assigned for the religious services.

This was not a case in which a testator, having expressed an intention that his estate should pass, had added a clause against alienation, in which case the latter clause would have been merely void.

Held, accordingly, that this bequest was invalid.

An account of the profits of the estate, from the date of the death of the testator, having been ordered by the decree of the Court below, in favour of the inheritor of a share at whose instance the bequest was held invalid, *held*, that this did not mean that inquiry should be made into the different payments by the manager for the time being, or moneys taken out by the members of the family, but that it should be ascertained to what portion of the savings of the family, or of the accumulations made, such sharer would be entitled; and that this order was accordingly correct.

APPEAL from a decree (21st June 1881) of the High Court (I. L. R., 7 Cal., 269) reversing a decree (24th September 1878) of the Subordinate Judge of Dacca.

[685] The question raised on this appeal related to the construction of a will, dated 17th Baisakh 1260 (28th April 1853) executed by one Krishna Pershad Das, who died on the 24th May following. The will having been made before the passing of the Hindu Will's Act XXI of 1870, neither that Act, nor any of the sections of the Indian Succession Act, 1865, incorporated in it, were applicable to the point now in dispute, which was whether a disposition of the profits of his estate made by the testator, without disposing of the estate itself, was not invalid, as, if allowed, creating a perpetuity.

The material paragraphs of the will are set forth in the report of the case, heard on appeal by the High Court (I. L. R., 7 Cal., 270), and they are accordingly omitted here. The provisions of the will more briefly stated were the following.—

The will directed that the testator's estate should remain intact, and that the profits should be applied in the first place towards performing the periodical ceremonies and worship of his ancestral deities. It also provided that his houses, zamindari, and immoveable property, and also his business, mercantile and banking, and the capital stock thereof, should remain intact, "as at present," and that his heirs, sons' sons, and great-grandsons, in succession, should be entitled to the profits thereof. No one was to be competent to alienate by sale, or gift, the immoveable property, to close any business, to misappropriate the capital stock thereof, or to divide the same.

The will also provided that, after the testator's death, his eldest son, Sriman Shookmoy Chandra Das should act as *kurta*, or manager, for the preservation of the estate, and as *shebait* to the deities, and that he should as *karmadhyakha* (manager of business), prepare and keep accounts of profits of the estates, and of the business, mercantile and banking, and of the rents of houses, but not alienate the testator's immoveable property then in existence, by sale, gift, or otherwise, or misappropriate, or waste the capital stock of his business. Having made provision for the revenue to be paid, collection charges, and repairs of houses, the will provided that, of the surplus profits, six-sixteenths [686] should be applied in part towards the worship of the ancestral deities, and as to the residue, towards the maintenance of all the members of the family and religious rites, the ten annas share remaining being carried to the credit of the estate.

In case of disputes between the eldest son and the testator's third wife, the mother of the testator's minor children, the will directed that the eldest son should receive five-sixteenths of the ten annas share: if another son should be born of the testator's third wife, the remaining eleven-sixteenths was to go to

her sons. If no son should be born, then the eldest son was to take five-and-a-half-sixteenths, and the sons of the third wife the remaining ten-and-a-half-sixteenths, absolutely. So long as the family remained joint, the expenses of the *Debsheva* and of the maintenance of the family were to be defrayed out of the six-annas share.

The will provided that in case of separation the shares of the sons were to be placed to their respective credits every year, each son to be entitled on attaining full age.

The testator then provided that in case of separation the sons should be at liberty to take their shares of the moveable property absolutely (but not of the immoveable property or of the capital stock of the business, or of the articles in use for the ancestral deities), according to the conditions laid down for the division of the ten-annas share of the profits. The will then provided for the maintenance of the testator's third wife, and minor sons, out of the six-annas share, each son on attaining majority to be entitled to his share under the will absolutely. After providing that the sons should reside in the ancestral dwelling-house, which was given to them in equal shares with the gardens, but that none of them should have any power of alienation, the will directed that if any of the heirs died without male issue, the widow of such heir should receive maintenance only, and that a daughter's son (grandson by a daughter), should get nothing, such share going over to the surviving sons. Lastly, it was directed that the eldest son, sons' sons, grandsons, and other heirs in succession, should perform the duties of *kurta* and *shebat*.

The testator in his lifetime married three wives. By his first wife he had no son. By his second he had one son, the appellant [687] Shookmoy Chandra Das. By his third, and only surviving, wife, Pria Dassi, he had three sons born before the date of his will, named respectively Harri Charan Das, now deceased, Gour Harri Das (the second appellant), and Anand Harri Das. A fourth son, born, after his death, lived only a few days.

This suit was brought by the widow of Anand Hari Das, also now deceased, against the above named Shookmoy Chandra Das, Gour Harri Das, and Pria Dassi, to obtain the share in the estate, moveable and immoveable (which would have come to her husband had his father died intestate), alleging the invalidity of the will. The defendants maintained the validity of the will.

The Subordinate Judge of Dacca, Baboo Gangacharan Sircar, made a decree in favour of the plaintiff as to the immoveables belonging to the testator. He was of opinion that the disposition made by Krishna Pershad related only to the proceeds and profits of the estate, and not to the *corpus*, in respect of which he had made no bequest. The testator had attempted to create an estate, whereby all his immoveable property, and *karbar*, would remain in his family in the male line, without power of alienation, but this attempt failed, the law not sanctioning perpetuity, nor allowing estates to remain in abeyance after the death of an owner. The following decree was made. "That the plaintiff as heiress of her husband do get possession of one-fifth of all the immoveable properties claimed by her" (with certain exceptions specified in the decree), "and of one-fifth of the capital of the existing *karbar*, the amount of which capital is to be ascertained in execution of decree. It is also ordered that the plaintiff is entitled to get from the defendants an adjustment of accounts of the profits and proceeds of the estate, consisting of houses, landed property, and several *karbars* which existed from the time of her father-in-law's death up to the death of her husband, and from the date of the death of the latter up to the institution of this suit. That the accounts be taken in execution of decree, and that the plaintiff is to have

one-fifth of the net profits, which will be found at the adjustment of accounts. The plaintiff to pay one-fifth of the expenses necessary for the worship; but this not, without her consent, to exceed one-fifth of the profits of a six-anna share of the [688] profits of the entire estate. The plaintiff's claim to the moveable property dismissed with costs. Plaintiff's costs in proportion to claim decreed to be paid by the defendants "

A Divisional Bench of the High Court (MCDONELL and FIELD, JJ.) maintained so much of this decree as directed an account of the profits of the immoveable estate, and the business profits, and gave one-fifth thereof, and of the immoveable estate to the plaintiff.

The judgment of the High Court, after giving an abstract of the will, stated the rule that where there is a general intention ascertainable from a will to create a valid estate, coupled with an intention to deprive such estate of its legal incidents, effect is to be given to the general intention to create such valid estate, but the other intention is to be disregarded and must fail. Here, however, it was impossible to gather from the will a general intention on the part of the testator to create a valid estate in any person who could take it consistently with law, there being no intention to dispose of the *corpus* of the estate in the lands. To this intention, which was to tie up the *corpus*, effect could not be given. The case of *Sonatum Bysack v. Juggut Soondree Dossee* (8 Moore's I. A., 66) where there was an express grant of the *corpus*, nominally to the family deity, but in effect (as the Judicial Committee held) for the benefit of the sons, in other words, an effectual gift of the estate itself, was distinguishable from the present. Here there was not only no express grant of the *corpus*, but to presume such a grant would be opposed to the intention of the testator, as indicated by the whole will.

It was held, accordingly, that the intention of the testator in disposing of the profits of the six-anna share was to give the profits only to his male descendants; in effect, a void bequest. Also, that the disposition of the ten-anna share of the profits was void, there being, in one event, a direction to accumulate for ever without a disposition of the profits, and in the others the gift was void, for the same reason as the gift of the six-anna share. The disposition, however, of the family dwelling-houses and gardens (save as regarded the prohibition of alienation), [689] was good, and also the testator's moveable property was sufficiently disposed of.

The judgment of the High Court, delivered by FIELD, J., is reported at length in the 7th volume of the Indian Law Reports, Calcutta series, at page 274.

On this appeal—

Mr. T. H. Cowie and Mr. R. V. Doyne argued that it should have been held that the gift by the testator to his sons, of the profits of the estate, should have been construed as a gift of the *corpus*, not invalidated by the clause against alienation, the latter clause being treated as void and inoperative, and other incidental provisions in the will being also regarded as of no effect. The Courts below had incorrectly taken the expressions of the will in reference to future interests in the estate, not as in themselves merely void, but as involving the invalidity of the principal object aimed at by the testator. This object was, in effect, the enjoyment of his estate by his sons and descendants, with a charge for the maintenance of the worship of the household deities. The application of the true rule of construction would have given effect to the testator's intention. The rule was stated in the judgment in *Jotendromohun Tagore v. Ganendromohan Tagore* (L. R., Ind. Ap. Sup. Vol. 47; 9 B. L. R., 377), and might be expressed thus, viz., that if the words in a

will conferred an estate actually inheritable, the language, though it might add invalid injunctions, would be read as conferring an estate inheritable as the law directed. If a gift were made, as it had been made here, with words restricting the right of transfer, the restriction should be treated as void, and the gift should receive effect. The testator intended that the estate should vest in the manager who was to take possession, and the will also provided for the eventual separation of the family. There was, in short, as complete a disposal of the corpus as there was in *Sonatun Bysack v. Juggut Soondree Dossee* (8 Moore's I.A., 66), and the creation of a perpetuity might be prevented without the entire disallowance of the gift. In the case cited, the gift to the *thakur* had been treated as a gift to the family, subject to the charge for religious services.

[690] [Sir B. PEACOCK, referring to the absence of a stated period within which the separation of the family would take place, or was contemplated by the will, asked whether it was contended that there was anything to show when the ten-annas share, the proceeds of which were, by the will, to be accumulated, would cease to be so.]

It is submitted that the clause for accumulation would only be itself held invalid, and would not invalidate the general disposition of property made by the will. As giving the inheritance to the testator's sons, and excluding the plaintiff from a right to inherit, leaving her the right to maintenance, the will might be supported. The account decreed was hardly consistent with the rights of the members of a joint family, and the costs of the appeal below should not have been awarded against the appellants personally. The development of the law, on the subject of bequests such as the present, was shown in the following cases, referred to in the order of their dates —

Soorjeemoney Dossee v. Denobundo Mullick, 1857 (6 Moore's I. A., 526), *Sonatun Bysack v. Juggut Soondree Dossee*, 1859 (8 Moore's I. A., 66), *Soorjeemoney Dossee v. Denobundo Mullick*, 1862 (9 Moore's I. A., 123), *Kumara Asima Krishna Deb v. Kumara Krishna Deb*, 1868 (2 B.L.R., O. C., 11), *Krishnamaran Das v. Ananda Krishna Bose*, 1869 (4 B.L.R., O.C., 231), *Aushutosh Dutt v. Doorgachurn Chatterjee* (I.L.R., 5 Cal., 438, L. R., 6 Ind. Ap., 182), *Jotendromohun Tagore v. Ganendromohun Tagore* (L.R., Ind. Ap., Sup. Vol., 47, 9 B.L.R., 377)

As to the provision in the event of the death of an heir without male issue, reference was made to *Tarakeswar Roy v. Kumar Shoshi Shikareswar* (I.L.R. 9 Cal, 958, L. R., 10 Ind. Ap., 51). And with regard to gifts to a class, *Leake v. Robinson* (2 Mer., 363), *The Duke of Marlborough v. Lord Godolphin* (2 Ves. Sen., 61), *Ramlal Mookerjee v. The Secretary of State for India* (I.L.R., 7 Cal., 304).

[691] Mr J. F. Leith, Q. C., and Mr. J. T. Woodroffe, for the Respondent, were not called upon.

Their Lordships' Judgment was delivered by .

Sir R. Couch.—The suit, which is the subject of this appeal, was brought to recover a part of the estate of one Krishna Pershad Das, who died on the 24th May 1853. Upon his death he left a third wife, the defendant Srimati Priya Dassi, Shookmoy Chandra Das, his eldest son by a former wife, the present appellant, and three minor sons, Harri Charan, Gaur Harri, and Anand Harri. Another son was born shortly after his death, but as this son only lived for a few days, it is not necessary to take any further notice of him. It is only material with regard to the shares into which the estate would be divided. Anand Harri, one of the sons, married the present plaintiff, and died in 1873 without leaving children, leaving the plaintiff his heir-at-law. Thereupon the plaintiff brought the suit, seeking to recover the share of the estate of Krishna Pershad Das, her father-in law, which she alleged had belonged to her

husband Anand Harri. The question as to whether she is entitled to recover or not depends upon whether Krishna Pershad Das left a valid will of his property. If he did, she would not be entitled to recover in the way she claimed. The property would be subject to the will, and she would take such rights, if any, as the will would give her.

The District Judge who tried the suit gave a decree in favour of the plaintiff, that she was entitled to recover the share claimed, and that she was also entitled to the account which she asked for in her plaint. The High Court have confirmed that decree.

The first material paragraph in the will (taking the translation which was adopted by the High Court) is the sixth, in which the testator says: "My estate shall remain intact, and from the profits thereof there shall be performed the worship, the periodical festivals and ceremonies, of my ancestral deities, idols and *chakras* according to my turn, as they have hitherto been performed. As regards the enjoyment of the profits, I do hereby provide that my houses, zamindaries, talooks, and other immoveable properties, and my business of various descriptions, and the capital stock thereof, shall always remain [692] intact as at present, and my heirs, sons, sons' sons, and great-grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immoveable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If anyone succeeds in doing so, or will do so, it shall be disallowed by the authorities."

The question is, what was the intention of the testator in this provision of his will? He says distinctly, "my estate shall remain intact," and then he proceeds to say, as regards the enjoyment of the property, the estate remaining intact, my heirs, sons, etc., "shall be entitled to enjoy the profits thereof." These words appear to their Lordships to indicate that he was not going to give away the estate, but that all he intended was to give the enjoyment of the profits to the persons mentioned in the will. His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it, which would not be allowed by Hindu law. It is true, if the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it, but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will, and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will.

When we come to the subsequent clauses, they further confirm this view of his intention. Having said that the profits are to be enjoyed, he, in the subsequent paragraphs, provides for what he considers and intends to be the mode of the enjoyment, and it is very material to notice that in the eighth paragraph he assigns a six-annas portion for the family worship of the idols, and also for the maintenance of the family whilst they continue joint, leaving a ten-annas share which, as long as the family remained joint, would not be, as he supposed, expended at all. [693] What he does with that is to provide that it shall simply accumulate. He does not dispose of it in any way, but as long as the family remains joint it accumulates; again confirming the view that his intention was that the estate itself should not be disposed of.

Then he goes on to provide for the way in which the profits shall be enjoyed in the event of disagreement among the members of the family and their separating; but the whole of these provisions appear to their Lordships to be consistent with and to support the view that the intention was that the estate itself should not be disposed of, and that there was no gift of the estate, but simply a gift with reference to the enjoyment of the profits.

The whole question really resolves itself into what was the intention of the testator to be gathered from the will? Their Lordships think that this was his intention, and that is the construction which must be put upon the will. This is the view which has been taken by both the lower Courts. The Subordinate Judge, a Hindu gentleman, quite acquainted with the customs of Hindu families, considered that that was the intention, and that being contrary to Hindu law, the will was an invalid will, and that the plaintiff was entitled to recover the share of the property which would belong to her husband, supposing the property not to be disposed of by the will.

There remains another question, and that is with regard to the account which has been ordered. The Subordinate Judge says, in reference to the 16th issue, which was the issue raised as to the accounts: "I have to observe that it is not denied that no portion of the profits of the estate which have accrued to the estate since the death of Krishna Harri, and which have remained in the hands of the manager the defendant No. 1, was given to Anand Harri, and that no account was ever rendered to him. Under such a circumstance I am clearly of opinion that the plaintiff, as the heiress of her husband, is entitled to an adjustment of accounts of the profits and proceeds of the estate from the date of her father-in-law's death to that of her husband's death, and from the date of her husband's death to the date of the suit, and to the amount of money which will [694] be found due to her share under this adjustment of accounts. The account shall be taken in the execution case."

This is the same account as was ordered to be taken in a similar case of *Soorjeemoney Dossee v. Denobundo Mullick* (9 Moore's I. A., 123). It is not intended that the different payments by the manager, or moneys taken out by the members of the family, should be enquired into, but it is to ascertain what portion of the savings of the family, or the accumulations which have been made, the plaintiff would be entitled to. It has been suggested that there may be settled accounts, and that there ought to be some provision to prevent the opening of settled accounts. The Subordinate Judge says very distinctly that no accounts have been rendered to Anand Harri, and in the face of such a finding as that their Lordships think it would not be proper to insert in the decree any such provision.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, the appellants paying the costs thereof.

Appeal dismissed.

Solicitor for the Appellants: Mr. T. L. Wilson

Solicitors for the Respondent: Messrs. Watkins & Lattey.

NOTES.

[1. INTENTION TO BE ASCERTAINED FROM THE ENTIRE INSTRUMENT—

See (1908) 36 Cal., 149; 11 Cal., 684; 14 Mad., 65, 20 Bom., 450.

Where the intention to bequeath an estate is clear, the invalid restrictions will be struck out:—(1903) 30 Cal., 111=7 C. W. N., 688

" Their Lordships do not find any express prohibition in this will against alienation of the estates, the beneficial enjoyment of which is given to the devisees, as there is of the estates appropriated to religious and charitable purposes. If there were such a clause added to a gift of a heritable estate it would be repugnant and void," distinguishing 11 Cal., 684 as a case where " independently of the provision against alienation there was no intention to pass the estate " :—(1897) 24 Cal., 834, at 849; 850 on appeal from (1893) 20 Cal., 906; (1895) 20 Bom., 450.

From a restriction on alienation it may be inferred that there was no intention to pass the property :—11 Cal., 684; 14 Bom., 360; see also 21 Mad., 425.

As regards agreement never to partition coparcenary property, see (1883) 7 Bom., 538.

II. PERPETUITIES—

The enjoyment of rents and profits cannot be limited indefinitely :—11 Cal., 684; 15 Cal., 409; 14 Bom., 360.

III. ACCUMULATIONS—

In (1897) 24 Cal., 589—1 C. W. N., 345, JENKINS, J., suggested that directions for accumulations may be upheld and that in the absence of special provision the limits to the devolution of property may be regarded as the limits for accumulation; this case was reversed on another point in appeal—25 Cal., 662; 27 Cal., 996. see on this point (1906) 34 Cal., 5; *contra* (1905) 9 C. W. N. 1033, see also (1910) 15 C. W. N., 66; (1902) 4 Bom., L. R., 803.]

[11 Cal. 694]

APPELLATE CIVIL.

The 27th January, 1885.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE BEVERLEY.

In the matter of the petition of Soshi Bhusan Chand.

Soshi Bhusan Chand

versus

Grish Chunder Taluqdar.

*Limitation Act (XV of 1877), sch. II, art. 171 B—Civil Procedure Code
(Act XIV of 1882), ss. 3, 368, 582—Respondent, Death of—
Practice—Substitution.*

"Having regard to s 3 of Act XIV of 1882, it is clear that the word "Code" in sch. II, art. 171B† of Act XV of 1877, applies to the present Code of Civil Procedure, Act XIV of 1882; and that, therefore, the word "defendant" in s. 368 of that Code when read with s 582 must be held to include "respondent."

* Civil Rule No. 173 of 1885, in Reg. App. 237 of 1883.

† [Art. 171 B.—

Description of application.	Period of limitation.	Time from which period begins to run.
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Under section 363 or 365 of the Code of Civil Procedure by a person claiming to be the legal representative of a deceased plaintiff.	Sixty days ...	The date of the plaintiff's death.]
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THE appeal in this suit was filed on the 19th November 1883, and on the 14th March, after the notice of appeal had been [693] served upon the respondent, and before the appeal came on for hearing, the respondent died. The appellant on the 6th January 1885 filed a petition before a Division Bench of the Court, praying that one Gopal Chunder Taluqdar might be substituted as respondent in the place of the deceased. The facts in this petition were on the 27th January 1885 held, under the order hereinafter in part set out, to be insufficient to satisfy the Court that the appellant had good reasons for the delay shown in making the application, and the Court directed him to supplement the petition by showing sufficient cause for the delay. In accordance with this order the appellant alleged that he first heard of the death of the respondent at the end of November or the beginning of December 1884, that the deceased was an inhabitant of Bathail, Station Mender, in the district of Rajshahye, and that he, the appellant, was a resident of Bahadur Bazaar in the district of Dinagepore, that these places were at a great distance apart, that the deceased was of a different caste and a stranger to the appellant, and that as soon as he heard of the death he made diligent enquiries as to the state of the family of the deceased, and had made this application, without unnecessary delay, after having satisfied himself as to the proper person to make respondent in the place of the deceased.

Baboo *Iswar Chunder Chuckerbutty* for the Petitioner.

The Order of the Court (FIELD and BEVERLEY, JJ) so far as suffices for the purpose of this report, was as follows. —

We have heard the pleader for the petitioner in this matter, and we have no doubt that under the provisions of the present law this application ought to have been made within 60 days from the date of the death of the respondent. The law as laid down in the case of *Ram Sunker Bhadoory* (3 C. L. R., 440) was altered by the amending Act (XII of 1879), which provided that, under ss. 363 and 365, the word "plaintiff" is to be held to include an appellant. After this amendment of the Code further doubts arose as to whether the word "plaintiff" in s. 366 of the Code was also to be held to include an appellant [see the case [696] of *Rajamonee Dabec v. Chunder Kant Sandel* (I. L. R., 8 Cal., 440)]. There are other cases in which a similar doubt arose. These doubts were removed by the amended s. 582 of the present Code, in which it is provided that "in chapter XXI, so far as may be, the words 'plaintiff,' 'defendant' and 'suit' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death, marriage, or insolvency of parties to an appeal." Looking at the express provisions of s. 3 of the present Code, we think that the term "Code" in art. 171B, sch. II of the Limitation Act, must apply to the present Code (Act XIV of 1882), and this being so s. 368 must be read with s. 582, and the word "defendant" in s. 368 must be held to include a respondent.

[With reference to the question whether the particular facts, as first alleged, were sufficient to explain the reason why the application was made beyond the time allowed by law, the Court directed the appeal to abate, unless the appellant should satisfy the Court by stronger facts on affidavit, that he had sufficient cause for the delay, and on the 13th February 1885 the appellant complied with this order, and the Court considering the facts then alleged (as set out in the body of the report) were sufficient to warrant the delay, made the order of substitution asked for subject to any objection that might be made thereto at the hearing of the appeal.]

Application allowed.

NOTES.

[See the C. P. C., 1908, O. 22, r. 11 Section 582 of the C. P. C., 1882, was amended, 7 All., 734, 11 Cal., 694, were cases prior to that amendment.]

[11 Cal. 596]

APPELLATE CIVIL.

The 16th June, 1885.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Chooramoni Dey and others

versus

Howrah Mills Company, Ltd.*

Land Acquisition Act (X of 1870)—Accretion to parent tenure—Reg. XI of 1825, s. 4, cl. 1—Rate of rent—Apportionment of compensation awarded.

The words "increase of rent to which he may be justly liable" contained in cl. 1, s. 4, Reg. XI of 1825, were not intended to lay down an inflexible rule applicable to all cases, and in the absence of any special circumstance [697] the rate of rent to be assessed upon an accretion should be in proportion to that paid for the parent tenure. Where therefore such accreted land is taken up under the Land Acquisition Act, the compensation awarded should be divided by giving the landlord the value of the rent payable in respect thereof, with 15 per cent. for compulsory sale, and the balance to the tenure holder.

Golam Ali v. Kali Krishna Thakur (I. L. R. 7 Cal., 479) commented on.

THIS was an appeal against a decree apportioning certain compensation granted in respect of lands taken up by the Government under the Land Acquisition Act.

The dispute between the zamindars, the appellants, and the respondents who held a *mourasi* and *mukurari* tenure, related to the apportionment of the compensation granted in respect of two bighas and fifteen cottahs of newly-formed land which had accreted to the original tenure.

The facts and the judgment of the lower Court are sufficiently stated in the judgment of the High Court for the purpose of this report.

The Advocate General (the Honourable G. C. Paul), Mr. Dass and Baboo Trailokya Nath Mitter for the Appellant.

Mr. Pugh and Mr. McNair for the Respondents.

The **Judgment** of the High Court (MITTER and NORRIS, JJ.) was as follows:—

This appeal has been preferred by the zamindars of Bagi Shibpore, against a decree of apportionment of the compensation granted in respect of two bighas fifteen cottahs of newly-formed land which accreted to a *mourasi* and *mukurari* tenure within the zamindari by the recession of the river Hooghly, of which tenure the respondents before us are the proprietors.

The appellants contended that, as the land in question was, under the 1st clause of s. 4, Reg. XI of 1825, added as an increment to the *mourasi* tenure of the respondents, they under that clause were bound to pay rent at the full letting value minus a deduction of twenty per cent. as their profits; and that the land having been taken under the Land Acquisition Act, the compensation awarded in respect thereof should be divided in the proportions of 80 per cent. to the appellants and 20 per cent. to the respondents.

* Appeal from Original Decree No 182 of 1883, against the decision of C. B. Garrett, Esq., Special Judge under the Land Acquisition Act, sitting at Howrah, dated the 17th of April 1883.

[698] The respondents admitted that they were liable to an increased rent, but contended that such an increased rent should bear the same proportion to the rent of the original tenure as the quantity of land accreted bears to the area of the original tenure, and that the compensation awarded should be divided by giving the appellants the value of rent of the accreted portion taken upon the above basis, *plus* 15 per cent. for compulsory sale, and the balance to them.

The lower Court has accepted the contention of the respondents as correct.

In *Golam Ali v. Kali Krishna Thakur* (I. L. R., 7 Cal., 479), it was held that accreted lands should be governed by the terms and conditions applicable to the parent tenure, and that the same rent was payable for it as for the land included within the *kabulhat*. Reading the judgment of Mr. Justice PONTIFEX, I do not think that any inflexible rule was intended to be laid down as applicable to all cases; but that, having regard to the particular circumstance of that case, it was thought that the accreted land should bear the same rent as was payable in respect of the land included in the original tenure. If I have rightly apprehended the purport of this decision, I feel no hesitation in following it. The words "increase of rent to which he may be justly liable," contained in cl. 1, s. 4 of Reg. XI of 1825, indicate to my mind that it was not intended to lay down any inflexible rule applicable to all cases. For example, where a *mukurari* was granted at the full letting value of the land comprised in it, it would be unjust to the tenant to assess the newly added land at the rate of the original *mukurari*, if the accreted lands be of inferior quality. On the other hand, if the accreted lands be of superior quality, or if in fixing the *mukurari* rent a lower standard than the full letting value was adopted in consideration of any bonus paid, it would be unjust to the landlord to fix the rent of the accretion at the rate of rent fixed in respect of the original tenure. But in the absence of any special circumstance the rate of rent to be assessed upon the accretion in my opinion should be in proportion to that paid for the parent tenure. In [699] this case no special circumstance is shown to exist. The decision of the lower Court upon this point is therefore correct.

(The Court then proceeded to deal with the other questions raised in the appeal, and concluded by varying the decree of the lower Court in certain particulars immaterial for the purpose of the report.)

Appeal allowed and decree modified.

[11 Cal. 699]
APPELLATE CIVIL

The 17th June, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE BEVERLEY.

Bhuban Pari and others.....Defendants
versus
Shamanand Dey.....Plaintiff.

Land Tenure, Transfer of—Mourasi surbarakari tenure, The mode of succession to—Consent of the zamindar to the transfer.

The tenure known in Orissa as *mourasi survarakari*, although recorded in the name of a single member, is descendible to all the heirs as joint heritable property, and cannot be transferred without the consent of the zamindar.

THE plaintiff brought this suit on the allegation that a certain mouzah within his zamindari, which was originally recorded in the name of one Michu Pari had since his death been settled with and stood in the name of his son, Karunakar, defendant, as *survarakar*, that under the Bengal Government Resolution of the 25th September 1868, the *survarakar* was entitled only to collect the rents and was not competent to alienate or divide the mouzah without the consent of the zamindar; that defendants 1 to 5, the coparceners of Michu and Karunakar, were not entitled to the property nor had they any right to sell their share to defendant No. 6, that Karunakar had by a deed of relinquishment transferred the tenure to the plaintiff (zamindar) and the plaintiff prayed that the *kobla* of sale in favour of defendant No. 6 be declared void and *khas* possession of the mouzah be given to the plaintiff.

The Munsiff found that the *survarakari* was a joint heritable tenure and dismissed the suit. The lower Appellate Court held [700] that the zamindar was entitled on the strength of the deed of relinquishment to re-enter on the property and gave him a decree.

From that decision an appeal was preferred to the High Court.

Baboo *Trailokya Nath Mitter* for the Appellants.

Baboo *Abinash Chunder Bannerjee* for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and BEVERLEY, J.) was delivered by

Garth, C.J.—The facts of this case are as follow :—

A certain mouzah in the district of Balasore constituted a *mourasi survarakari* tenure recorded in the name of Karunakar Pari, defendant No. 7. It has been found as a fact by both the lower Courts that the tenure was previously held by his father Michu Pari, and by his grandfather Edhab Pari. Besides Michu, Edhab left two other sons, who are represented by defendants 1 to 5.

In 1879 the defendants 2 to 5 brought a suit against their cousin, defendant No. 7, for possession of a share in the tenure, and that suit was decreed

* Appeal from Appellate Decree No. 563 of 1884, against the decree of J.B. Worgan, Esq., Officiating Judge of Cuttack, dated the 7th of January 1884, reversing the decree of Baboo Haranath Ghose, Rai Bahadur, Munsiff of Balasore, dated the 5th of October 1882.

in their favour on 3rd June 1880. Five days prior to that decree, however, namely, on the 29th May 1880, defendant No. 7 executed a deed of surrender of the tenure in favour of the zamindar, who is the plaintiff in the present suit. Subsequently, on the 24th September 1881, defendants 1 to 5 sold a share in the tenure to defendant No. 6.

The plaintiff then brought this suit to have it declared that defendants 2 to 5 had no interest in the tenure, and that the sale to defendant No. 6 was invalid.

The suit was dismissed in the Court of first Instance; but, on appeal the District Judge held that the tenure was the sole property of defendant No. 7, who surrendered it to the zamindar; and he accordingly gave the plaintiff a decree for *khas* possession.

Against this decree the defendants 1 to 6 have appealed to this Court.

The question of law arising for our decision is simply this: whether a *mourasi survarakari* tenure in Orissa descends to all the heirs as joint family property, or to one heir only to the exclusion of the others?

[701] The nature of these tenures was to some extent defined by the Government orders of the 25th September 1838, and in two cases, *Puddo Lochun Mundle v. Lukhun Burrooah* (S. D. A. Reports, 1860, Vol. II, p. 109), and *Doorjodhon Dass v. Chooya Daye* (1 W. R., 322), it was held that those orders were to be recognized as authority in respect of the character or constitution of these tenures.

Those rules provide that the tenure be recognized as one of the existing tenures of Cuttack, that when the tenure is in the possession of several joint *survarakars*, the Collector may, with the concurrence of the zamindar, select one or more to be the recorded "*manager*" of the *survarakari*, that the tenure may under certain circumstances be "hereditary property," but that, whether hereditary or not, the tenure cannot be alienated or sub-divided without the consent of the zamindar.

The effect of these rules, we think, is to place the tenure much on the same footing as ordinary tenures, and to constitute it joint heritable property, subject to this, that for convenience sake the name of one of the owners is to be recorded as the proprietor, who is to act as the *manager* for the rest, and to be directly responsible to the zamindar for the rent. The Munsiff states that this is the nature of the tenure as usually understood in Cuttack, and that this view has been frequently upheld by the Courts. No case has been cited to us which bears directly on the point, but we think that this is the true meaning of the rules.

The prohibition against alienation or sub-division appears to be directed against such a splitting of the tenure as would be effected in this case by the sale of a portion of it to defendant No. 6. Such a splitting of the tenure cannot take place without the consent of the zamindar.

On the facts then, as found in this case, we must hold that defendants 1 to 5 had an interest in the tenure, which defendant No. 7 under the circumstances had no authority or power to surrender to the zamindar; and we must further hold that the sale of a portion of the tenure to defendant No. 6, not having been made with the consent of the zamindar, is invalid.

[702] The decree of the District Judge must, therefore, be reversed. The plaintiff's suit for *khas* possession will be dismissed, but it will be declared that the sale to defendant No. 6 is invalid, having been made without the consent of the plaintiff zamindar.

Defendants 1 to 5 will have their costs in all the Courts against the plaintiff. Defendants Nos. 6 and 7 will pay their own costs.

Appeal decreed in part.

[41 Cal. 702]
APPELLATE CIVIL.

The 2nd June, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BEVERLEY.

Jogendro Bhuputi and others.....Defendants
versus
Nittymanund Man Sing.....Plaintiff.*

*Hindu law—Inheritance—Mitakshara—Sudra family —
Dasiputra or son by a slave girl—Right of survivorship.*

In a Sudra family of the Mitakshara school, a *dasiputra* or illegitimate son by a slave girl is a coparcener with his legitimate brother in the ancestral estate and will take by survivorship.

THIS was a suit for the possession of the ancestral raj and zamindari of Killa Sukinda in the Province of Orissa by right of survivorship under the Mitakshara law. The plaintiff alleged that he was a *Kshetri* or a member of the regenerate class and a son of Raja Upendra Bhuputi by a *phulbabi* wife, Rani Chandra Kala *alias* Rambhudei, that according to family custom Raja Nundkishore Bhuputi by his eldest wife, Rani Nilmoni Patmabadie, succeeded to the *raj* and zamindari, but the plaintiff continued to live in commensality with him and receive his maintenance; that Nandkishore Bhuputi died on the 5th March 1878, leaving him surviving three widows and a daughter, and under the *shastras* the plaintiff, as the eldest surviving brother, was entitled to succeed.

It was contended on behalf of the defendants, the widows of Nundkishore Bhuputi, that the Rajas of Sukinda were not *Kshetri* but *Sudra* Khandaits that the late Raja had left an adopted son, Jogendro, the minor defendant; and that, even if the adoption [703] failed, the plaintiff, as the son of a concubine, was not entitled to inherit.

The Court of First Instance (the Subordinate Judge) found there was no adoption, and held that the parties being all *Sudras* the plaintiff as a *dasiputra* was under the Mitakshara law entitled to succeed to his brother by survivorship, and gave a decree.

The defendants appealed to the High Court.

Mr. W. C. Bonnerjee, Baboo Kali Prasanna Dutt and Dr. Guru Dass Bonnerjee, for the Appellants.

The Advocate-General (Mr. G. C. Paul), Baboo Annada Pershad Bannerjee, Baboo Amarendra Nath Chatterjee, Baboo Kuruna Sindhu Mookerjee, and Baboo Jogendro Chunder Bose, for the Respondent.

* Appeal from Original Decree No. 100 of 1883, against the decree of W. Wright, Esq., Subordinate Judge of Cuttack, dated the 29th of March 1883.

The facts and arguments sufficiently appear from the **Judgment** of the Court (GARTH, C.J., and BEVERLEY, J.) which was delivered by

Garth, C.J.—The plaintiff in this case sued to establish his title to the *raj* and zamindary of Killa Sukinda in the District of Kuttack. The plaintiff's father, Raja Upendra Bhuputi, Harichundun Mohapatra, admittedly died on the 23rd October 1857, leaving (1) a son, Nundkishore by his Rani Nilmoni Patmabadie; (2) the plaintiff, his son, by a woman called Rambha or Chandra Kala; and (3) a third son, Abhirkishore, by another woman called Asili or Raskala. He was succeeded in the *raj* by his legitimate son, Nundkishore, who died on 5th March 1878, leaving no son but three widowed Ranis, and a daughter by one of them.

The plaintiff claimed to succeed to his half-brother Nundkishore on the allegation that his mother was a lawful *phulbibahi* wife of Raja Upendra.

The three widows on the other hand set up one Jogendro Bhuputi as the heir to the *raj*, alleging that he had been adopted by the late Raja on the 18th April 1877; and they further pleaded that, even if the adoption was not proved, the plaintiff could not succeed inasmuch as he was the illegitimate son of a slave girl, and that in that case the heirs would be the widows and the minor daughter of the deceased, or, if women were debarred from the [704] succession, then Jogendro would be entitled as the next legitimate heir of Raja Nundkishore.

The Subordinate Judge of Kuttack who tried the suit found against the adoption of Jogendro, and gave the plaintiff a decree. He came to the conclusion that the plaintiff being the son of a Sudrapathees by a slave girl was entitled to the succession by right of survivorship according to the Mitakshara law.

Against this finding the defendants have appealed, urging—

- (1) That the Subordinate Judge is wrong in his view of the law;
- (2) That even if his view of the law is correct, he is in error in finding that the Raja's family are *Sudras* (that being the only class among whom an illegitimate son can succeed), and
- (3) That the adoption of Jogendro is sufficiently proved.

The plaintiff respondent on the other hand has filed certain cross objections to the effect that the Subordinate Judge should have found that the plaintiff's mother was a lawful *phulbibahi* wife.

The points therefore that we have to consider are—

- (1) The question of adoption: if Jogendro was really adopted by the late Raja, the plaintiff obviously can have no claim to succeed, if, however, the finding of the Court below on the question of adoption be upheld, it will be necessary then to consider—
- (2) Whether the plaintiff was a legitimate son of the late Raja by a *phulbibahi* wife;
- (3) If not, whether he is nevertheless entitled to succeed on the ground of survivorship, as found by the Court below. And this last question involves the further point as to—
- (4) Whether the parties are *Sudras*.
- (1) First as to the question of adoption.

Raja Nundkishore died on the 5th March 1878, and it appears that a few days afterwards the three widows petitioned the Court of Wards to take charge of the estate on behalf of the adopted son, who was, and still is, a minor. At about the same time the plaintiff applied to have the estate made over to him as heir. An enquiry was held by Mr. Farrer, the Sub-divisional

[706] Officer of Tajpore, who reported to the Collector of Kuttaok on the 18th and 20th March 1878, that the alleged adoption was never really made, and also that the plaintiff, as the son of a slave girl, had no right to the succession. In this conclusion the Collector, who appears to have taken part in the enquiry, concurred. Ultimately, on the 30th December 1878, the Collector applied to the Civil Court to attach the estate under Regulation V of 1799, and Regulation V of 1827, until some one or other of the claimants should establish his right to the succession, and this was done on 6th January 1879. Claims were then preferred to the Judge, who thereupon made a further summary enquiry, and by an order dated 13th October 1879, the Judge (Mr. MACPHERSON) found against the adoption. A subsequent order by his successor (Mr. COCHRANE), dated 17th February 1880, declared the plaintiff entitled to succeed to the estate, and put him into possession. These orders, however, were set aside by this Court on 23rd June 1880, as having been made without jurisdiction, and the plaintiff was required to give up possession of the estate, the various claimants being referred to a regular suit to establish their right to the succession. The plaintiff accordingly brought the present suit, in which the facts have been enquired into for the third time.

The Subordinate Judge, after noticing the evidence given on this point by both sides, sets out four reasons which satisfy him that no adoption in fact took place.

These reasons are . —

"1st.—An adoption was extremely unlikely at the time as the pregnancy of the youngest Rani must then have been known or at least suspected.

"2nd.—Had there been an adoption, it would naturally have been at the Raja's expense, and the expenditure would have been noted in his accounts; but, strange to say, those accounts contain no mention of any such expenditure.

"3rd.—The investiture ceremony would also, in case of an adoption, have been performed at the house of the adoptive, and not, as it is admitted to have been, at that of the natural parents.

"4th.—The adoption, too, would not, I imagine, have been kept a secret until after the Raja's death, as, although there may have [706] been an object for concealment prior to the birth of the youngest Rani's daughter, there certainly was none after, and that the adoption should notwithstanding not have been mentioned in public seems to me to indicate with tolerable clearness that it could not have been made."

The adoption is said to have taken place on the 18th April 1877; and the youngest Rani's daughter was born in January 1878. It is scarcely possible therefore, that the Rani's pregnancy could have been known on the date on which the adoption is said to have taken place. Whether the adoption really took place on that date is a different matter, but we think there is not much force in the first of the above reasons which are given by the Subordinate Judge. The other reasons, however, seem well founded, and it is to be observed that, although they have been advanced on the occasion of each enquiry, there has been no satisfactory attempt to answer them.

The oral evidence in support of the adoption is to be found in the depositions of—*Pundub Thatnantham*, a Paik, p. 123 of the Paper book; *Rajguru Upendra Punchanam*, the Priest, pp. 127, 130; *Dinobundhu Patnaik*, a Mohurir, pp. 148, 158-9; *Bawaribundhu Patnaik*, a Mohurir, pp. 162, 164, 165; *Madhub Patnaik*, Sherishtadar, pp. 172, 177; *Nilmoni Putmabadi*, Dowager widow, pp. 189, 199; *Markutmalu Patmabadi*, Dowager widow, pp. 202, 205; *Raja Gour Man Singh*, of Parikud, pp. 207, 208.

This evidence is for the most part general and vague, but there are several important contradictions as to the performance of the ceremony and the invitations sent out, and presents made on the occasion. Some importance has been attached to the evidence of the Raja of Parikud, who has been examined with a view to meet the objection that no one appeared to be aware of any adoption before the late Raja's death. This Raja says that he met Nundkishore in 1875 at Kuttack, and that he then told him of his intention to adopt a son (the translation in the paper book is not quite accurate), and that within two years from that time he received an invitation to the ceremony and sent presents in return. The letter of invitation, however, though said to be still in existence, is not produced, while on this and other matters the Raja's testimony is contradicted [707] by other witnesses. Moreover, there seems no sufficient reason why Nundkishore should in 1875 entertain the idea of adopting a son. He was at that time no more than 32 years of age (p. 140). He had three Ranis, one of whom had given birth to a son only the year before (p. 40); and another of whom gave birth to a daughter some three years later. Under these circumstances we are unable to attach any credit to the testimony of the Raja of Parikud.

It is worthy of remark that several important witnesses who are said to have been present at the time of the ceremony, and most of whom were examined by Mr. Farrer and the District Judge, have not been called as witnesses in this suit. These witnesses are the following:—*Padmatub Tikaitra*, the father of the so-called adopted son Jogendro, *Mokund Banpati*, the family priest; *Narsingh Paharaj*, the priest who is said to have negotiated the adoption, *Doyamohi Patnark* the late Raja's Dewan, who appears to have denied all knowledge of any adoption, and *Degamber Rajguru*, a priest still to have been present at the ceremony of adoption.

These witnesses were for the most part disbelieved at the time of the former enquiry, and in this trial their places have been taken by others, and the points on which they contradicted each other have thus been carefully avoided.

Much has been made of the fact that on Nundkishore's death Jogendro was immediately placed on the *guddar* as his successor, and that it was he who gave the order for the cremation of the deceased. It is said that this was done in the presence of the plaintiff who thus acquiesced as it were in Jogendro's assumption of the *raj*. But it may be that the plaintiff was under some misapprehension at that time, or he may have been persuaded by the Ranis not to question the alleged adoption, and it may not have occurred to him until later that, if the adoption was set aside, he might possibly be able to secure the succession for himself.

Then we also think that some weight must be attached to the fact that, when Mr. Farrer visited the Rajas of Sukinda and Panchkot in November 1877, nothing whatever was said by either [708] of them to lead him to suppose that any adoption had either taken place or was in contemplation.

On the whole we see no sufficient reason to depart from the conclusion arrived at on this point by the lower Court, *viz.*, that the fact of Jogendro's adoption by the late Raja has not been established.

(2) The next point is whether the plaintiff is the legitimate son of a *phulbibah* wife.

On this point besides the oral evidence adduced by the plaintiff, the learned *Advocate-General* has drawn our attention to certain documents upon the record which show that, immediately after the death of Raja Upendra, the plaintiff was represented to be the son of a *phulbibah* wife. Nundkishore being a minor, the estate was at that time taken under the charge of the Court of

Wards, and the first document we are referred to is a copy list of the inmates of the Rajbari, printed at pp. 104-7 of the brief, in which Nittyanund Man Sing is entered as a son of a *phulbibahi* wife. The list, indeed, mentions no less than eight *phulbibahi* wives, besides a number of slave girls, including Rambha Behara and Asili Behara. This list appears to have been given by the Pat Rani Nilmoni, to the Nazir of the Collector on the 8th December 1857, when he went to take charge of the estate on behalf of the Court of Wards (p. 282). On the 18th January 1858 certain allowances for the *amlah* and members of the family were sanctioned by the Commissioner, and in the order of sanction (pp. 107-9) we find Nittyanund Man Sing under the head of *phulbibahi*, etc., described as the son of Chandra Kala. We are next referred to a petition presented by the Pat Rani Nilmoni to the Commissioner on the 17th December 1858, in which Chandra Kala is again mentioned as a *phulbibahi* and Nittyanund Man Sing as a *phulbibahi* son, and lastly a number of receipts have been filed showing that maintenance was regularly paid in accordance with the list of December 1857.

All these documents, it is said, having been in existence some twenty years before the present claim was preferred, are good and sufficient evidence of the truth of the plaintiff's allegation that he was the son of a *phulbibahi* wife Chandra Kala.

[709] On the other hand, it is contended that no reliance can be placed on these documents for this reason, that it was the Pat Rani's object to swell the maintenance charges, and a *phulbibahi* wife would receive a larger allowance than a slave girl, and moreover the Rani was very anxious to prevent the Raja Nundkishore from being sent to the Wards Institution in Calcutta, and this was another reason why she would purposely swell the maintenance charges of the household in order that there might be no sufficient surplus to pay for the minor Rajah's education. On this point we would refer to the evidence of the Mukhtar Rajbullubh Ghose, witness No. 6, for the plaintiff (p. 35), and that of Madhub Patnaik, witness No. 14 for the defendants (pp. 107-1). It is important also to notice that in her petition of the 17th December 1858 that Pat Rani speaks of four persons in all, that is to say three Ranis and one *phulbibahi* only, as having had maintenance in the time of the late Raja Upendra.

Under these circumstances, we think that too much weight must not be assigned to these documents. As opposed to them we have the statement made by the woman Rambha herself before Mr. Farrer, a statement which the Subordinate Judge seems to have considered almost conclusive on the point. This woman, it is to be observed, is mentioned in the list at p. 104 as a different person from Chandra Kala, and it can hardly therefore be contended that the list is correct, and that Chandra Kala and Rambha are identical. In her statement to Mr. Farrer (p. 210) Rambha said that Man Singh was her son, and that she was never married to Raja Upendra. Man Singh also admitted both in his deposition (p. 209), and in his petition of 29th April 1878 (p. 15, 16 of the supplementary papers) that the Rambha who was examined was his mother. The plaintiff has not himself ventured to go into the witness box to contradict or explain these admissions, and we think, therefore, that in the face of them we cannot hold that Nittyanund Man Singh was not the son of Rambha Behara or that Rambha Behara was the same person as Chandra Kala *phulbibahi*. We agree with the lower Court that the plaintiff's mother was a slave girl and not a legal wife married after the *phulbibahi* form.

[710] We next come to the question whether the plaintiff, as the son of a slave girl, is entitled to succeed to the estate on the death of the late Raja, his legitimate brother.

It is admitted that, if the plaintiff's father belonged to one of the regenerate classes, his illegitimate son could not under any circumstances succeed, and it is therefore of importance to consider in the first place whether the Rajas of Sukinda are genuine Kshetrias or belong to the Sudra caste.

In this connection it is to be observed that, while the plaintiff in his plaint describes himself as a Khetri by caste, the Raní defendants in their written statements allege that the Rajas of Sukinda are Khandait Sudras. These allegations were probably made on both sides without perceiving the consequence that they might involve. But it is contended that the fact of Jogendro being invested with the sacred thread tends to show that the Sukinda Raja, as well as the Panchkot Rajas, belonged to the Kshetria caste. We think that this circumstance although well worthy of notice, is by no means conclusive upon the point. No doubt the Rajas of Sukinda, like other Rajas of Kuttack, endeavoured to assume the rank of true Kshetrias, but whether they were so in fact is more than doubtful. The evidence seems to show conclusively that they were Khandaits, but Khandaits are not necessarily Kshetrias. On the contrary, the Subordinate Judge, a gentleman of much experience states confidently that a Khandait is of the Sudra class, and without going the length of confirming that assertion as a universal rule, we think that the evidence in this case tends strongly to the conclusion which has been arrived at by the Court below that the plaintiff's father was a Sudra.

There is little or no reliable testimony as to his being Khetri, whilst on the other hand we have seen that the Ranis themselves in their written statements allege that the Rajas of Sukinda were Sudra Khandaits, which they would probably have been unwilling to do if their caste had been really that of Khetri; and the priest of the family, who is a Brahmin of 80 years of age, and who has officiated as the family priest during the time of Upendra Raja, says distinctly that the Rajas of Sukinda are reported to be Khetris, but in reality they are [711] Khandaits, evidently using the term "Khandaits" in contradistinction to "Khetris," and thus confirming the view of the Subordinate Judge that Khandaits are not Khetris but Sudras.

Assuming then that the plaintiff's father was a Sudra and his mother a female slave, the question is whether, according to the rules of Hindu law, and having regard to the fact that the Raja's family belongs to the Mitakshara school, the plaintiff is entitled by right of survivorship to succeed to the *raj* after the death of his half brother Nundkishore, Upendra's legitimate son. If it were a question of *heirship*, that is to say, if the plaintiff did not form part of the joint family with Nundkishore, and if the *raj* descended to Nundkishore's *heir*, it is alleged that Jogendro as the nearest of kin to Nundkishore would be heir to the *raj* in preference to the plaintiff. But if the plaintiff formed part of the joint family with Nundkishore, it is contended that upon Nundkishore's death he became entitled to the *raj* as he would to any partible property by survivorship.

The Subordinate Judge, relying upon the case of *Sadu v. Barza* (I. L. R., 4 Bom., 37) has held that the plaintiff is entitled to succeed to the *raj* by right of survivorship.

On the other hand, we have been referred to the case of *Krishnayan v. Muttusami* (I. L. R., 7 Mad., 407), in which it was held by a Division Bench of the Madras High Court that, although an illegitimate son might succeed to

the estate of his father, he could not exclude any right by survivorship that accrued to his father's brother, nor could he succeed to the estate of that father's brother.

In the Bombay case above mentioned, which was the decision of a Full Bench concurring with Mr. Justice NANABHAI HARIDAS, the facts were as follows :—

One Manajee died, leaving surviving him his two wives Baiza and Sabitri, a son Mahadu by Baiza, a daughter Darya by Sabitri, and an illegitimate son Sadu by a continuous concubine. Subsequently, Mahadu and Sabitri died, and the property came into the possession of Baiza. Sadu then sued to recover it.

Sir MICHAEL WESTROPP, C.J. said : "What we have to [712] consider is not what would have been the rights of the parties if Mahadu had died in the lifetime of his father, but what were their rights on the death of Mahadu, he having survived his father? It appears to us that Mahadu, at least from the time of his father's death in 1850 until his own death in 1865, and Sadu, were co-parceners, and consequently that on the occurrence of the latter event the usual result of co-parcenary followed, *viz.*, that the surviving co-parcener took the whole property.

And after considering the authorities he proceeds : "No special provision is here made by Vijnaneshvara for the case of the death either of the son of the wedded wife or the son of the female slave after the death of their father and before partition. But the effect of what he has said being, as we think, to create a co-parcenary between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a co-parcenary, and that accordingly the survivor would take the whole if the other died without leaving male issue."

He then goes on to notice what he considers an inconsistency in the Hindu law in bringing in the daughter and the daughter's son to share the inheritance with the illegitimate son which he characterizes as "one of those arbitrary arrangements not uncommon in Hindu law," and in the result decides in concurrence with the other members of the Court that Sadu, the illegitimate son, succeeded to the joint estate by survivorship.

In the Madras case,* V and S were undivided brothers of the Sudra caste. V died before S, leaving two illegitimate sons by A, a continuous concubine. S left two widows. It was held that although the illegitimate sons of A would be entitled to inherit the estate of V, they could neither exclude the right of survivorship of S nor succeed to the estate of S. In that case TURNER, C.J., said : "But while we concede the claim of the illegitimate son we are unable to uphold the contention that he is entitled to take the undivided interest of his father. He is placed in the Mitakshara on the same footing with a daughter's son and the conception of co-parcenary pre-supposes Sapinda relationship and a legal marriage. Inasmuch as neither a widow, nor a daughter, nor a daughter's son, can exclude a co-parcener's right [713] of survivorship, it appears to us that neither can an illegitimate son do so. Another question is whether, as illegitimate sons, the second appellant and his brother are entitled to succeed to their paternal uncle Sandara. Adverting to the several secondary sons known to the ancient Hindu law, six of them are declared to be heirs to kinsmen in Datta Chandrika, s. V, 22. It follows that illegitimate children who are inferior to them all and who do not exclude the daughter's son, cannot succeed to collateral heirs. There can be no relationship between them, as it is founded upon the legal marriage."

This case to some extent conflicts with the decision of the Bombay Court, and we have accordingly done our best to elicit the true principle which underlies the scattered dogmas that are to be found in the text-books on this point.

The text of the Mitakshara is as follows :—Chap. I, s. 12.

" Even a son begotten by a Sudra on a female slave may take a share by the father's choice.

" But if the father be dead, the brethren should make him partaker of the moiety of a share, and one who has no brother may inherit the whole property in default of a daughter or daughter's sons."

The questions before us, therefore, appear to be these .—

(1) Assuming the right of the son of a Surda by a female slave to participate with a legitimate son in the inheritance upon a partition, does the father's estate after his death become the joint property of the legitimate and illegitimate sons in such sort that the right of survivorship exists between them ?

(2) If so is that principle of survivorship applicable also to the case of an impartible Raj ?

It has been contended before us that the right of survivorship only obtains in those cases where an interest in joint property is acquired by any member of the joint family at his *birth*, and that a *dasiputra* cannot have such a right, as it is only by the father's choice or pleasure that he obtains any share at all.

It is further argued that the text in Chapter I, s. 12 of the Mitakshara seems to place a *dasiputra* in the same category [714] and to entitle him to the same sort of rights as a daughter or a daughter's son.

A daughter or a daughter's son would not take by survivorship from a son, although she or he might take the whole property as heir to the father, and upon the same principle it is argued that a *dasiputra*, although he would upon partition share the inheritance with his legitimate half-brother to the extent of one-half of what the half-brother would take, he would not before partition succeed by survivorship to the legitimate son, although he might take the property as heir to his father.

There is no doubt a very clear distinction in the Mitakshara law between taking by heirship and taking by survivorship, and it was contended on the authority of certain passages in Varadaraja's " Partition and Succession " that, although the *dasiputra* might be entitled to take a half share upon partition, he would take it *as heir and not by survivorship*.

As the question appeared to us to be one of some difficulty, we thought it right to consult our colleague Mr. Justice MITTER upon it, and the conclusion at which we have arrived is in accordance with that of the Bombay Court.

It is true that a *dasiputra* is not entitled to participate in the inheritance except at the pleasure of his father, and for that reason during his father's lifetime it seems admitted that he would have no right to enforce a partition, but it was the opinion of Mr. Justice HARIDAS, in the Bombay case that, after his father's death, an illegitimate son could enforce a partition as against his legitimate brothers.

Whether this is so or not it seems to us that the rule laid down in the Bombay case is correct, and is most consistent both with justice and authority.

If a Mitakshara father leaves several illegitimate sons, although born of different mothers, it seems clear that they would all jointly participate in the property, and would succeed to each other by survivorship (see Mayne on Hindu Law, s. 467, and cases there cited). If they can thus succeed by survivorship, *inter se*, there seems no reason why they should not succeed in the same way to a legitimate half-brother.

[715] It also appears clear that, when a son has been adopted and a natural son is afterwards born to the father, the adopted son upon partition would,

like a *dasiputra*, take a less share than his natural brother. As a rule, he would take only one-fourth of his brother's share, though the law upon that subject is different in different parts of the country ; and yet, though he takes upon partition a much smaller share than his natural brother, it seems that before partition he would succeed to him by survivorship (see Mayne, s. 158, and the case in 1 Madras High Court Reports, p. 49, there cited.)

This case of an adopted son appears to us very analogous to that of an illegitimate son. In both cases there is the same sort of imperfect brotherhood to the legitimate son, and in both the superior position of the legitimate son is recognized by his receiving a larger share upon partition.

We see no reason, therefore, why an illegitimate son should be in a worse position than an adopted son as regards his succession by survivorship to the legitimate brother. It is obvious that practically speaking in a family composed partly of legitimate and partly of illegitimate sons, the fact of either a legitimate or illegitimate son dying before partition would result in the augmentation of the shares of all the survivors upon partition.

As an illustration of this principle let us suppose the case of a Mitakshara father dying and leaving him surviving one legitimate son A, and two illegitimate sons B and C. On the father's death B and C became entitled each to half a son's share, that is to say A would be entitled on partition to obtain a moiety of the estate, and B and C each one-fourth. But if before partition B were to die, and a partition were to take place between A and C, it is clear that A would take two-thirds of the property, whilst C would take one-third. In other words the share to which B would have been entitled would remain a part of the joint estate or common stock, which A and C would divide between them. In this view A and C would be co-parceners, succeeding by survivorship to what B might have claimed upon partition. Can there be any doubt that the same result would follow if A (instead of B) died before partition? Can it be doubted that in that case B and C would take A's share by survivorship?

[716] It will be found that in the Madras case the point was somewhat different from that raised in the present. There the question was whether illegitimate sons could represent their father as regards the grandfather's estate, so as to exclude the right by survivorship which would otherwise accrue to the father's brother. It was held that they could not, and that, although they might succeed to their father's separate estate, they could not exclude their legitimate uncle in respect of joint ancestral estate. In the present case the question is not as between the plaintiff and his father's brother, but between the plaintiff and his own brother. The father alone was solely entitled to the estate, and it may be, therefore, that the Madras case does not conflict with our present decision.

The next question is, whether the fact that this is an impartible *raj* makes any difference in the application of the principle? We think not. It has been frequently held, and especially in the *Shivaqunga* case (9 Moore's I. A., 539) that an impartible *raj* or zamindari subject to Mitakshara law, though it can only be enjoyed by one co-parcener at a time is nevertheless joint property, so far that the succession is governed by the principle of survivorship. We think, then, that on these grounds the plaintiff was entitled to succeed to the *raj*, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This case was affirmed by the Privy Council in (1890) 18 Cal., 151 : 17 I. A., 128. See the notes to that case.]

[11 Cal. 716]

APPELLATE CIVIL.

The 2nd June, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Budri *NarainPlaintiff

versus

Sheo Koer.Defendant.*

Security for costs—Civil Procedure Code (Act XIV of 1882), s. 549—Appeal rejected for want of security—Extension of time for giving security.

The proper construction of s. 549† of the Civil Procedure Code is that, where an appellant has been ordered to furnish security within a certain time, and that order has not been complied with, and no application has been made to extend the time within the period allowed, the Court is bound to reject the appeal.

THIS was an application under s. 549 of Act XIV of 1882, [717] arising out of a report of the Registrar of the Court as to the sufficiency of a security ordered to be furnished.

On the 12th February 1885, the respondent obtained an order directing the appellant, within two months time, to furnish security, to the satisfaction of the Registrar, for the costs of the original hearing of a suit which had been decreed against the appellant, and of the pending appeal against that decision, and the Registrar was ordered to report on the sufficiency of the security offered.

The Registrar submitted his report, considering the security offered sufficient, but referred a question back to the Court as to the validity of the proposed security, some portion of the property intended to be given as security being joint family property.

On the 1st June 1885 the Court decided that the security was bad; whereupon Mr. *Gregory* applied to the Court to have the appeal dismissed under s. 549 of Act XIV of 1882, more than two months having expired since the 12th February 1885.

The Court at the request of Baboo *Kali Kissen Sen*, who appeared for the appellant, deferred making an order, so as to give him an opportunity of looking into the authorities on the question as to whether the Court had the power to extend the time for furnishing security.

* Appeal from Original Decree No 52 of 1883 against the decree of Moulvie Mahomed Nurul Hossein, Khan Bahadoor, Subordinate Judge of Patna, dated the 2nd of October 1882

†[Sec. 549—The Appellate Court may at its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any

When appellant resides sufficient immoveable property within British India independent of the property (if any) to which the appeal relates.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.]

On the 2nd of June Mr. Gregory, however, referred the Court to the case of *Haidri Bai v. East Indian Railway Co.* (I. L. R., 1 All., 687), and in conformity with that ruling the Court (GARTH, C.J., and MITTER, J.) passed the following order :—

We find that it has been decided by the Allahabad High Court, in the case of *Haidri Bai v. The East Indian Railway Co.* (I. L. R., 1 All., 687), that where the High Court orders an appellant to give security for costs, the Court may extend the time within which it orders the security to be furnished if an application is made within that time ; but if the security is not given within the time ordered by the Court, and no application is made within that time to extend the time for giving security, the Court is bound by s. 549 of the Civil Procedure Code to reject the appeal.

We agree that this is the proper construction of the section, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[The decision reported above is no longer good law, having been reversed and overruled on appeal by the Privy Council—see 17 Cal., 512 · 17 I. A , 1

Principle applied in other cases—

The principle of the Privy Council decision has been extended by the High Courts in India to several analogous cases.—21 Bom , 576 (Security for costs) ; 16 Bom , 263 (Amendment of plaint) ; 19 All , 240 (Payment of additional Court fees) , 15 Mad , 384 (Enlargement of time for award) , 6 C L J., 490

Statutory provision—

Section 148, Civil Procedure Code, 1908, now provides—

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired]

[718] APPELLATE CIVIL

The 12th June, 1885.

PRESENT.

MR JUSTICE TOTTENHAM AND MR JUSTICE AGNEW.

Hart Defendant

versus

Tara Prasanna Mukherji... .. Plaintiff.

*Civil Procedure Code (Act XIV of 1882) s. 295—Rateable distribution
of sale proceeds—Money decree—Cause of action—*

*Mortgage decree—Mortgagee purchasing under his
own decree, Execution of decree by.*

The cause of action given by the last para but one of s. 295 of the Civil Procedure Code does not arise until the money has been actually paid over to the person who is alleged not to be entitled to receive the same, and a suit brought by a person claiming to be entitled to be

* Appeal from Appellate Decree No. 1245 of 1884, against the decree of B. L. Gupta, Esq., Officiating Judge of Birbhum, dated the 17th of April 1884, affirming the decree of Baboo Manu Lal Chatterji, Subordinate Judge of that District, dated the 25th of January 1884.

paid a share of sale proceeds under that section and to recover the same from another to whom such sale proceeds have been ordered to be paid, if brought before they have been actually paid to such other person, is premature and should be dismissed.

Every decree, by virtue of which money is payable, is to that extent a "decree for money" within the meaning of that term as used in s. 295, even though other relief may be granted by the decree; and the holder of such decree is entitled to claim rateable distribution of sale proceeds with holders of decrees for money only under that section.

There is nothing in s. 295 which takes away the right from a mortgagee who has obtained a decree upon his mortgage to proceed against the property of his mortgagor other than that subject to his mortgage.

Thus the holder of a mortgage decree which directs that the amount be realized from the mortgaged property and from the mortgagor personally, is entitled to claim rateable distribution under that section, and is not in the first instance bound to proceed against his mortgage security and exhaust that.

A mortgagee who has obtained a decree on his mortgage is not restricted to proceedings in the first instance against his mortgage security before proceeding against other property of his mortgagor, but when he sells any portion of the property, the subject of his mortgage, and purchases it himself, he is bound, before he can proceed further against the mortgagor or claim rateable distribution under s. 295, to prove that there is still a balance due to him, and that the property sold and purchased by him realized a fair amount, the mere fact of the property having been sold at auction not being alone sufficient to prove its value, and this ought to be enquired into most carefully by the Court to which an application is made to further execute the decree or to share rateably under s. 295.

THE plaintiff in this case, on the 17th Falgun 1282 (28th February 1876) advanced the sum of Rs. 12,000 at compound [719] interest, to two brothers, Harish Chunder Ghose and Panchanun Ghose, upon the security of certain immoveable property, a portion of which was situated in the Birbhum District, and the remainder in the Moorshedabad District. These properties were numbered respectively 1 and 2 in the schedule annexed to the plaint. The amount of *palm jama* payable to the zamindar in respect of property No. 1 was stated to be Rs. 2,000. The mortgage was to secure the sum of Rs. 15,000.

On the 16th of November 1880 the plaintiff obtained, by consent, a decree in the Judge's Court, Birbhum, against Harish Chunder Ghose and Brajendrabala Dasi, the widow of Panchanun Ghose, for the amount of interest and costs then due upon the mortgage. The decree in that suit was in the following terms: "That the suit be decreed in terms of defendant's admission; that plaintiff do get Rs. 5,769-8, and interest during the pendency of the suit Rs. 62—total, Rs. 5,831-8, with interest at 6 per cent. per annum from this to date of realization from the mortgage properties and from defendants personally." The total amount payable to the plaintiff under this decree including costs was Rs. 6,282-4-4. On the 24th of March 1881 the defendant obtained a decree in the High Court in its Ordinary Original Civil Jurisdiction against Harish Chunder Ghose and Brajendrabala Dasi for Rs. 16,632-6-6 and costs. The decree in this suit ordered Harish Chunder Ghose personally and Brajendrabala Dasi out of the estate of Panchanun Ghose, to pay the amount decreed. On the 2nd of November 1881 the plaintiff in execution of his decree sold the property No. 1 and purchased it himself for Rs. 1,376, and he claimed that a balance was still due to him under his decree of the 16th November 1880.

The defendants' decree was transmitted under the provisions of s. 223 of the Civil Procedure Code to the District Court of Birbhum for execution, and certain immoveable properties in the District of Birbhum, viz., Lot Dhaora, and also a six-anna share in Bhadrapur, which had formerly belonged to Harish Chunder Ghose and Panchanun Ghose jointly, and were then in the possession of Harish Chunder Ghose and Brajendrabala Dasi were attached. These pro-

perties were not subject to the plaintiff's mortgage. The plaintiff also attached Lot Dhaora. Subsequently he [720] applied to the Birbhum Court for a certificate to the District Court of Moorshedabad for the sale of property No. 2 and such certificate was granted, and transmitted to the Moorshedabad Court for execution. After the institution of the present suit this property was sold for Rs. 600.

Before applying for execution to the Moorshedabad Court, the plaintiff, who had become aware of the attachment of Lot Dhaora and Bhadrapur, applied on the 2nd of October 1882 to the Birbhum Court for execution of his decree by the sale of these properties or for a rateable distribution of the sale proceeds in case the properties should be sold by the decree-holder.

On the 30th of November 1882 the defendant sold Lot Dhaora and Bhadrapur, and the proceeds of the sale, Rs. 9,905, were deposited in Court. On the 31st of March 1883 the District Judge rejected the plaintiff's application for a rateable distribution of the sale proceeds under the defendant's execution, and ordered the whole of the money deposited in Court to be paid to the defendant, and this order was affirmed on appeal by the High Court on the 25th June 1883. On the 3rd of July 1883 the plaintiff instituted the present suit, alleging that the reteable amount due to him out of the sum of Rs. 9,905 was Rs. 2,292-5, and praying for payment of this sum, or, if it had been drawn by the defendant, for a decree directing plaintiff to recover it from him, or for rateable distribution after deducting the amount realized by the sale of the property No. 2.

On the 31st March 1883 the District Judge, whilst rejecting the plaintiff's application for rateable distribution, passed an order that the money should not be then paid out to the defendant in order to give the plaintiff an opportunity of contesting the validity of his order in the High Court. Whilst that order staying the payment of the sale proceeds to the defendant was in force, the plaintiff, on the 3rd July 1883, instituted this suit, and applied for and obtained an injunction restraining the defendant from drawing the balance claimed out of Court.

The defendant in his written statement, amongst other things, alleged that the property No. 1, which the plaintiff had caused to be sold on the 2nd November 1881, was worth some Rs. 40,000, and he contended that inasmuch as the plaintiff had himself purchased it for Rs. 1,376 under his own mortgage decree, his mortgage debt was extinguished, or that at all events he should not be allowed to further execute his decree without being made to account for the true value of that property. He further contended that, having regard to the fact that the plaintiff's decree had been transmitted to the District Court of Moorshedabad on the 17th July 1882 for execution, and that the decree was still in that Court and no certificate had been obtained to show how far the decree had been satisfied by the sale of the property in that district, the plaintiff was not entitled to apply for execution in the Birbhum Court, and consequently not entitled to maintain this suit. He further pleaded that the suit was premature, as at the date of its institution he had not received any portion of the sale proceeds which still remained in Court, and that the suit could not be maintained under s. 295 of the Code of Civil Procedure. He also contended that the plaintiff's decree was not within the terms of that section, not being either a decree for money or against the same parties as his, the defendant's decree.

The first Court gave the plaintiff a decree for Rs. 2,037 1 pie, and that decree was upheld by the Lower Appellate Court, the points taken and argued in both Courts being substantially the same as those argued in the High Court.

The defendant now preferred a special appeal to the High Court.

The Advocate-General (the *Hon. G. C. Paul*) Baboo Tarack Nath Sen and Baboo Joyeshwar Sen for the Appellant.

Baboo Rashbehari Ghose for the Respondent.

The Advocate-General.—The suit is one under the provisions of s. 295 of the Civil Procedure Code to recover a share of sale proceeds to which the plaintiff claims he is entitled, and under the provisions of the last para. but one of that section such suit can only be brought after the sale proceeds have been paid to the defendant. Here they have not only not been paid, but the plaintiff himself by obtaining an injunction has prevented their being paid over, therefore the suit is altogether premature and cannot be maintained. The section only gives the right of action after the money has been taken out of Court. The plaintiff could not [722] maintain the suit even assuming it was only sought to obtain a declaratory decree as the Court had no jurisdiction to grant such a decree in this case.

In the next place the plaintiff has no right to claim any portion of the sale proceeds because his decree was not against the same judgment-debtor. Plaintiff's decree was against Harish Chunder Ghose and Brajendrabala Dasi personally, whereas the defendant's decree was against Harish Chunder Ghose and Brajendrabala Dasi as representative of the estate of Panchanum Ghose, and decrees against a person in his personal capacity and against him in a representative capacity cannot be said to be against the same judgment debtor. Section 295, therefore, cannot have any application.

Then, even assuming that the decree be considered as against the same judgment-debtor, the section does not apply, because the plaintiff's decree is not a "money decree." The words "decree for money", as used in the section, must be construed to mean a "decree for money *simpliciter*," and not a decree for money and something more. Here the plaintiff's decree is an ordinary mortgage decree. The Subordinate Judge has held it to be a decree for money, but in one sense all decrees are decrees for money, and the Legislature, by using the expression in the way it has done in the section, must be taken to have meant to refer to mere money decrees as distinguished from decrees by which other relief is granted. The cases cited by the Subordinate Judge as establishing his proposition, viz, *Luchmi Dai Koori v. Asman Sing* (I. L. R., 2 Cal., 213); *Ramdhun Dhur v. Mohesh Chunder Chowdhry* (I. L. R., 9 Cal., 406); 11 C. L. R., 565), *Fukeer Bux v. Chutturdharee Chowdhry* (12 B. L. R., 513 note, 14 W. R. 209), *Radha Kant Roy v. Mirza Sudafut Mahomed Khan* (21 W. R., 86), *Kristo Kishore Dutt v. Kooplall Duss* (I. L. R., 8 Cal., 687), are clearly distinguishable on this point and do not support the contention that this is a money decree within the terms of this section. See also *Debi Charan v. Purbhu Din Ram* (I. L. R., 3 All., 388). In addition it would not be equitable to allow the plaintiff who [723] has a mortgage decree to proceed against the mortgagor personally or his other property not the subject of the mortgage to the prejudice of third parties without first making him exhaust his mortgage security—*Wah Muhammad v. Turab Ali* (I. L. R., 4 All., 497).

Neither is the plaintiff in a position to further execute his decree to the prejudice of third parties or other creditors of the mortgagor. He has already prior to this suit sold the equity of redemption in one of the mortgaged properties and himself purchased it at what we say was a gross undervalue. He then became both mortgagor and mortgagee in respect of that property. He then proceeds to sell the equity of redemption in another of the mortgaged properties in the same manner after this suit was instituted, and by means of this injurious process he contrives to sell all the mortgaged property subject to his mortgage, purchases it himself, and then, though he has his security, he attempts to execute

his decree for the balance against the mortgagor's other property to the prejudice of other creditors. This mode of proceeding should not be allowed, being contrary to the principle laid down in *Nawab Azimut Ali Khan v. Jowahir Singh* (13 Moore's I. A., 404), and to what are now the provisions of the present law (see Transfer of Property Act) IV of 1882 ss. 99 and 67). It has also been held by a Full Bench of the Allahabad Court—*Ganga Sahai v. Krishen Sahai* (I. L. R., 6 All., 262),—that the provisions of that Act can be applied to some extent to mortgages executed before it came into force, and therefore the plaintiff should not be allowed to execute his decree in this way. See also *Yakoob Ali Chowdhry v. Ram Doolal* (13 C.L.R., 272), and the Tagore Law Lectures, 1875-76, p. 119. Upon all these grounds the judgment of the lower Courts was wrong, and the defendant is entitled to have the suit dismissed with costs.

Baboo Rashbehary Ghose for the Respondent.—This suit, which resulted in a decree in favour of the plaintiff on the 16th November 1880, was one for arrears of interest due upon the mortgage and not for the principal money advanced by the plaintiff, which still remains unpaid, and it was in execution of that decree that [724] the property No. 1 was sold and purchased by the plaintiff for Rs. 1,376, subject of course to the charge created by the mortgage. The property sold in execution of the defendant's decree was not subject to any mortgage, and the plaintiff, by the mere fact of his being a secured creditor, was not precluded from executing his decree against that property, or in fact any property belonging to the judgment-debtor. He was not restricted to pursuing his remedy against the mortgaged property in the first instance, and an unsecured creditor could not compel him in the first instance to realize his money from the mortgaged property. This Court has invariably refused to compel a mortgagee to resort in the first instance to the mortgaged property.

The plaintiff's decree is a money decree within the meaning of s. 295, and what is known as a mortgage decree is nothing but a money decree. It never has been suggested that a holder of a mortgage decree has not the same rights as an ordinary decree-holder. See *Luchmi Dai Koori v. Asman Sing* (I.L.R., 2 Cal., 213), *Purmessunee Dasse v. Nobin Chunder Tarun* (24 W. R., 305), *Huro Soonduree Dasse Bungshee Mohun Doss* (5 W. R., Mis. 32); *Fukeer Bux v. Chuttardharee Chowdhry* (12 B. L. R. 513, note, 14 W. R., 209), *Kalee Pershad Singh Nundee v. Raye Kishoree Dossee* (19 W. R., 281), *Radha Kant Roy v. Mirza Sudafat Mahomed Khan* (21 W. R., 86), Macpherson on Mortgages (6th Edn.) p. 10.

• The enactment of proviso a to s. 295 shows clearly that it is only intended to exclude a mortgagee as such, i. e., in his capacity of mortgagee, from sharing in the sale proceeds, but it was never intended to exclude a mortgagor who had obtained a decree from pursuing his legal remedy. Had that been intended, there was no necessity for the enactment of that proviso, and it is therefore clear that a mortgagee in all other cases than that included in the proviso is entitled to the same benefits as are conferred on other decree-holders by the section. The plaintiff's right to share is thus within the section and not excluded by the proviso.

The case of *Yakoob Ali Chowdhry v. Ram Doolal* (13 C. L. R. 272) is clearly distinguishable from this case.

[725] For the purpose of ascertaining whether the plaintiff's and the defendant's decree are against the same judgment-debtor, you must look to what the claim in each suit was, and not be guided solely by the form of the decree—*Isahn Chunder Mitter v. Buksh Ali Soudagur* (Marsh., 614). The plaintiff's mortgage was executed by *Harish Chunder Ghose* and *Panchanun Ghose*,

and his suit was against the first-named and the "widow" of Panchanum. So it is clear that the estate of Panchanum Ghose was sued and intended to be bound by the suit, and whatever form the decree takes it must be held to be against the same judgment-debtors as that of the defendant, both suits, as a matter of fact, being against the same parties.

The plaintiff's suit cannot be said to be premature. Supposing the defendant did not choose to draw out the sale proceeds, he could defeat the plaintiff's right altogether. The law gives the right of action, and the defendant says we cannot have a declaratory decree, therefore it comes to this, that the defendant has it in his power to prevent the plaintiff availing himself of the right the law gives him—a state of things which no Court of Equity would allow. Upon this point see *Gogaram v. Kartick Chunder Smgh* (B. L. R., Sup. Vol. 1022; 9 W. R., 514). [TOTTENHAM, J.—That case was upon the question whether a suit would lie or not, and not upon the question when it would lie.] The law says the action will lie, and there is an order preventing us participating in their sale proceeds, therefore our suit is in the nature of a suit to set aside that order, and unless brought within a year from the date of the order, would be barred by art 13th sch II of the Limitation Act. It, therefore, lies in the hands of the defendant to defeat our action. [TOTTENHAM, J.—Your suit is not to set aside the order, but is quite independent of it.] It must be taken to be one to set aside the order, otherwise we could get no relief so long as the order exists. Supposing the defendant delayed drawing out the money for some six years, and then we sued, could he not plead that our suit was barred?

The case of *Wooma Moymee Burmonya v. Ram Buksh Chetlangee* (16 W. R. 11) is also an authority for the proposition that this suit will lie, and that the plaintiff is entitled to succeed.

[726] The *Advocate-General* in reply.—The plaintiff himself stopped the defendant drawing out the money, and cannot therefore complain that he has no right of action. He would be entitled to sue at any time, and he need not pray to have the order set aside. He would, if successful, recover the money from the defendant, and the order would not affect him.

The case of *Ishan Chunder Mitter v. Buksh Ali Soudaquir* (Marsh., 614) was not a case of a consent decree. Here the plaintiff chose to take a decree by consent against the widow personally, and he cannot therefore contend that his decree is against the same persons as the defendants.

The plaintiff having himself purchased the mortgaged property must satisfy the Court that his claim is not fully satisfied before he can be allowed to further execute his decree. It may well be that the property purchased is more than enough to satisfy his mortgage and all claims he may have under it. See *Gulab Singh v. Pemian* (I. L. R., 5 All., 342).

In all cases where it has been held that a mortgagee can proceed against the person or other property of the mortgagor without first proceeding against

* [Art 13.—

Description of suit.	Period of limitation.	Time from which period begins to run.
To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year ...	The date of the final decision or order in the case by a Court competent to determine it finally.]

the mortgaged property, it has been upon the supposition that the rights of third parties are not interfered with. Here the question is between the mortgagee and a third party, and therefore such cases do not apply. As to the meaning of a "decree for money," see the note to O'Kinealy's Code of Civil Procedure, p. 291. In the old Act the words used in s. 271 was "decree" not "decree for money."

Our ad vult.

The **Judgment** of the High Court (TOTTENHAM and AGNEW, JJ.) was delivered by *

Agnew, J., who, after stating the facts, proceeded—The first ground of appeal taken before us was, that the suit is premature. The suit is based on the provisions contained in the last paragraph but one of s. 295 of the Civil Procedure Code.

That section provides for the rateable distribution of assets among holders of decrees for money, and the paragraph in question provides that, "if all or any of such assets be paid to a [727] person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets." It is contended for the defendant, that as the amount sued for has admittedly not come to his hands, the suit cannot lie, as he cannot be called upon to "refund" what he has never received; that the cause of action arises upon the receipt of assets by the person alleged not to be so entitled to receive them; and that when assets have not been received there can be no refund. For the plaintiff it was argued, on the authority of *Gogaram v. Kartick Chunder Singh* (B. L. R., Sup. Vol, 1022, 9 W. R., 514) and *Wooma Moyee Burmonya v. Ram Buksh Chetlanghee* (16 W. R., 11), that it is necessary in such a suit as this to set aside the order of the Court directing the payment of the money, that unless the suit is brought within one year from the date of such order it will be barred under art. 13, sch. II of the Limitation Act, which provides a period of one year for a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit, such period to be calculated from the date of the decision or order sought to be set aside, and that, if the defendant's contention is correct, it would be in the power of any person to whom assets have been wrongfully ordered to be paid, by refraining from drawing the money out of Court, to debar the person entitled to the assets from his remedy. In the first place no person would be allowed to avail himself of the plea of limitation under such circumstances, for that would be to allow him to benefit himself by his own wrong, in the next place, it was by the plaintiff's own act that the defendant was prevented from drawing the money in suit out of Court. The words of the section are clear, and we are bound to give them their ordinary meaning. The section says that a person entitled to assets paid to another not entitled to receive them may sue such person to compel him to refund. The cause of action does not, therefore, arise until the money is paid, and we think that this suit is premature and must be dismissed for that reason.

The next ground of appeal is based on the first paragraph of [728] s. 295 which provides that, "whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have prior to the realization applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons."

The decree in the plaintiff's suit on his mortgage was against Harish Chunder Ghose and Brajendrabala Dasi "personally," and the decree in the defendant's suit directed Harish Chunder Ghose personally and Brajendrabala Dasi out of the estate of Panchahun Ghose to pay the amount decreed, and it

is argued that decrees against a defendant personally and against the same defendant in a representative capacity, are not decrees against the same judgment-debtor," and that therefore the plaintiff is not entitled to ask for a rateable distribution of assets between himself and the defendant. As we are of opinion that the suit must be dismissed as premature, it is not necessary to decide this point, but, if it was necessary, we should decide it in favour of the plaintiff.

The last ground of appeal which was relied upon was as to the meaning of the words "decrees for money" in s. 295. It was argued for the defendant that a mortgage decree is not a "decree for money" within the meaning of the section, but that the only decrees included in those words are decrees for money *simpliciter*; and that, although a mortgage decree sounds in money, it is not a "decree for money" unless the mortgagee abandons his lien upon the mortgaged property. It is further argued that, if he does not abandon his lien, he is bound in equity to proceed against the mortgaged property in the first instance, and exhaust that before proceeding against the mortgagor's other property; and that the English rule that a mortgagee may proceed on all his remedies at once does not apply in this country.

Now, under an ordinary mortgage decree, the mortgagee is entitled, if he cannot obtain satisfaction from the mortgaged property, to take out execution in the same suit against other property of the mortgagor. It is not necessary that he should [729] bring a fresh suit for the balance. Then, is there anything in the section to take away this right of the mortgagee to obtain satisfaction against other property of the mortgagor when there are other creditors? The section provides that, "whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held, for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." Formerly the first attaching creditor was allowed to pay himself out of the proceeds of sale of property which he had attached to the exclusion of other attaching creditors. That has been done away with, and the rule now is, that all attaching creditors shall share rateably. Then the section provides that, when property is sold subject to a mortgage, the mortgagee as such shall not be entitled to share in any surplus. The reason for this is, that in such a case the mortgagee is secured, and he cannot be entitled to more than his principal, interest and costs. Then the section provides for the sale of mortgaged property free from the mortgage, and for the distribution of the proceeds of sale when the mortgaged property is sold in execution for the discharge of the mortgage.

The object of the section appears to us to be to provide for the rateable distribution of the assets of a judgment-debtor among all persons who have obtained decrees ordering the payment of money to them from the judgment-debtor; and the fact that a person, who has obtained such a decree, also holds security, or is entitled to any other relief under the decree is immaterial. There is, therefore, we think nothing in the section which takes away the right of a mortgagee, who has obtained a decree upon his mortgage, to proceed in the same suit against property of the mortgagor not subject to the mortgage when there are other creditors—nothing which shows that the only persons entitled to share rateably in the proceeds of sale of property sold in execution of a decree are those who have obtained decrees for money only. We think, therefore, that every decree, by virtue of which money is payable, is to that extent a "decree for money," within [730] the meaning of the section, even though other relief may be granted by the decree; and that the holder of such a decree

is entitled to claim rateable distribution with holders of decrees for money only. If it were not so, and if the holder of a mortgage decree, or of any decree under which money was payable and other relief granted, was held not to be the holder of a decree for money, this result would apparently follow, that before he could claim rateable distribution he would be obliged to sue again for his money only. This could hardly have been the intention of the Legislature.

The next question is, whether a mortgagee is bound in equity to proceed in the first instance against the mortgaged property, and to exhaust that, before he can claim to come in and share rateably with other creditors. We have not been referred to any authority for this proposition, and we do not know of any reason why the English rule that a mortgagee may proceed on all his remedies at once should not be applied in this country. But it is clear that when a mortgagee has sold any portion of the mortgaged property under his decree, and has purchased it himself, he is bound, before he can proceed further against the mortgagor, to prove that there is still a balance due to him, and that the property sold realized a fair amount, and this ought to be enquired into most carefully by the Court to which the application to share rateably is made. The mere fact that the property was purchased at auction is not alone sufficient to prove its value, where the mortgagee himself is the purchaser. It would manifestly be inequitable to allow a mortgagee to buy in the mortgaged property at auction for a sum far below its real value, and then to go on against other property of the mortgagor to the injury of other creditors. In this case no inquiry seems to have been made as to the value of the mortgaged property. The Munsif merely says: "There is nothing in the record or in the conduct of the parties which goes to prove that the properties fetched inadequate and unfair prices, or that the sale benefited the debtors." And the District Judge does not refer to the point at all. The defendant, in his written statement, alleged that the property No. 1 was worth Rs. 40,000 at least, and the lower Courts should have raised an issue upon this and have enquired [731] into the value. We think, apart from this, that there is matter upon the record, and upon the plaintiff's own case, which shows that this property was sold for far less than its real value. The amount of *patni jama* payable to the zamindar in respect of the property is stated in the schedule to be Rs. 2,000. Taking the property at ten years purchase, a very low valuation, it appears to be worth at least Rs. 20,000, that is to say, more than sufficient to cover the whole of the plaintiff's claim for principal, interest, and costs. Moreover, the mortgage was for Rs. 15,000 at compound interest. Rs. 12,000 was only actually advanced; but it is not likely that the plaintiff agreed to advance Rs. 15,000 at compound interest upon property which, according to his case now, was worth only between Rs. 16,000 and Rs. 17,000. If we had not been of opinion that the suit must be dismissed upon the grounds already stated, we should have sent it back to the Munsif for enquiry as to the value of the property. The appeal is allowed with costs and the suit is dismissed.

Appeal allowed.

NOTES.

[1. NATURE OF SUIT UNDER SECTION 295 (SECTION 73, C.P.C. 1908)—

It has been held that a suit under the last para. but one of section 295 of the Civil Procedure Code, 1882 (. section 73, Civil Procedure Code, 1908), is a suit for money had and received, and that the period of limitation is three years from the date of the receipt of the assets by the defendant—see 23 All., 313, 322 : 28 I. A. 203 : 7 M. L. J. 277 As to suits for declaration that a rival decree is collusive, see 9 C. L. J. 385.

II. MONEY DECREE—

The view taken in this case (11 Cal., 718) has been followed by the Madras High Court and it has been held that a decree directing a sale of the mortgaged property in default of payment of money, is a money decree within the meaning of section 295. See 20 Mad., 107; 28 Mad., 224 (a case under section 230 of the Code of 1882); 28 Mad., 473 (F.B.): 15 M. L. J., 126 (a case under section 258 of the Code of 1882).

But the Calcutta High Court holds in its later decisions that a decree which directs the sale of the hypothecated property in default of payment of money, is not a decree for the payment of money within the meaning of section 295, unless it renders the mortgagor also personally liable. See 25 Cal., 580, 27 Cal., 285, (1913) 20 P.C., 829. 17 C.W.N., 1039 (mortgagee required to exhaust his security first).

The Allahabad High Court takes the same view as the later decisions of the Calcutta High Court—see 16 All., 418, 22 All., 401; also see 10 All., 35.

Statutory Provision—

The conflict must now be deemed set at rest, in view of the language of Or. 21, rule 20, which shows that a decree for sale in enforcement of a mortgage cannot be generally treated as a decree for the payment of money, thereby practically giving effect to the later Calcutta and Allahabad decisions.

III. (MORTGAGEE) DECREE-HOLDER—EXECUTION-PURCHASER—

This case must be deemed overruled in so far as it lays down that a mortgagee who has obtained a mortgage decree and after obtaining leave to bid at the sale held in execution of such decree has become the purchaser, stands in a fiduciary position towards his mortgagor. For it has been held by the Privy Council that leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser. See 16 Cal., 682 (P.C.); 16 Cal., 132, 19 Cal., 4, 18 Mad., 153, 24 Mad., 56, 18 All., 31; 22 All., 284, 24 Mad., 85.¹

[11 Cal 731]

APPELLATE CIVIL.

The 3rd June, 1885.

PRESENT . .

MR. JUSTICE PRINSEP AND MR JUSTICE GRANT.

Mathura Das Judgment-debtor

versus

Nathuni Lall Mahta and another... ..Decree-holders.

*Sale in execution of decree—Civil Procedure Code (Act XIV of 1882),
ss. 294, 311—Decree-holder bidding at sale without permission
of the Court—Substantial injury.*

Under the terms of s. 294 of the Civil Procedure Code, it is discretionary with the Court to set aside an execution sale at which the decree-holder has bid and purchased without first obtaining permission from the Court so to do; and in dealing with such a case, the Courts, although considering the matter as an irregularity in the conduct of the sale, will not interfere with the sale, unless it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity.

¹ Appeal from Order No. 420 of 1884 against the order of Baboo Ram Pershad, Subordinate Judge of Tinsuk, dated the 13th of November, 1884

ON the 16th June 1884 the right, title and interest of one Mathura Das in certain mouzahs was put up for sale in execution of a decree for Rs. 19,460 obtained against him by Nathuni Lall Mahta and others. At this sale the decree-holders themselves [732] purchased the mouzahs in question for a sum of Rs. 14,550. They, however, had not obtained from the Court permission to bid at the sale.

The judgment-debtor applied under s. 311 of the Code of Civil Procedure to have this sale set aside on the grounds (1) that the sale proclamation had not been properly made, (2) that the property had been sold at a very low price, it being worth over two lakhs six thousand, exclusive of a pucca house worth another lakh of rupees, (3) that the decree-holders had not obtained the permission to bid at the sale.

The Subordinate Judge found that the sale proclamation had been properly posted and published, that the small price bid for the property could not therefore be said to be due to want of notice of the sale, but was probably due to the fact that these very mouzahs were also advertized for sale in satisfaction of a decree for eight lakhs of rupees obtained against the judgment-debtor by the Maharajah of Durbungah, and that, although the decree-holders had not obtained permission to bid at the sale, under the circumstances of the case it did not seem proper, the judgment-debtor having suffered no substantial injury from the irregularity, to set aside the sale merely for this reason, he, therefore, disallowed the objections and held the sale to be good.

The judgment-debtor, appealed to the High Court on, amongst others, the ground that the decree-holders having bid and purchased without the permission of the Court, the sale ought to be set aside.

Baboo Umakali Mukerjee for the Appellant.

Baboo Mohesh Chunder Chowdhry and Baboo Saligiam Singh for the Respondents.

The **Order** of the Court (PRINSEP and GRANT, JJ.) was as follows :—

Under the terms of the third para. of s. 294 of the Code, it is discretionary with the Court of execution to set aside a sale in which the decree-holder has purchased without the permission of the Court having been first obtained. In dealing with such a matter, which we regard as an irregularity in conducting the sale, it should be taken into consideration whether any substantial [733] injury has resulted, that is to say, whether, by reason of the decree-holder being the purchaser without permission of the Court previously obtained, an inadequate price has been realized at the sale. The judgment-debtor, appellant, has been unable to show us that the judgment of the lower Court, in holding that there was no such substantial injury, is incorrect. There are other irregularities alleged by the appellant in publishing the proclamations; but it is unnecessary to consider them having regard to the finding that no substantial injury has resulted at the sale.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[DECREE-HOLDER BIDDING AT SALE WITHOUT LEAVE OF COURT—EFFECT—

The words " the Court may, if it thinks fit, set aside the sale," show that a purchase by the decree-holder without permission is not *ipso facto* void; such purchase is valid until it is set aside—see 11 Bom., 588; 21 Cal., 554 (558)

SUBSTANTIAL INJURY NECESSARY.

In determining whether the sale should be set aside, the Court should have regard to the adequacy of the price. If the price is inadequate or any other substantial injury is made out, the sale can be set aside even after its confirmation, *see* 32 Mad., 242.

ONE DECREE—HOLDER OBTAINING LEAVE AND PURCHASING.

It has been held in a recent decision that, where one of several joint decree-holders applied for execution on behalf of his co-decree-holders and afterwards obtained leave for himself to bid and purchased the property, the purchase-money being equal to his share of the decree amount, the co-decree-holders were entitled to recover their share of the property purchased, *see* 33 All., 563 . 11 Ind. Cas., 517 (F B).]

[11 Cal. 733]

APPELLATE CIVIL.

The 23rd June, 1885

PRESENT.

MR. JUSTICE PRINSEP AND MR. JUSTICE GRANT.

Guru Pershad Singh and another, minors represented by their mother
Sunderbasi Koer and another.....Plaintiffs

versus

Gossain Munraj Puri and another.....Defendants.

*Minors— Practice—Guardian—Parties—Next friend—Married woman—
Civil Procedure Code (Act XIV of 1882), s. 457.*

In a suit brought by minor sons against their father, their mother cannot act as next friend

THIS was a suit by Guru Pershad Singh and Thakoor Pershad Singh, minor sons of Jhika Singh (through their mother and guardian Musmamut Sunderbasi Koer), and their mother Sunderbasi Koer against the said Jhika Singh and Gossain Munraj Puri, the latter being a person to whom certain property was mortgaged by Jhika Singh. The plaintiffs and the defendant Jhika Singh formed a joint and undivided Hindu family governed by the Mitakshara law.

The plaintiffs alleged that the mortgaged property was the ancestral property of the family, which the defendant Jhika Singh, a vagabond and a spendthrift, had mortgaged for the purpose of raising money to spend in intoxicating drinks, and licentious pleasures. The Subordinate Judge disbelieved the [734] evidence and dismissed the plaintiffs' suit with costs. The plaintiffs appealed to the High Court. At the hearing an objection was taken that the mother of the minors could not be their guardian for the purposes of the suit, and that the proceedings were bad *ab initio*.

Baboo Karuna Sundhu Mookerjee for the Appellants .

Baboo Kishori Lal Goswami for the Respondents.

The **Judgment** of the High Court (PRINSEP and GRANT, JJ.) was delivered by

Prinsep, J.—This suit has been brought by two minors represented by their mother, and by the mother herself, against their father, and one who has obtained a decree against him, to obtain the exemption of their shares in

* Appeal from Original Decree No. 61 of 1884, against the decree of Baboo Dinesh Chunder Rai, Rai Bahadur, Subordinate Judge of Gya, dated the 20th of December 1883.

certain ancestral property from sale in execution of that decree. The suit has been dismissed by the Court of First Instance, and the plaintiffs are the appellants.

An objection has been taken before us for the first time that, as the person appointed to be guardian of the minors for the purposes of this suit is their mother, a married woman, they are not properly represented, and the proceedings are bad *ab initio*.

The terms of s. 457 of the Code of Civil Procedure are clear in declaring that "no married woman can be so appointed."

It might, therefore, happen that if the minors were unsuccessful in the present litigation, when they come of age they would claim the right to sue again, on the ground that they were not bound by any of these proceedings, which were not taken before by one properly representing them; and they might also claim to be exempted from all costs incurred in this suit.

The objection should have been raised in the first Court, but the Subordinate Court should, without any objection being made by the defendant, have taken notice of it, although the matter was one which might readily escape his observation. The fact that the case has proceeded so far cannot affect our action except in the matter of costs, for the defendants clearly should not obtain costs for proceedings unnecessarily taken when they were partly to blame for the result.

[735] We must, therefore, declare the proceedings to be null and void so far as the minors are concerned.

We have, however, to consider the case of the other plaintiff, the mother. Having regard to her position in the matter under litigation, the comparatively small interest that she individually represents, and the confusion which would result in a suit brought by her alone, if indeed that were possible in the absence of the minor sons as parties to it, and on this point we would express no opinion, we think that we should allow her to withdraw from it with liberty to bring a fresh suit. The plaint will be returned. We allow no costs in this or the lower Court.

Judgment for defendants.

NOTES.

[I. MARRIED WOMAN AS NEXT FRIEND OF A MINOR—

Under the Code of 1882, a married woman could be appointed as the next friend of a minor in a suit. The view taken in 11 Cal., 733, was **overruled** by a Full Bench of that Court in 17 Cal., 488 (F B).

II. MARRIED WOMAN AS GUARDIAN AD LITEM OF A MINOR—

Under the Code of 1882, section 457, a married woman could not be appointed as the guardian *ad litem* of a minor defendant. If the minor was so represented, the whole proceedings should be set aside as null and void. See 6 C. L. J., 36; 23 All., 459.

STATUTARY CHANGE.

Under Order 32, rule 4, sub-rule 1, a married woman's disability in this matter is completely removed and she may be appointed the next friend as well as the guardian *ad litem* of a minor.]

[11 Cal. 735]
APPELLATE CIVIL.

The 28th August, 1885.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE GRANT.

In the matter of Brojeshwari Dasi.....Defendant
versus
Guroo Churn Das.....Plaintiff.*

Civil Procedure Code (Act XIV of 1882), s. 561—Cross-appeal—Respondent cross-appealing in forma pauperis

A plaintiff who has obtained leave to sue *in forma pauperis*, and has been successful in obtaining a decree for a portion of his claim, but has failed as to the other portion, is not entitled, on an appeal by the defendant, to be heard *in forma pauperis* on cross-appeal as to the portion of his claim decided against him in the lower Court.

ONE Guroo Churn Das brought a suit against his motherone Brojeshwari Dasi, *in forma pauperis* to recover certain moveable and immoveable property which he alleged belonged to him by right of inheritance. This suit was valued at Rs. 25,955, and in it the plaintiff obtained a decree for the immoveable property, but his claim to the moveable property was dismissed for want of evidence.

The defendant appealed to the High Court against the decree, and prior to the hearing of the appeal (and within time) Guroo [736] Churn Das appeared before the Deputy Registrar to file a cross appeal *in forma pauperis*, with regard to the part of the decree which dealt with the moveable property.

The Deputy Registrar, being of opinion that there was no provision in the Code for cross objections being heard *in forma pauperis*, submitted the matter to the Court with the following remarks.—

" This is a memorandum of objections under s. 561 of the Civil Procedure Code, presented by the respondent *in forma pauperis*. It is valued at Rs. 8,125, indicating an *advalorem* fee of Rs. 405. The Code provides for pauper plaintiffs and pauper appellants (*see* Chs. XXVI and XLIV), but makes no provision for pauper defendants or respondents. It is a question whether the memorandum of objections engrossed on plain paper can be admitted. On a similar reference made by me in 1868, viz., *Rashomonee Dossée v. Chowdhry Junmojoy Mullick* (9 W. R., 356), Mr. Justice JACKSON held as follows:—' I think at present that there is no reservation in favour of pauper respondents [*see* note (e) to article 11 of schedule B annexed to Act XXVI of 1867]; but that the party desiring to object, must, if he desires to be heard as a pauper, file a cross-appeal. This, however, need not prevent the objection being filed, as the law only provides that the Court should not *hear* till the stamp duty is paid; and therefore it is at the hearing that the question will have to be raised.'

" It does not appear from the judgment that was afterwards passed on the appeal to which the cross objection relates, that the question was either raised at the hearing or decided. *See Chowdhry Junmojoy Mullick v. Rasmoyee Dossée* (10 W. R., 309).

* Civil Order No. 1222, on Deputy Registrar's report on memorandum of objections in appeal from Original Decree, No. 384 of 1885.

"The memorandum of objections will, it is presumed, have, with reference to s. 16 of the Court Fees Act, to be admitted; but it will not be heard until the respondent shall have paid the additional fee which would have been payable had the appeal comprised the part of the decision objected to."

Baboo Joy Gobind Shome for the Petitioner.

[737] The Court (PRINSEP and GRANT, JJ.) passed the following order :—

We have no power to remit the stamp duty in the matter.

Application refused.

[NOTE.—See, however, *Shoshi Bushan Chand v. Grish Chunder Talookdar*, ante p. 694, and *Doorgah Churn Dass v. Nittokalli Dossee*, I. L. R., 5 Cal., 819.]

NOTES.

[See also 8 Mad., 214, 1 Bom., 75; 1 N.L.R., 33.]

[11 Cal. 737]

CRIMINAL REVISION.

The 20th July, 1885

PRESENT ·

MR. JUSTICE PRINSEP AND MR. JUSTICE GRANT.

In the matter of the petition of Rajendro Chunder Roy Chowdhry and another.

Recognizance to keep the peace—Power of a District Magistrate to call on a person residing in another district to furnish security—Criminal Procedure Code (Act X of 1882), s. 107—Procedure.

The provisions of s. 107 of Act X of 1882 do not empower a Magistrate to issue process on persons not residing within the limits of his district.

The proper course for a Magistrate to pursue, where he believes that certain persons who are resident beyond the limits of his district are likely to commit a breach of the peace within his district, is to cause information of the fact to be given to the Magistrate within whose district such persons reside, and to produce evidence in support of such view, in order that proceedings may be taken against them by a Court which has jurisdiction.

RAJENDRO CHUNDER ROY CHOWDHRY and Mohima Chunder Roy Chowdhry, two zamindars, residents of Furreedpore, holding property both in Backergunge and Furreedpore, managed by agents, were called upon by the Joint Magistrate of Backergunge to show cause why they should not be bound over to keep the peace for one year, by entering into a recognizance bond with sureties for Rs. 20,000.

The Joint Magistrate found that these persons were likely to commit a breach of the peace in the district of Backergunge, and ordered them each to execute a bond with sureties to the amount of Rs. 5,000 to keep the peace for one year. The zamindars applied to the High Court to have the order set [738] aside on the ground that, as they were residents of Furreedpore, the Joint Magistrate of Backergunge had acted without jurisdiction in binding them down to keep the peace. This objection was also taken before the Joint Magistrate.

* Criminal Revision Case No. 260 of 1885, against the order passed by Mr. L. P. Sherrin, Joint Magistrate of Backergunge, dated the 16th of May 1885.

Baboo *Doorga Mohun Dass* for the Petitioner.

Baboo *Chunder Kant Sen* for the other side.

The **Judgment** of the Court (PRINSEP and GRANT, JJ.) was delivered by

Prinsep, J.—The order binding over the petitioners to keep the peace must be set aside. It appears that these persons were not within the jurisdiction of the Magistrate of Backergunge, but that they were within the jurisdiction of the Magistrate of Furreedpore, and it has been found that they are likely to commit a breach of the peace within the district of Backergunge. Under such circumstances, as held by a Full Bench of the Allahabad High Court in the case of *Joy Prokash Lall* (I. L. R., 6 All., 26) and several decisions of this Court, these persons cannot be bound over by the Magistrate of Backergunge. The proper course for him to take, if he thinks there is evidence that they are likely to commit a breach of the peace within the district of Backergunge, is to have information laid before the Magistrate of Furreedpore, and have evidence in support thereof forthcoming, so that proceedings may be taken by a Court of competent jurisdiction.

. *Order set aside*

NOTES.

[POWER OF A MAGISTRATE TO CALL ON A PERSON RESIDING IN ANOTHER DISTRICT TO FURNISH SECURITY—

The terms of section 407 do not authorize a Magistrate to bind over a person not residing within the limits of his district See 6 All., 26 (F B), 23 Bom., 32, 14 All., 49, 12 Cal., 133.

Temporary residence sufficient to give jurisdiction—

It has been held that if during the temporary residence of the accused he commits any act likely to cause a breach of the peace, a Magistrate has jurisdiction, although the accused permanently or habitually resides in another district See 24 Cal., 344 1 C W N., 129]

[11 Cal 738]

APPELLATE CIVIL

The 16th July, 1885

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE AGNEW

Ram Chand Dutt Defendant

versus

Mosai Santal Plaintiff

Small Cause Court, Mofussil—Act XI of 1865, s. 6—Jurisdiction—Suit for refund of rent voluntarily paid to a wrong person.

A Mofussil Court of Small Causes has no jurisdiction under s. 6 of Act XI of 1865 to entertain a suit for a refund of money paid as rent, in which it is found that the payment was made to a wrong person voluntarily, and under no mistake as to that person being entitled to receive it, but with the object of defrauding an intermediate tenure-holder

[739] THE plaintiff brought a suit in the Midnapore Court of Small Causes to recover from the defendant a sum of money which he alleged he had paid to

* Civil Rule No. 502 of 1885 against an order passed by Baboo Behari Lal Mullick, Judge of the Court of Small Causes at Midnapore, dated the 10th of January 1885.

the defendant under duress. It appeared from the proceedings in the Small Cause Court that the defendant admitted the receipt of the money, but alleged that the plaintiff was his tenant, and that no duress was used; and contended that the Court had no jurisdiction over the case under s. 6 of Act XI of 1865. The plaintiff, on the other hand, alleged that he was not a tenant of the defendant's, but of an intermediate tenure-holder. The Judge of the Small Cause Court held on the merits of the case that the intermediate tenure-holder was the landlord of the plaintiff, and that therefore the defendant was not entitled to collect rent from the plaintiff, that no duress had been used when the payment was made, but that the payment was made voluntarily and under no mistake, probably with the intention of defrauding the intermediate tenure-holder, and he therefore ordered the defendant to refund the sum paid. On the question of jurisdiction he held that the case of *Collector of Cawnpore v. Kedari* (I. L. R., 4 All., 19) was a sufficient authority to show that a Small Cause Court had jurisdiction over such a suit.

The defendant then applied to the High Court to have the order of the Small Cause Court set aside, on the ground that the Court had no jurisdiction to hear the case, it not being one cognizable by a Court of Small Causes; and on the 13th April 1885 a rule *nisi* was granted by TOTTENHAM and GHOSE, JJ., calling upon the plaintiff to show cause why the order of the Small Cause Court should not be set aside.

Mr. Doss and Baboo Chunder Kanla Sen in support of the rule

Baboo Bhobani Charan Dutt showed cause.

The Order of the Court (TOTTENHAM and AGNEW, JJ.) was as follows.—

It appears to us that this rule must be made absolute. The suit in question was not such as is cognizable by a Small Cause Court. It does not appear to come within the description given in s. 6 of Act XI of 1865 of suits cognizable by Courts of Small Causes. Baboo Bhobani Charan Dutt, who appeared to show cause against the rule, argued that the suit was practically for damages. [740] The plaintiff did not purport to be for damages, although the plaintiff did allege that the money had been obtained from him by force. Had that been so, possibly we might have held that the suit was for damages. But even if the Small Cause Court had jurisdiction to entertain the suit under the misapprehension that it was for damages, it had no jurisdiction to grant a decree when it had ascertained on trial what the facts really were. The facts found and set out in the judgment of the Court below are quite sufficient to show that that Court had no jurisdiction to grant a decree. The Court expressly found that the money paid to the defendant by way of rent by the plaintiff was not extorted by force or duress. It found also that it was not paid to the defendant under any mistake as to his being entitled to receive it. On the contrary it found that the payment was made voluntarily, that it was made with the full knowledge that the defendant had no right to the money; and that it was probably made in order to defraud intermediate holders who were entitled to the rents. That being so, if the plaintiff in this suit was entitled to recover the money at all, he could not recover it in the Court of Small Causes.

The rule must be made absolute with costs.

Rule absolute.

[11 Cal. 740]
ORIGINAL CIVIL

The 31st August, 1885

PRESENT.

Mr JUSTICE PIGOT

Byjnath and others Plaintiffs

versus

Graham and others Defendants.*

*Appeal to Privy Council—Amount under Rs 10,000—Civil Procedure Code
(Act XIV of 1882), ss. 595, 596, 600—Appealable value.*

Leave to appeal to Her Majesty in Council granted in one of six suits directed to be heard together, although the amount involved in such suit was under the appealable value, there being an important question of law, which did not arise in the five other suits, the suit, however, involving other questions of law common to all the six suits, such suits having been, by agreement of counsel, heard upon the same evidence, and concluded by the same judgment, five of such suits being appealable as of right, and the aggregate amount in the six suits being considerably more than the appealable value

[741] THIS was an application for leave to appeal to Her Majesty in Council in one of six suits directed to be heard together, arising out of the bankruptcy of Carolambus Tambaci and Sons, merchants and agents, for the sale of piece-goods, carrying on business in England, Calcutta, and elsewhere.

These suits all raised questions as to the title to goods in Tambaci's godown in Calcutta, at the date of the bankruptcy, as to the title to goods which had arrived at Calcutta by sea, but had not been actually delivered, and as to the right to call for an account in respect of other goods previously sold and accounted for.

The particular suit in which the application was made was brought by the plaintiffs who were the banians of the firm of Tambaci and Sons at Calcutta for a declaration that they were entitled to a lien upon 55 bales of piece-goods marked P T and Co, which had been shipped by the steamer *Knight of St. Patrick*, and consigned for sale by Peacock, Mollison and Co, of Manchester, to Tambaci and Sons in Calcutta, and which had arrived in Calcutta, on the 14th September 1882, previously to the date on which Carolambus Tambaci had suspended payment, viz, the 27th September 1882. The bills of lading of these goods had been endorsed over to the banians who claimed them as security for advances made by them to the firm of Tambaci and Sons, not specifically against the goods, but generally under the terms of their banianship agreement, and prayed for the delivery to them of these bales, for an injunction and other incidental relief. The defendants claimed these 55 bales as agents for Peacock, Mollison and Co, stating that they had been consigned to them on the express terms that the proceeds of sale should be remitted to Manchester, and specially appropriated to meet their drafts against the shipment, and further that Tambaci and Sons had no power to pledge the goods, or deal with the bills of lading regarding them.

The other five suits were brought by Peacock, Mollison and Co., and other persons claiming as vendors or consignees against the banians for a

* Application in Original Suit No. 552 of 1882, decided by Mr Justice CUNNINGHAM and Mr. Justice WILSON, on the 2nd March 1885.

declaration of their rights over certain other goods in the godowns of Tambaci and Sons at Calcutta, as above stated.

[742] In the course of these suits certain commissions were issued to England for the purpose of obtaining evidence, and it was agreed by counsel on both sides that all this evidence taken under commission should be received as evidence in all the suits at the hearing before the High Court in Calcutta; and at the hearing in this Court it was further agreed by arrangement of counsel, that the evidence taken in the suit of *Byjnath v. Graham* should be evidence in all the suits. Some evidence was, however, given separately in some of the suits, but the general result of the agreement of counsel was that almost all the evidence was common to all the suits, most of the questions to be decided affecting in a greater or less degree either all these suits or at least more than one of them.

These cases were heard together by a special bench consisting of Mr. Justice CUNNINGHAM and Mr. Justice WILSON sitting on the Original Side of the Court

On the 2nd of March 1885, the Court delivered one judgment in all the cases, which dealt firstly, with the cases generally, and secondly, with the cases separately as far as it was necessary to do so, where the issues differed. As regards the 55 bales claimed by Byjnath and others as banians under the circumstances before set out, the Court, on an issue raised as to whether the bills of lading of the 55 bales had been endorsed to Byjnath under such circumstances as to defeat the right to stoppage *in transitu*, held that the legal effect of the transaction was governed by s. 103 of the Contract Act, and that the words of s. 103 "an advance made upon it" plainly required that the pledge of a bill of lading, in order to defeat the right of stoppage *in transitu*, should be as security for a new advance, and not as security for a pre-existing debt, that the section further required the advance for which the bills of lading were pledged to be "made *specifically* upon it," and after stating that "the construction of this section was by no means free from doubt," decided that the requirements of the section would be complied with where it is shown that any sum is advanced on the terms that it is to be secured by the particular bill of lading or the goods represented by it, though it may be secured by other bills or goods also, and although the bill of lading may have been intended to [743] be security not only for the particular sum or sums advanced upon it, but also for some antecedent liability.

Reading the section in that sense the Court decided that Byjnath was entitled to hold the 55 bales as security for all the sums advanced by him after the arrival of the particulars of shipment by the steamer *Knight of St. Patrick*.

The gross value of the 55 bales was Rs. 9,406-4. Against this judgment, as far as it regarded their particular case *Graham and Co.*, the defendants, being desirous of appealing to the Privy Council, applied to the Court for that purpose on, amongst others, the following grounds --

(1) That the case accepted by the Court as the case of the plaintiffs was not disclosed in their pleadings, nor in their answer to written interrogatories administered by the defendants for the purpose of eliciting in detail the facts which were alleged to constitute the lien claimed.

(2) That the Court had overlooked, in weighing the evidence, several facts pressed at the hearing, and had made no mention of them in its judgment; that the finding of the question of lien was against the weight of evidence.

How seller may stop where instrument of title assigned to secure specific advance.

* [Sec.—103:—Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.]

(3) That the Court, whilst admitting the construction put upon s. 103 of the Contract Act to be that based on *Roger v. The Comptoir d'Escompte* (L. R., 2 P. C., 393) had adopted a construction of that section not only at variance with that decision, but with the plain meaning of the words of the section, and the illustration thereto, with reference to antecedent debt.

(4) That the Court held that there was no specific advance against the 53 bales, and that section 178¹ of the Contract Act did not protect the banians' transaction.

Mr. *Hill* for the Applicants.—Although the value of the subject matter of the particular suit is under Rs. 10,000, yet the decree involves indirectly a claim or question to, or respecting, property of that amount, inasmuch as this is one of several suits involving the same important questions of law, ordered to be heard together upon the same evidence, and concluded by one judgment, the aggregate amounts involved in such suits being far more than [744] Rs. 10,000. See *Ko-khine v Snadden* (L. R. 2 P. C., 50) which is a very similar case to this, in which special leave was given to appeal. Moreover, the Special Bench constituted to hear these cases was formed with a view to an appeal direct to the Privy Council, the parties, would not have consented to the cases being heard in this way, had they thought they would have been precluded from an appeal by reason of any particular suit being decided against them in an amount under Rs. 10,000. The case is a proper one for appeal, important questions of law arise as to one of which the Judges state that it is "not free from considerable doubt." Section 600[†] of the Code states that the petition must pray for a certificate, either that as regards amount or value and nature, the case fulfils the requirements of s. 596,[‡] or that it is otherwise a fit one for appeal to Her Majesty in Council.

[PIGOT, J.—Ought not the words used by the learned Judges, expressive of doubt as to the law on that one point, to be sufficient under the last part of the 1st paragraph of s. 600.]

Mr. *Hill* further cited the cases of *Khajan Aishanulla v. Karoanamoyi Chowdhry* (4 C. L. R., 125) and *Jugolkishore v. Jotendro Mohun Tagore* (I. L. R., 8 Cal., 210), which were, however, distinguished from the present case by the Court.

* [Sec. 178 —A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods, or documents provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly.]

Pledge by possessor of goods or documentary title to goods.

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.]

† [Sec. 600.—Every petition under section 598 must state the grounds of appeal, and pray for a certificate, either that, as regards amount or value and nature, the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council.]

Certificate as to value or fitness.

Upon receipt of such petition, the Court may direct notice to be served on the opposite party to show cause why the said certificate should not be granted.]

‡ [Sec. 596 —In each of the cases mentioned in clauses (a) and (b) of section 595, the amount or value of the subject-matter of the suit in the Court of First Instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards,

or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value,

and where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law.]

Mr. *Stokoe* [with the Advocate-General (Mr. *Paul*)] for the plaintiffs.—The fact that there is a mere question of law is not of itself sufficient under s. 596. The result of the decree as regards the defendants is that they have lost a sum less than Rs. 10,000, and whatever might be the result of an appeal, they can get no more than the subject of the lower Court's decree. There is therefore no ground for saying that the decree, directly or indirectly, involves a question to property of the value of Rs. 10,000. There is only one point of law involved in this suit which will not be involved in the other cases, all of which can be appealed as of right, the decrees being for amounts over Rs. 10,000. The grounds put forward are nearly all questions of fact, and the Court would hardly certify that the questions of fact have not been thoroughly sifted by the Special Bench, and thus certify that the case is one out of the run of the general cases, and as such fit to go to the Privy Council

[745] **Pigot, J** —In this case there is a point of law determined which did not arise in the other cases heard with it, and on that point, at least, the Judges express their opinion that their construction of s. 103 of the Contract Act is not free from doubt. The case of *Ko-khine v. Snadden* (L. R., 2 P. C., 50) is not without some bearing on the question arising in this application. The several cases heard by the Special Bench are closely connected in subject-matter, and as the Judges in the case alluded to thought the matter fit for appeal, so I think here that the applicants, although not interested to the extent of Rs. 10,000 in the amount of the decree passed against them, still are interested, to a substantial amount, in the question, which must be in issue in the appeals which are allowed as of right. I think, therefore, that I ought to grant a certificate under s. 295 that the case is one fit for appeal to Her Majesty in Council.

Application allowed.

Solicitors for Plaintiffs. Messrs. *Sanderson & Co*

Solicitors for Defendants: Messrs. *Roberts, Morgan & Co.*

NOTES

[The C P C, 1908, O 45, r 4, makes express provision for consolidation, for valuation purposes, of suits involving substantially the same questions when decided by the same judgment but not when decided by separate judgments

This will be done even if the same question of law should arise in some of the suits only and not in others —(1910) 13 C L J., 503, *see also* (1907) 34 Cal., 400, 402]

[11 Cal. 745]
APPELLATE CIVIL.

The 16th July, 1885

PRESENT

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE O'KINEALY.

Peari Mohun Mukerji. Plaintiff

versus

Drobomoyi Dabia and others. Defendants

Evidence—Judgments not inter partes—Admissibility of evidence.

In a suit for possession of land the defendant, in order to show the character of his possession, offered in evidence a judgment obtained by him in a suit to which the plaintiff or his predecessors in title were not parties

Held that the judgment was admissible in evidence

THIS was a suit for *khas* possession of certain lands held by the defendants with mesne profits. The facts of the case are sufficiently set forth in the judgment of the High Court

Baboo Gura Dass Bonnerjee, Baboo Bipro Dass Mukerji and Baboo Pran Nath Pandit for the Appellant.

The Advocate-General (the Hon. G. C. Paul), Babu Sri Nath Dass and Baboo Ram Lukhee Ghose for the Respondents.

[746] The Judgment of the Court (CUNNINGHAM and O'KINEALY, JJ.) was delivered by

Cunningham, J.—In this case the plaintiff, Peari Mohun Mukerji, sues the defendants, Girish Chunder Chatterji and others, for *khas* possession. The plaintiff alleges that the lands in dispute are lands within his *seputni*, and that the defendants have no right or title to them. The defendants set up, *first*, that they have been more than twelve years in possession of the lands, *secondly*, that, with the exception of the plots mentioned in paragraph 2 of their written statement, the lands claimed by the plaintiff are held by them as their *ayma*, and *thirdly*, that of the plots mentioned in paragraph 2 of their written statement, some belong to other mouzahs, and some to certain lakhirajdars whose names are not given. The Subordinate Judge was of opinion that the defendants had proved their title to the lands, that the settlement [statement?] made by the plaintiff, or by the people who carried on the case for him, that he was in possession of the lands, was false, and he came to the conclusion that the plaintiff, or at least the people who carried on the case for him, had fabricated the documents used in support of his claim. Against this decision the plaintiff has appealed.

Now, if we go back to the origin of the cause, we find a document purporting to be a copy of the original *sunnud* given for these *ayma* lands in 1194. This document is at page 136 of the appellant's paper-book. Objection to it has been taken to its reception in evidence that it is a copy of a copy, and is therefore inadmissible. No such objection was taken in the lower Court, and it is doubtful whether we should accede to the objection*. But admitting that the document should not be received in evidence, we do not think that this in any way impeaches or destroys the title of the defendants. It is in evidence that a case arose in 1799 between Ramkanto Roy and the predecessors in title of the defendants. In that case the *ryaradar* claimed, as the plaintiff now

*Appeal from Original Decree No. 105 of 1884 against the decree of Baboo Bhuvan Chunder Mukerji, Second Subordinate Judge of Hooghly, dated the 20th of December 1883.

does, the land as *mal*, and in that case, as in this, the defendants set up the title that they held the lands under the *sunnud* of 1194 and the subsequent *chucknama*. The decision in that case recites as follows :—"The defendants, in their answer, state that in 1194 B. S. [747] the zamindar of Burdwan gave a *sunnud* in respect of 2,000 bighas of *chur* lands to their father, Jagat Narain Mitra, deceased, that agreeably to that *sunnud*, the Maharajah made a *chuckbust* of 1,754 bighas 13 cottas of land in the seventeen mouzahs, Amerpur, &c., and that they have been holding possession according to that *chuckbust*." That suit was dismissed, and it was found that, with the exception of 16 bighas 16 cottas, the plaintiff was not entitled to the lands which he claimed. One thing is of some significance, namely, that in the judgment there is the following description of the nature of the suit. "In the suit, on a claim for possession of 4,226 bighas of *mal* lands, the plaintiff in his plaint, dated the 3rd January 1792, stated that the defendants had forcibly taken possession of the six mouzahs, Amerpur, &c.; and half of the lands of the other mouzahs, comprising an area of about 4,226 bighas. So that in that suit the plaintiff claimed the whole of Amerpur and five other villages and a portion of each of the remaining villages as *mal*. The suit being dismissed, so far as the claim of *ayma* was concerned, it was found that the defendants were in possession under the *sunnud*. Objection has been raised to this judgment that it is not *inter partes*, and is therefore inadmissible in evidence. As regards this objection we think that the document is admissible in evidence as showing the nature of the possession of the defendant's predecessor in title. As a rule judgments are evidence only between parties, but there is an exception to this. In the case of *Davies v. Lowndes* (1 Bing. N C., 606) it was decided that decrees in Chancery between other parties, concerning the same lands, were admissible in evidence, to show the character in which the possessor enjoyed the lands. That decision is in consonance with the decision of their Lordships of the Privy Council in the case of *Rameshwar Pershad Narain Singh v. Kunjbehari Pattuck* (L. R., 6 I. A., 33). There, as here, the question was as to a right to certain property, and in that case criminal proceedings not *inter partes* and agreements entered into between parties not parties before the Court were held to be admissible in evidence. Their Lordships in that case say. "It was objected that this *razinama* does [748] not bind the proprietor of Mahooet, but although it was apparently made between tenants, it seems to have been subsequently acted on, and may properly be used to explain the character of the enjoyment of the water." We think, therefore, that this decree is admissible in evidence to show the nature of the enjoyment which the defendants then had in the lands.

The first matter for consideration is, whether the lands held as *ayma* include the whole or only a part of the villages. If we turn to a copy of the *chucknama* given at page 141 of the appellant's paper-book, we find the headings as follow—Description Dhamla—the next heading gives the total quantity of land by *ayma* standard, the next heading gives the land transferred, the next heading gives the *mal* lands, the next heading gives the *baja* land; the next heading gives the Government land; the next heading gives the remaining land held as *ayma*. It is said that, looking at the top of the *chucknama* itself, it would appear that only the *ayma* mehal was measured, and that there is nothing to show that it contains the whole of the village. We think, on a construction of the document itself, especially looking at the decision of 1199, that what it did intend to describe was the lands of the whole village of every denomination.

But as the *ayma* lands were given according to the *ayma* measurement there arises the question, what was the standard pole according to the *ayma*

measurement. The evidence on this point consists of several documents. The learned Subordinate Judge was of opinion that, as the *qaradar* in the year 1799 sued for 4,226 bighas of land, and the predecessors of the defendant in the present suit claimed 1,754 bighas by *ayma* measurement, these 1,754 bighas by *ayma* measurement were equal to 4,226 bighas by ordinary measurement. This of course is evidence to a certain extent, but it is not conclusive of what the *ayma* measurement was. Then there is the *chucknama* of 1199, which shows that 56 *guz*—which ordinarily means a yard—are required for every *ayma rassi* or bigha. 40 *guz* are only required in the ordinary standard pole, and if it be admitted that the *guz* in both cases is the same, an *ayma* bigha would be greater than two bighas by ordinary measurement. This, however, is uncertain, [749] because we do not know what the length of an *ayma guz* is or was. Then, again, in the judgment referred to at page 52 of respondent's paper-book, it was found between the same parties that two bighas nine cottas by *ayma* measurement were five bighas by the current ordinary measurement. This also is very good evidence but still not conclusive, because we do not know whether the lands described were the same lands that were measured in 1199.

There is another point, too, which also goes to support the idea that the *ayma* measurement was at least much larger than the ordinary measurement. In the defendant's written statement, paragraph 2, they pleaded that certain plots, namely, 32, 52, 56, 57, 58, 63, 65, 66, 67, 70, 137 and 382, were lands not in their possession, but were lakhiraj lands belonging to certain other people. The Subordinate Judge held that these lands were the plaintiff's *mal* lands within the original eight *chucks* of Dhamla, and that these lands as now measured amounted to 206 bighas. It is contended before us by the learned pleader who argued the case for the appellant that this finding is erroneous. But this finding was not contested in any way in appeal, and there was nothing brought to our notice in argument which would lead us to believe that it is erroneous. If the 45 bighas, held by the plaintiff's predecessor is now found to be 206 bighas, the defendants would be entitled to hold more land than they actually hold.

Looking at these facts and the important fact found by the lower Court that the plaintiff and his predecessor in title have never been in possession of these lands, the only conclusion we can come to is that from the 5th of January 1799, the date of the order in the suit between the *qaradar* and the predecessor in title of the defendants, the defendants have held these lands under an *ayma* title. The case then comes within the decision of their Lordships of the Privy Council in the case of *Hwo Pershaw Rai Chowdhuri v Gopal Dass Dutt* (I. L. R., 9 Cal., 255) decided on the 26th of May 1881. In that case the plaintiff sued for certain land, asking *khas* possession, the defendants set up a *chuckdari* title, and they were able to prove that from 1838 they [750] had held these lands under a colour of title. In that case their Lordships of the Privy Council said, "The result is, their Lordships think, that the defendants, even if not in possession under a well-proved legal title, are in possession under a colour of title which might have been avoided as far back as the year 1838, and that, inasmuch as no proceedings were then taken to avoid it, time has run in their favour. Their Lordships will therefore humbly advise Her Majesty that the decree of the Courts below must be affirmed, and that this appeal be dismissed." Following that case we think that the present case should also be dismissed. But even if that decision were not final of the matter, as we think it is, the plaintiff would fail on another ground, namely, that as regards the lands in dispute he has shown neither title nor possession. That he was never in possession was found, and

we think rightly, by the Court below, and he is not able to show us any title whatever to lands not *ayma* lands. In this view also the suit must fail.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[On the same principle, it has been held that though a consent decree obtained against a defaulting proprietor is not binding on the auction-purchaser at a revenue-sale, still it is admissible in evidence in a suit where the purchaser is a party to show how possession was obtained —9 C. W. N., 383 See the Notes to *Gujju Lall v. Fattah Lall* (6 Cal., 171) in the Law Reports Reprints.]

[11 Cal 750]

APPELLATE CIVIL

The 16th July, 1885

PRESENT

MR JUSTICE WILSON AND MR JUSTICE BEVERLEY

Shama Charan Das. . . . Plaintiff

versus

Joyenoolah and another.. . . . Defendants.

Registration Act (III of 1877), ss. 23, 34, 77—Presentation for registration—

Limitation for completion of registration—Attendance of executant before

Registrar, Time for—Refusal to register.

There is no provision, either in the Registration Act or in the Stamp Act, which lays down that where a document is presented for registration insufficiently stamped, such a presentation shall have no effect. The only effect of such a presentation is that the actual registration is delayed.

There is in law no limitation for the actual fact of registration, provided that the requirements of the Act have been complied with in the matters for which a limitation of time is provided. *Sah Makhun Lall Pandey v. Sah Kundun Lall* (15 B. L. R., 228) followed.

[751] Although s. 34† lays down that no document shall be registered unless the persons executing the same, their representatives, assigns, or authorized agents appear before the

* Appeal from Appellate Decree No. 1512 of 1884, against the decree of Baboo Mati Lal Sirkar, Subordinate Judge of Rungporc, dated the 26th of May 1884, affirming the decree of Baboo Sharoda Prosad Chatterji, Second Munsif of Koorigram, dated the 6th of February 1884.

† [Sec. 34 —Subject to the provisions contained in this Part and in sections 41, 43, 45, 69,

Inquiry before registra- Act, unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26 :

Provided that if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee in addition to the fine, if any, payable under section 24, the document may be registered.

Such appearances may be simultaneous or at different times.

The registering officer shall thereupon—

- (a) inquire whether or not such document was executed by the persons by whom it purports to have been executed,
- (b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and
- (c) In the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear.

Any application for a direction under the proviso in this section may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

Nothing in this section applies to copies of decrees or orders.]

Sub-Registrar within the periods allowed for presentation, yet this section is directly subject to s. 77, and that section nowhere provides any time within which the parties, their representatives, assigns, or authorized agents, shall appear to admit execution

All that is required in order to maintain a suit under s. 77 is that there must be a refusal to register by the Sub-Registrar, an appeal within time to the Registrar, a refusal by the Registrar and a suit filed in the Civil Court within one month from the order of the Registrar refusing registration.

THIS was a suit under s. 77 of the Registration Act of 1877.

It appeared that the defendants on the 10th June 1882 executed a mortgage of certain properties in favour of the plaintiff. This mortgage was presented for registration on the 6th October 1882, but the Sub-Registrar, finding the stamp of one rupee affixed thereon to be insufficient, impounded the document, sending it to the Collector of the district. On the 7th November 1882 the Collector passed an order directing the realization of Rs. 2-8 as additional stamp duty, and Rs. 7 as penalty. This order was duly served on the defendants. The defendants, however, took no steps in compliance with this order, and the plaintiff, therefore, on the 10th August 1883, paid the money himself. On the 23rd August 1883 the document was then returned to the Sub-Registrar, but that officer refused to register it on the ground that the executants had not appeared before him within the time allowed for presentation by ss. 23, 24⁺, 25⁺ and 26⁺ of the Registration Act as required by s. 34 of the Registration Act. The plaintiff then unsuccessfully appealed to the Registrar on the 7th September 1883, and on the 27th September 1883 brought this suit to compel registration.

The defendants contended that the provisions of the Registration Act had not been complied with.

The Munsif held that the executants had not under s. 34 appeared before the Sub-Registrar within the time allowed for presentation under ss. 23, 24, 25 and 26, that no application for a direction under the proviso of s. 34 had been lodged with the Sub-Registrar, and that therefore the Sub-Registrar could not have registered the document, that there was nothing in the Registration Act which would allow the time expended in getting the document [752] sufficiently stamped being deducted from the period allowed for registration, and that therefore the plaintiff had not complied with the conditions precedent to the bringing of his suit, and on the authority of the cases of *Edun v. Mahomed Siddik* (I. L. R., 9 Cal., 150), *Lakhmoni Chowdhraim v. Akroomoni Chowdhraim* (I. L. R., 9 Cal., 851), *Bhagwan Singh v. Khuda Baksh* (I. L. R., 3 All., 397), and *Rahmatulla v. Sarwatulla Kayehi* (1 B. L. R., 58), dismissed the suit.

*[Sec. 24 —If owing to urgent necessity or unavoidable accident, any document executed, or copy of a decree or order made, in British India is not presented for registration till after the expiration of the time here-

Provision where delay in presentation is unavoidable. before prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, such document shall be accepted for registration.

Any application for such direction may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.]

Document executed out of British India. †[Sec. 25 —When a document purporting to have been executed by all or any of the parties out of British India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the registering officer, if satisfied

(a) that the instrument was so executed, and

(b) that it has been presented for registration within four months after its arrival in British India,

may, on payment of the proper registration fee, accept such document for registration.]

Provision where office is closed on last day of period for presentation

‡[Sec. 26 — Whenever a Registration Office is closed on the last day of any period provided in this Act for the presentation of any document, such last day shall, for the purposes of this Act, be deemed to be the day on which the office re-opens.]

The plaintiff appealed to the Subordinate Judge, who held that the document, having been insufficiently stamped on its presentation on the 6th October 1882, could not, at the time when it came before the Sub-Registrar sufficiently stamped on the 23rd August 1883, be said to have been presented within the time allowed by the Act, and that no application for a direction having been lodged with the Sub-Registrar as required by s. 34, it could not be said that the plaintiff had done all he was bound to do under the Act before he brought his suit under s. 77. He therefore dismissed the appeal.

The plaintiff appealed to the High Court

Baboo *Girish Chunder Chowdhry*, for the Appellant, contended that, even admitting that the document was insufficiently stamped on the day of presentation, the subsequent payment of the stamp duty entitled the document to registration, as though it had been duly stamped on the date of presentation, that all the requirements of s. 23 had been complied with, and that the provisions of s. 34 did not apply, inasmuch as the executant did not appear at all before the Sub-Registrar

Baboo *Dwarka Nath Chowdhry* and Baboo *Dequmber Chatterjee* for the Respondents.

The **Judgment** of the Court (WILSON and BEVERLEY, JJ.) was as follows:—

This was a suit brought under s. 77 of the Registration Act to compel registration of an alleged mortgage bond.

The bond was executed by the defendants on the 10th June 1882. It was presented for registration by the plaintiff, the mortgagee, on the 6th October of the same year. It was then [753] found by the Sub-Registrar to whom it was presented, that the stamp on the document was insufficient. The Sub-Registrar, acting under the directions contained in the Stamp Act, impounded the document and sent it to the Collector. The Collector thereupon issued an order directing that the deficiency of stamp duty, with a penalty, should be paid by the person who was bound to pay the stamp duty on the document, that is to say, the defendants. It is not necessary to go into details of what happened with reference to that matter. It is enough to say that the money not having been recovered from the defendants, the executants of the document, the plaintiff ultimately paid the deficiency of stamp duty and the penalty on the 10th August 1883.

On the 23rd August, the Sub-Registrar refused to register the document and made the proper endorsement upon it that registration was refused, and made the entry, which the law requires, in his book. Upon that the plaintiff appealed to the Registrar under s. 72 of the Registration Act. On the 7th September 1883 the Registrar dismissed that appeal and refused to order the registration. This plaint was filed on the 27th September 1883.

The suit has been dismissed in both the lower Courts without investigation into the merits, on legal grounds arising on the construction of the Registration Act. Before examining those grounds it will be convenient to point out in outline what the scheme of the Registration Act is as bearing upon this matter.

Section 23, which is in Part IV of the Act, the title of which is "of the time of Registration," directs as a general rule that every document of this nature shall be presented for registration within four months from the date of its execution, which time may in certain contingencies be extended to four months more, the total period being eight months.

The next matter of importance to notice is what is required by s. 32. That section says: "Except in the cases mentioned in s. 31[†] and s. 89[†], every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office, by some person executing or claiming under the same." Then we come to s. 34, which says no document shall be regis-[754]tered, "unless the persons executing such document appear before the registering officer within four months from the date of execution", provided again that in certain contingencies that period of four months may be extended to eight months. But it must be observed that that section is expressly made subject, amongst other sections, to s. 77, under which this suit is brought. Now, for those matters, periods of limitation are provided, but there is one matter for which no limitation is provided for at all, and that is for the fact of registration. Accordingly, it has been held by the Privy Council in the case of *Sah Mukhun Lall Panday v Sah Kundun Lall* (15 B. L. R., 228) that there is in law no limitation for registration, provided the requirements of the law have been complied with in those matters for which a limitation of time is provided.

Now, several objections have been taken to the proceedings in this case, and effect has been given to them in the Courts below. In the first place in the lower Appellate Court it has been said that the document was not presented in due time. And the ground on which that is said is, because it was found not to have been duly stamped when presented. But there is no provision in the Registration Act or in the Stamp Act which says that if the document, when presented, is insufficiently stamped, the presentation shall be no presentation. On the contrary, the procedure provided is wholly inconsistent with that idea, because what the procedure requires (and the procedure was carried out in the present instance) is that the registering officer, to whom the document is presented, receives it and makes his entry accordingly, he impounds it and sends it to the Collector, the Collector takes the necessary steps to compel payment of the proper stamp duty and the penalty, he then returns the document to the registering officer, who shall proceed with the matter. The effect is that the presentation is a good presentation, though the actual registration is delayed. But, as I have pointed out, there is no period limited for registering. We think, therefore, that the lower Appellate Court is wrong in saying that there was no proper presentation of this document within four months as required by law.

[755] The next objection taken is that this suit will not lie, because the second requirement has not been complied with, inasmuch as the parties who executed the document did not, as required by s. 34, appear to admit execution before the registering officer within four months, nor within eight months. That ground appears to have been relied on in both Courts. In the first Court it is said "According to the provisions of s. 34 of the Registration

Registration or acceptance for deposit at private residence * [Sec. 31 - In ordinary cases the registration or deposit of documents under this Act shall be made only at the office of the officer authorized to accept the same for registration or deposit

But such officer may, on special cause being shown, attend at the residence of any person desiring to present a document for registration or to deposit a will, and accept for registration or deposit such document or will.]

† [Sec. 89 - Every officer granting a certificate under the Land Improvement Act, 1871, shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the land to be improved, or of the land to be granted as collateral security, is situate, and such registering officer shall file the certificate in his book No. 1.]

Act, a deed can only be registered if the persons executing the document or their representatives, assigns or agents appear before the registering officer within the time allowed." And in the lower Appellate Court also the same view appears to have been taken. But it must be observed, as we have already pointed out, that that section is expressly subject to s. 77, and s. 77 is the section which enables the Civil Court to direct registration of a document. In s. 77 there is no such provision as to the time within which the parties are to appear to admit execution, and, indeed, one of the most obvious reasons which may make it necessary for any party to come to the Civil Court under s. 77 to compel registration, must be his inability to procure the attendance of the party executing before the registering officer. We think therefore, that on that point also the lower Appellate Court is in error.

Then, thirdly, it is said in the first Court, "registration could not have been directed after eight months." We are not sure whether the Munsiff intended to lay this down broadly as a proposition, or whether it ought not to be justified by the contest. If he intended to lay that down as a broad proposition of law, it is clear that that is inconsistent with the decision of the Privy Council.

Let us now turn to see the exact sequence of the sections immediately connected with s. 77 under which the suit is brought. The first of those sections, which it is necessary to notice, is section 71. The Sub-Registrar, if he refuses to register, is to make an endorsement on the document that the registration is refused. That is done in two cases—the case in which the Sub-Registrar refuses to register on the ground that execution is not admitted, and the case in which he refuses on any other ground. Section 72 deals with the case where the refusal of the Sub-[736]Registrar is on any ground other than the denial of execution, in which case there is an appeal to the Registrar within a month from the refusal, and the Registrar is to deal with the matter, and to order registration or refuse it. Sections 73 and 74 deal with cases where registration is refused on the ground of denial of execution, whether before the Sub-Registrar or the Registrar himself. In the case of denial of execution before the Sub-Registrar, again, there is an appeal to the Registrar, and he is to deal with the matter in the manner provided in the following sections —

Then, according to s. 76, the Registrar also is to endorse his refusal.

Then comes section 77, which deals with both cases—the case in which the refusal has been on the ground of denial of execution, and the case of refusal on any other ground, and it says that within a month from the Registrar's order, a suit may be filed in the Civil Court.

Now, it seems pretty clear on the face of those sections that what is required in order to maintain a suit under s. 77 is that the procedure laid down in those sections shall be followed, that is to say, that there must be a refusal to register by the Sub-Registrar, an appeal within due time to the Registrar, a refusal by the Registrar, and a suit filed in the Civil Court within time. That is exactly what has happened in this case.

Of the cases bearing on the matter the first in point of time is the case of *Bhagwan Singh v. Khuda Buksh* (I. L. R., 3 All., 397). There the Sub-Registrar refused registration on the ground of denial of execution. Instead of taking the course that the Act points out, by appealing to the Registrar, the plaintiff in that case brought a suit in the Civil Court, and the suit was dismissed on the ground that he failed to fulfil the necessary preliminaries required by the preceding sections which lead up to a suit under s. 77.

The same point came before the Calcutta High Court, in the case of *Edun v. Mahomed Siddik* (I. L. R., 9 Cal., 150). There, again, the same thing was said, that in order to entitle a person to bring a suit under s. 77 (the refusal in that case being on a ground [757] other than denial of execution) the previous step must have been taken of appealing against the Sub-Registrar's order of refusal.

The last case, which will be found in the same volume at page 851, is the case of *Lakhim Choudhram v Akroon Choudhram* (I. L. R., 9 Cal., 851). That case appears to decide substantially the same thing. It is exactly similar to the Allahabad case.

Now, those cases appear to us to establish exactly the conclusion which we should be disposed to arrive at on the construction of ss. 72 to 77, but we do not think that they support the propositions laid down in the Courts below, namely, that deficiency of stamp duty will invalidate the presentation, or that the non-attendance of the executing party within four or eight months is fatal to a suit in the Civil Court under s. 77, or that registration cannot be made after eight months.

For these reasons, we think that the decree of the lower Court cannot be sustained. The case has been dealt with only on this preliminary point, the merits have not been gone into. The case must, therefore, go back to the Munsiff's Court for trial on the merits with this statement of the law.

Costs of this appeal will abide the result.

Appeal allowed and case remanded.

NOTES.

[NO LIMITATION FOR REGISTRATION—

No time is fixed by law within which the registration of an instrument presented and accepted within 4 months of its execution must be completed. See 15 Cal., 538, 11 Bom., 691, 16 Cal., 189, 18 Mad., 255, 3 C. P. L. R. 67 (effect of withdrawal).

REQUISITES FOR A SUIT UNDER SECTION 77—

In order that a suit may lie in a Civil Court under section 77 of the Registration Act, the following conditions are to be fulfilled.—

(1) Presentation by a person authorized to present the document, to the Sub-Registrar within time.

(2) A refusal to register by the Sub-Registrar.

(3) An appeal within 30 days to the Registrar.

(4) A refusal by the Registrar.

(5) Institution of the suit within 30 days of the refusal.

See 9 Cal., 150, 9 Cal., 851, 16 Mad., 341, 6 All., 460.

Hence when the appeal to the Registrar is made after the prescribed period and the Registrar refuses to register on the ground that the appeal is time-barred, such a refusal cannot sustain a Civil suit under section 77. See 24 All., 402 (F. B.).

But a refusal by a District Registrar, on an application duly presented within time, for the reason that no evidence has been adduced before him, is a refusal under section 77 and a suit is maintainable. See 34 All., 165; 13 I. C., 89.

Similarly, a refusal to register for not summoning witnesses under section 36 is a refusal under section 77, and a civil suit will lie—9 A. L. J., 756; 16 I. C., 97.]

[11 Cal. 757]

APPELLATE CIVIL.

The 1st July, 1885.

PRESENT.

MR. JUSTICE FIELD AND MR JUSTICE O'KINEALY.

Peari Mohun Mukherji. Plaintiff

versus

Banshi Majhi. Defendant.

Landlord and Tenant—Enhancement of rent, Suit for—Beng Act VIII of 1869, s. 4—Presumption of evidence

In a suit for arrears of rent at enhanced rates, where the defendant relies on the presumption contained in s 4 of Beng Act VIII of 1869, it is not sufficient, in order to do away with that presumption, to show that the land has not been in cultivation from the time of the permanent settlement. It must be shown that the land has not been held since the time of the permanent settlement.

[758] THIS was one of a series of suits instituted by the plaintiff against his tenants for arrears of rent at enhanced rates. The case is thus stated by the District Judge: "These appeals being analogous have been tried together with the consent of all the parties. The plaintiff-appellant sued in the Munsiff's Court for rent at enhanced rates from the defendants, who are admittedly tenants with occupancy rights, but the Munsiff dismissed all these suits upon the ground that the notices of enhancement served upon the defendants were insufficient and bad in law, and also because he found that in instituting these suits the plaintiff had improperly split up the consolidated holdings of some of the defendants, and lastly because all the defendants hold their tenures at fixed rents, and as such are not liable to enhancement of rent. The plaintiff's appeals in this Court are directed against all these findings of the lower Court, and it will be convenient to consider the findings of the Munsiff in the order in which they appear in his judgment. The Munsiff considers that the notices of enhancement are bad in law, because they do not state precisely to what extent the productive power of the land and the value of the produce have increased. Both of these grounds of enhancement are included under the same heading in s 18, Beng. Act VIII of 1869, and therefore, in my opinion, when the total increase under this general heading is shown in the notices served upon the defendants, I consider that these notices are sufficient in law to enable the defendants to comprehend the cases which they have to meet. *McGiveran v Hurkhoo Singh* (18 W. R., 203). In this Court, moreover, with a view to obtain a final decision on the merits, the pleader for the defendant waives the point, and I accordingly hold that the notices served upon the defendants are sufficient. In the next place the Munsiff finds that Suits Nos. 1219, 1225, and 1228, are untenable, because the plaintiff has split up the consolidated holdings of the defendants in these suits. The plaintiff has objected to this finding on the ground that the written statements filed by the defendants in these cases, as well as the

* Appeal from Appellate Decree No. 2563 of 1883, against the decree of J. G. Charles, Esq., Additional District Judge of 24-Pergunnahs, dated the 23rd of June 1883, affirming the decree of Baboo Bepin Chandra Rai Munsiff of Diamond Harbour, dated the 30th of June 1882.

pottahs and annual accounts submitted by them, all acknowledge the existence of separate holdings at several rents, for if it had been the intention [759] of the parties that the holdings should be consolidated, it was superfluous to retain a record of the separate rentals. In my opinion, however, the finding of the Munsif on this point is correct, and the wording of the annual accounts as well as of the *pottahs* filed by the defendants, seem to me to show that both at the time these *pottahs* were granted, and subsequently when payments were made, the parties treated these holdings of the defendants not as separate holdings, though for convenience a list of the original plots was kept. In all the suits which have been appealed, uniform payments of rent for upwards of twenty years has been proved to the satisfaction of the Munsif, and indeed is admitted by the plaintiff on appeal. The main issue, therefore, in all these cases is, whether the presumption of law raised by s 4, Beng Act VIII of 1869, has been rebutted by the evidence on the record. The Judge went into the evidence on this issue, and, finding in favour of the defendants, dismissed the appeals with costs.

The plaintiff appealed to the High Court.

The Advocate-General (the Hon. G. C. Paul), Baboo Pran Nath Pundat and Baboo Biprodass Mookerjee, for the Appellant.

Baboo Gurudas Banerjee and Baboo Koruma Sindhu Mookerjee, for the Respondent.

The Judgment of the Court (FIELD and O'KINNEALY, JJ), was delivered by

Field, J—Two points have been taken in this appeal. The suit was brought to enhance the rent of a certain holding. The Judge in the Court below held that the enhancement notices and the proceedings taken thereupon were bad because a number of holdings were treated as separate, and separate notices were issued in respect thereof, while the evidence showed that these holdings were consolidated. The Judge relies upon the accounts filed by the plaintiff. He also relies upon certain *pottahs*. These *pottahs* in a subsequent part of his judgment he holds not binding upon the parties, but although they were not binding upon the parties, inasmuch as they were granted by a Hindu widow, it might be contended that they are evidence on the particular point. Whether they are or are not evidence, the Judge [760] is clearly wrong in finding that the annual accounts kept by the plaintiff showed that he treated the holdings as consolidated. This being so, we think that the findings of the Judge below on the point of consolidation should be set aside; and it would have been necessary for us to remand the case in order that the Judge below, after excluding from his consideration the annual accounts which were not evidence, might, upon the rest of the evidence, come to a finding whether the holdings had been consolidated or not. It is, however, agreed by the counsel for the parties that this question shall remain open. We, therefore, set aside the findings of the Court below upon the question of consolidation, and this question will remain an open one between the parties.

The second point argued is concerned with twenty years' presumption. It is found as a fact that the payment of rent for twenty years at the same rate has been proved, and this being so there arises a presumption according to s. 4, Beng. Act VIII of 1869, that the land has been held at this rate from the time of the permanent settlement. It is then sought to rebut this presumption by showing that this tenure or holding has come into existence since the time of the permanent settlement. If this could be shown, no doubt the presumption would be rebutted. The facts are these. In the year 1197 (1790) a taluk containing three mouzahs—Srikissenpur, Lakhinaraipur and Ramlochanpur, together with other villages,—was settled for ten years from 1197 to

1206 (1790 to 1799), and was number 73 in the Collector's *towji*. On the expiry of that decennial settlement, a second settlement was made with a person who had purchased at a revenue sale the rights of Komalprosad, with whom the first settlement was made. In 1818 a measurement was made, and as the result of this measurement there was in 1823 a settlement made for a large portion of excess land (Towfeer). This Towfeer or excess land was found to be no less than 10,492 bighas. This excess land was separately settled in 1823 under a separate number 796; and it therefore became a separate revenue-paying estate. It is admitted by both parties that the lands which form the subject of this and other cognate suits are included within the Towfeer Estate No 1076. The plaintiff's contention is that [761] it must be assumed that the land settled as Towfeer in the year 1823 was not under cultivation in 1793, that is, the time of the permanent settlement. It is contended that if it were cultivated land, it must have been included in the settlement of 1197, or in that of 1206. If that is a proper contention, it is then further contended that the defendants' holding must have come into existence not earlier than 1823.

Now, in the first place, we may observe that, in order to maintain the presumption of section 4 of the Act, cultivation is not essential. What the law says is, that it must be presumed that the land was *held* from the permanent settlement, and land may be held without being cultivated. It is impossible for us to assume that if the tenures which form the subject of dispute in these suits were cultivated lands in 1793, they must have been included in one of the two settlements of 1197 or 1206. There is admittedly no evidence to show the condition of the land at that early period. Both settlements were made as well for waste as for cultivated lands, and we cannot hold that the land omitted from the earlier settlement and afterwards settled must have been uncultivated in 1197 and 1206, and therefore during the intervening years, and therefore at the time of the permanent settlement.

We think, therefore, it is impossible to say that it has been proved that these holdings came into existence not earlier than in 1823, and therefore the twenty years' presumption has been rebutted and does not apply.

Under the circumstances the appeal must be dismissed with costs.

Appeal dismissed

[762] CRIMINAL REVISION.

The 13th July, 1885.

PRESENT

MR JUSTICE PRINSEP AND MR JUSTICE GRANT

In the matter of the petition of Hurendro Narain Singh Chowdhry
and others.

Hurendro Narain Singh Chowdhry

versus

Bhobani Prasa Baruani and others

Criminal Procedure Code (Act X of 1882), s. 145—Procedure under that section—Attendance of witnesses—Process to enforce attendance.

Proceedings under s. 145 of the Criminal Procedure Code should on all points of procedure be regarded as summons cases, and although it is discretionary with a Magistrate to issue a

* Criminal Revision No. 227 of 1885, against the order passed by Lieutenant-Colonel T. B. Michell, Deputy Commissioner of Goalpara, dated the 7th May 1885.

summons on a witness in such a case, yet, when any one of the parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance; and where such refusal is made, it is incumbent on the Magistrate to record his reasons for such refusal.

FOR some time previous to the 12th December 1884 disputes had arisen between Bhubani Prea Baruwani and others (hereafter called the first party) and Hurendro Narain Singh Chowdhry and others (hereafter called the second party) regarding the right to possession of the Dhupghata forest.

And on the 12th December 1884, in consequence of further disputes which had arisen between the parties of the first and second part, the Deputy Commissioner directed the Collector of Gouripore to take possession of the forest on behalf of Government, until one of the contending parties had established their right to possession in the Civil Court.

This order of the Deputy Commissioner was on application by the parties concerned set aside by the High Court on the 6th March 1885, and the Deputy Commissioner was directed to give the parties an opportunity of proving their right to possession of the forest in a proceeding regularly held under s. 145 of the Criminal Procedure Code.

Whereupon the Deputy Commissioner framed an enquiry under s. 145 of the Criminal Procedure Code making the title of the pro-[763]ceeding *Queen Empress v. Bhubani Prea Baruwani and others (first party) and Hurendro Narain Singh Chowdhry and others (second party)*. The notices issued to the opposing parties did not set out the boundaries of the forest. During such enquiry it appeared that the Deputy Commissioner declined to issue process to compel the attendance of certain witnesses required by the second party, and to grant a commission for the examination of certain of such party's witnesses resident out of the jurisdiction of the Court, and further declined to hear the arguments of the pleaders of both the first and second parties before coming to his decision.

The order of the Deputy Commissioner was as follows. -

"In accordance with the orders of the High Court, dated the 6th of March 1885, I have proceeded under the provisions of chapter 12 of the Code of Criminal Procedure to enquire as respects the fact of actual possession of the Dhupghata forest, the subject of dispute. The enquiry has been a protracted one. Twenty-eight witnesses altogether have been examined and a great number of documents, which, in my opinion, have no bearing on the enquiry, have been filed. I have confined the investigation as much as possible to the fact of actual possession on the 12th of December 1884, on which date the forest was taken possession of by the Collector of Goulpara. The dispute regarding the right to possess this forest has been the cause, for some years past, of constant disturbances in the district, and neither of the contending parties would have recourse to the Civil Court.

"The evidence I have taken regarding the fact of actual possession is extremely conflicting. What the one party asserts the other party directly denies. I am satisfied, however, that at the time the Collector took possession of the land in dispute, the Zamindar of Gouripore (the first party) was, and had been for long, in actual possession of it, although his possession was disputed by the second party, and constant efforts were made to oust him from it. I took the evidence of all the witnesses produced by the second party, but I did not think it necessary to hear the arguments of counsel on either side. I find that the Zamindar of Gouripore (first party) was in possession of the Dhupghata forest on the 12th December 1884 (on which date the Collector of

Goalpara attached it), and I declare him to be entitled to retain [764] possession thereof until evicted therefrom in due course of law, and I forbid all disturbance of such possession until such eviction."

Hurendro Narain Singh Chowdhry and others (second party) applied to the High Court to have the order set aside, on the following grounds:—

(1) That the Deputy Commissioner was in error in confining the enquiry to the fact of possession on the 12th December 1884, on which date the forest was taken possession of by him as Collector.

(2) That the Deputy Commissioner should have enquired into and come to a finding as to the fact of actual possession at the time when the dispute arose between the parties and the proceedings were instituted.

(3) That the Deputy Commissioner ought to have issued processes and compelled the attendance of the witnesses cited by the second party, and should have heard the arguments of the pleaders before coming to any decision

(4) That the Deputy Commissioner ought not to have confined his investigation to the taking of the evidence of witnesses produced by the parties.

(5) That the Deputy Commissioner should have acceded to the prayer for the examination by commission of such of the witnesses of the second party as were out of the jurisdiction.

(6) That the Deputy Commissioner ought to have considered the documentary evidence adduced by the second party

(7) That the Deputy Commissioner has assigned no reasons whatever for refusing to rely on the testimony of such of the witnesses as were examined by the second party.

(8) That the enquiry and order made was defective and bad *ab initio*, inasmuch as the boundaries of the disputed tract of the forest were not specified in the notices issued or the order passed.

(9) That the Deputy Commissioner ought to have ascertained and found which of the two parties was last in actual peaceful possession of the forest, and of how much and what part thereof

(10) That the Deputy Commissioner ought not to have ordered the first party to be maintained in possession of the [765] whole of the forest, inasmuch as the evidence of the said first party does not prove that the whole of the forest called the Dhupghata forest in the proceedings was in their possession.

(11) That under the circumstances of the case the Deputy Commissioner ought to have made or directed a local enquiry.

The Advocate-General (Mr. G. C. Paul), Baboo Hem Chunder Bannerjee and Baboo Uma Kali Mookerjee, for the Petitioners.

Mr. Pugh, Baboo Srenath Doss and Baboo Kishore Lall Sircar, for the Opposite Party.

The **Order** of the Court (PRINSEP and GRANT, JJ.) was as follows.—

This matter has already been before another Division Bench of this Court. It relates to a dispute between two zamindars regarding a forest. On a former occasion the Deputy Commissioner, finding that there were disputes regarding this forest, directed the Collector to assume possession until one of the contending parties had established his right to it in the Civil Court. This order was set aside in March last by a Division Bench of this Court, which held that it was the duty of the Deputy Commissioner to give

the parties an opportunity of proving their possession of the forest in a proceeding regularly held under s. 145, and having the parties then before it. The High Court directed such proceedings to be initiated.

It would have been fruitless to enquire which of the parties at the time that this order was passed was in actual possession, inasmuch as the possession was admittedly with the Collector, and therefore, as we understand it, the object of this proceeding would be to ascertain the possession as it existed at the time when the Collector took over possession.

The next point on which it is necessary for us to express an opinion relates to the property now in dispute. It is made the subject of complaint by the learned Advocate-General that no specific boundaries have been pointed out. But so far as we can learn from the proceedings, the parties themselves and the Deputy Commissioner who tried the case knew very well what was the subject-matter of dispute, viz., the tract of country [766] known as this forest. We, therefore, think that there is nothing in this contention.

After the Deputy Commissioner had instituted proceedings under s. 145, the second party by two petitions applied for summonses on their witnesses. Both these applications were refused by the Deputy Commissioner without any stated reasons. Now, the terms of s. 145 are somewhat obscure in this respect. They merely declare that on the day of trial the Magistrate shall receive the evidence produced by the parties respectively. It is nowhere declared in the Code whether these proceedings are to be regarded as what is known as summons cases or as warrant cases, but we are inclined to think that from their nature they should be regarded on all points of procedure as summons cases. We think, however, that although it is altogether discretionary with the Magistrate to issue summons on the witnesses cited by each party in such a case, at the same time when any one of the parties comes at a proper time before him and asks for processes to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance, as he has apparently done in the present case. The applications for summonses were in this case made on the 31st March, and the case was not decided until the 7th May, so that there was ample opportunity to serve the summonses. The Magistrate, however, has on one application stated "The parties must produce their own witnesses. This is an application to summon no less than 99 witnesses in a proceeding under s. 145 of the Code of Criminal Procedure", and on the other application he records a similar order, the number of witnesses here being 114 instead of 99. But the number of witnesses summoned is not necessarily a reason for refusing to grant a process. If the parties had produced 99 and 114 witnesses in Court, the Magistrate would have been bound to examine them. There is no reason to refuse an application for summons simply because a large number of witnesses is mentioned therein.

We think that there are no valid grounds for the next objection taken, because it does not appear that the Magistrate refused to examine any witnesses who were in attendance. The order recorded is that the pleaders did not wish to examine any more of the witnesses who were in attendance.

[767] The next objection taken relates to the omission of the Magistrate to consider the documentary evidence tendered. He states it as his opinion that it has no bearing on the enquiry. As observed by the learned Advocate-General, the Magistrate has probably arrived at this conclusion because he has refused, in another portion of his judgment, to hear the arguments of the pleaders on both sides. It is not improbable that if he had heard their arguments he would have his attention directed to the next points on which the documentary evidence was intended.

The Magistrate was also wrong in refusing to hear the argument of pleaders before deciding this case.

We think, therefore, that the case should be re-heard by the Deputy Commissioner, who will give the parties an opportunity of securing the attendance of their witnesses if they make applications for processes within reasonable time, reserving, however, to himself the discretion of refusing the applications if he considers that the witnesses have been cited merely for purposes of vexation, delay or defeating the ends of justice, or for other valid or sufficient cause. But he should in no case refuse to issue a process without invariably recording his reasons for such refusal.

Re-hearing ordered.

NOTES

[WHETHER MAGISTRATE BOUND TO PROCURE ATTENDANCE OF WITNESSES CITED BY A PARTY IN PROCEEDINGS UNDER SECTION 145 OF THE CRIMINAL PROCEDURE CODE, 1898—

(1) At first it was held that proceedings under section 145 of the Criminal Procedure Code should be treated in matters of procedure as a summons case and therefore the Magistrate should not arbitrarily refuse his assistance to a party who applies for process to secure attendance of his witnesses; and where he so refuses the High Court could interfere in revision. See 11 Cal., 762, 21 Cal., 29.

(2) It was even held that a Magistrate acts without jurisdiction in refusing to issue process for the attendance of witnesses cited by one of the parties. See 30 Cal., 508 note, 31 Cal., 685.

Later decisions of the same High Court took the somewhat modified view that it could not be laid down as a rule of law that proceedings under Chapter XII of the Criminal Procedure Code should be regarded as to procedure as summons cases, but as a special provision has not been made by the law, it should be laid down as a rule of convenience that the Magistrate is not absolved from the duty of assisting the parties in procuring the attendance of material witnesses when it is shown that their attendance cannot be enforced without such assistance. See 30 Cal., 508, 2 C. L. J., 286 note.

It has been held in a recent case that it is not obligatory on a Magistrate to assist parties under section 145 in securing the attendance of their witnesses and they cannot claim as a matter of right that process should be issued by the Court to secure such attendance. See 32 Cal., 1093, 2 C. L. J., 280.]

[11 Cal. 767] ORIGINAL CIVIL

The 16th July, 1885.

PRESENT

MR. JUSTICE NORRIS.

In the matter of the petition of Solomon

Gopaul Chunder Lahiry and another.Plaintiffs

versus

Solomon.....Defendant.

Review—Mistake of Counsel—Civil Procedure Code (Act XIV of 1882), s. 623—Limitation Act (XV of 1877), s. 5—"Sufficient cause."

In a suit between A and B, heard on the 29th January 1883, a certain conveyance was filed with the plaint, but up to the hearing this conveyance had been protected from discovery.

* Application for review in Suit No. 294 of 1884

B's counsel had, however, had a copy thereof delivered to him at the time *B's* written statement was being drawn, and a copy briefed to him at the hearing. At the hearing *A's* [768] counsel stated that the effect of the conveyance was to vest the entirety of certain property in *A*, this view was accepted by *B's* counsel, who did not read the conveyance. The only issue in the case was "who was in possession of the property," and the Court decided this issue on the 5th February in favour of the plaintiff.

On the 26th February *B* brought a suit against *A* to set aside this conveyance on the ground of fraud. And in certain proceedings in this case taken on the 31st March, *B's* counsel discovered, as he alleged for the first time, that under the conveyance, a moiety of a seven-twenty-fourth share remained in *B*. On that day instructions were given to *B's* counsel to draw up a petition of review of the judgment of the 5th February. This petition, owing to the Easter Vacation, was not, and could not have been, presented till the 9th April.

Held, that the words "sufficient reason" in s. 623 of the Code should receive a liberal construction, and should be construed so as to do substantial justice to the parties, that as in this case it appeared to the Court that the construction upon the conveyance by *B's* counsel was the correct one, "sufficient reason" had been shown for making the application.

In deciding whether *B* had shown "sufficient cause" within the meaning of s. 5* of the Limitation Act, for not making the application within the time allowed by law, the Court, following the principles laid down by BOWEN, L. J., in *re Manchester Economic Building Society* (L. R., 24 Ch. D., 488) in its discretion held that "sufficient cause" had been shown by *B*.

Anderson v. Corporation of the Town of Calcutta (I. L. R., 10 Cal., 445) distinguished. THIS was a rule calling upon the plaintiff to show cause why a review of a certain judgment, dated the 5th February 1885, should not be granted.

It appeared that under a deed, dated the 19th March 1883, Gopaul Chunder Lahiry purported to have purchased from one Khoja Abdool Aziz, amongst other properties, a certain house and premises, No. 43, Ram Mohun Ghose's Lane, and that after he had been put into possession he had been, on the 22nd May 1883, forcibly dispossessed from a portion of these premises by one Bibi Solomon, who, after taking possession, refused to attorn to him. Gopaul Chunder Lahiry thereupon on the 8th June 1884 brought a suit to eject Bibi Solomon from the premises. This suit came on for hearing on the 29th January 1884, when the line of argument taken by the counsel for the plaintiff was, that under the deed of the 19th March 1883, the entire legal estate in the house and premises, No. 43, Ram Mohun Ghose's Lane, passed to the [769] plaintiff. In this suit the following issues were raised: (1) Was the conveyance in fact executed? (2) If so, was it executed *bona fide* for consideration or collusively or fraudulently? (3) If the document was executed for consideration and *bona fide*, did the plaintiff acquire any title to the property as against the defendant? (4) Was the plaintiff ever in possession of the property, and is he entitled to oust the defendant from it? The only issues tried at the hearing were the first and the fourth. On the 5th February 1885, a decree was passed in favour of the plaintiff.

On the 26th February 1885, Bibi Solomon brought a suit against Gopaul Chunder Lahiry for the purpose of having the deed of the 19th March 1883 set aside on the ground of fraud, and on the 2nd March 1885 applied for an

Proviso where Court is closed when period expires. [Sec. 5.—If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens.]

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

injunction in that suit, restraining Gopal Chunder Lahiry from dealing with the premises No. 43, Ram Mohun Ghose's Lane, and from executing the decree of the 5th February 1885, until the final hearing of the last-mentioned suit.

This application was taken up on the 30th and 31st March 1885 in the presence of counsel for both parties; and shortly before the defendant's counsel rose to reply to the arguments of counsel for the plaintiff, the former called for and read the deed of the 19th March 1883, and discovered that on the face of it the entire estate in the said premises comprised in the deed of the 19th March 1883, did not pass to Gopaul Chunder Lahiry, but that a moiety of a seven-twenty-fourth part thereof was still in the defendant, and had not been and did not purport to have been conveyed under the said deed to Gopaul Chunder Lahiry. Counsel for the defendant thereupon pointed out this fact to the Court, and the Court took time to consider its judgment.

On the 31st March 1885 the defendant's attorney gave instructions to counsel to draw up grounds of review of the judgment of the 5th February 1885, and on the 1st April a petition of review was duly prepared and ready to be filed, but owing to the fact that the learned Judge who had passed the decree of the 5th February 1885 did not sit again on the Original Side of the Court on that day, and owing to the subsequent immediate intervention of the Easter Vacation, the petition was not filed, till the 9th April 1885. The ground set out in the petition was that it had been [770] discovered subsequently to the judgment of the 5th February 1885, that the deed of the 19th March 1883 did not purport to pass the entire legal estate to Gopaul Chunder Lahiry, but that on the face of it a moiety of a seven-twenty-fourth share thereof remained in Bibi Solomon. On the same date Mr Justice NORRIS granted the rule first above mentioned.

At the hearing of the arguments on this rule it was admitted that the deed of the 19th March 1883 had been put in evidence by the plaintiff, and that it had been filed with the plaint, but had been protected from defendant's inspection, inasmuch as it was a document relating to the plaintiff's title. The Court, therefore, with a view of ascertaining what opportunities the defendant's attorney had of seeing the document between the 5th February and the 20th March, called the managing clerk of the defendant's attorney. The following was the evidence.—“I did not see the original conveyance before I instructed my counsel at the hearing of the first suit. I saw a copy of it. I read it, and briefed a copy to counsel before the hearing. On the day of the hearing of the application for the injunction, I was informed by counsel of the effect of the deed, before that time counsel had not discovered the defect. I instructed counsel on that very day (the 31st March) to draw up grounds of review.”

Mr. Hill and Mr. J. G. Apcar appeared to show cause.

Mr. Hill.—The application for review is barred by limitation, the date of the decree is the 5th February 1885, and that of the application the 9th April 1885. Section 5 of the Limitation Act does not save the application, as it cannot be said that a mistake arising from not having carefully studied the effect of the document is a sufficient excuse under that section.

On the 26th February Bibi Solomon filed her suit to set aside the deed, and surely at that date the effect of the document might have been discovered. Negligence of counsel stands on the same footing as that of any other person, and cannot be taken to be a sufficient ground under s. 5 for extending the time of limitation. The first suit was heard on the 24th January 1884, and the then defendant's counsel made use of the deed. Has therefore the Court power to deal with the matter, having regard to the Limitation Act; and is

the ground of mistake sufficient to take them [771] out of the Limitation Act?—See *Anderson v. The Corporation of the Town of Calcutta* (I. L. R., 10 Cal., 445). The other side come before the Court under s. 623 of the Code of Civil Procedure, but under s. 626 the Court is to reject the application if there is not sufficient ground. "Sufficient reasons" must mean reasons *ejusdem generis* as the reasons which are mentioned earlier in the section. The very slightest diligence would have enabled them to see what the effect of the deed was. Mere neglect to look carefully into a document is not a sufficient reason for a review. The case of the *Land Credit Co. of Ireland v. Lord Fermoy* (L. R., 5 Ch. App., 764) shows that it is doubtful, even where an important witness has stated that he has made a mistake in his evidence, whether a review would be allowed. See also the case of *Umrao Thakur v. Gakul Mandal* (8 B. L. R., App., 34) as to the effect of s. 376 of Act VIII of 1859, and also the cases in the note to that case which show that misconduct of a case is not a ground for review. See also the cases collected in Daniell's Chancery Practice, vol. II, p. 1526. With regard to negligence being insufficient, see *Gudadhur Chowdhury v. Shama Churn Mitter* (16 W. R., 8); *Ram Dhun Chuckerbutty v. Joy Narain Pangah* (8 B. L. R., Ap. 36 note. 12 W. R., 536), *Seetanath Ghose v. Shama Soonduree Dassia* (8 B. L. R., Ap., 37 note: 14 W. R., 26), *Brojendro Coomar Roy Chowdhry v. Wise* (19 W. R., 130). With regard to an error in law not being a good ground, see *Jadub Ram Deb v. Ram Lochun Mudduck* (19 W. R., 189), *Ellem v. Basheer* (I. L. R., 1 Cal., 184). Further, they have not proceeded in a right way by asking for a review, they should have appealed, the limitation, both for an appeal and a review, is twenty days therefore, if they can show that they have come to the Court within time for a review, they could have done so for an appeal. On the face of the deed I have a good title. The recital in a deed cannot cut down the operative parts of the conveyance—*Holliday v. Overton* (14 Beav., 467).

NORRIS, J., called upon Mr Gasper on the following points (1) as to the construction of the deed, (2) whether defendant has [772] shown sufficient cause for not making the application within the time allowed by s. 5 of the Limitation Act.

Mr. Gasper (with him Mr Bonnerjee) for Bibi Solomon.—The deed does not purport to convey the whole house to Gopaul. Bibi Solomon takes a seven-twenty-fourth share

[NORRIS, J.—Yes, that is so, but there is nothing in your affidavit to show that the defendant's attorney did not see the deed before the period of limitation expired.] I submit that we are entitled to a review, even assuming that we had an opportunity of seeing the deed when the plaint was filed—see *Mahadeva Rayar v. Sappam* (I. L. R., 1 Mad., 396).

The case of *Anderson v. The Corporation of the Town of Calcutta* is distinguishable from this, as here, the mistake is one made by both sides, whereas in *Anderson's case* the mistake was on the part of the plaintiff's attorney. As to the effect of a mistake on the part of an attorney—see *Carter v. Stubbs* (50 L. J., Q. B., 161).

The Courts in England have declined to be bound by iron rules in such cases as the present. See the judgment of BOWEN, J., in *re Manchester Economic Building Society* [L. R., 24 Ch. D., 488 (504)].

Mr. Hill in reply.

NORRIS, J.—In this case Mr. Bonnerjee obtained a rule on behalf of the defendant, calling upon the plaintiff to show cause why I should not grant a review of judgment.

The suit originally came on for hearing on the 29th January last. Mr. *Phillips* and Mr. *Hill* appeared for the Plaintiff. Mr. *Bonnerjee* and Mr. *Gasper* for the Defendant.

Mr. *Phillips* opened the plaintiff's case and stated that his client's title depended upon a conveyance, dated 19th March 1883, which he said conveyed the whole of the premises, 43, Ram Mohun Ghose's Lane, to his client, and suggested that the only issue to be tried was "is the plaintiff claiming under Khoja Abdool Aziz" entitled to possession?

Mr. *Bonnerjee* asked me to try certain other issues which he named, and I adjourned the case until the 5th February to consider whether I ought to allow those issues to be raised.

[773] On 5th February I decided against Mr. *Bonnerjee*, and the trial proceeded.

Mr. *Hill* produced the conveyance of 19th March 1883, and its execution by Khoja Abdool Aziz was proved by Mr. Wheeler. Mr. *Hill* thereupon tendered the conveyance, and it was admitted.

The learned counsel for the defendant did not object to the conveyance, nor did either of them read it, or ask that the officer of the Court should read it; they relied upon the accuracy of Mr. *Phillips'* statement that it conveyed the whole premises to his client. I also relied upon that statement, and on that assumption the trial proceeded and ended in a judgment for the plaintiff.

On the 26th February Bibi Solomon filed a plaint against Gopaul Chunder Lahiry praying—

(a) "That it may be declared that the transaction evidenced by the said Indenture of the 19th day of March 1883 is invalid and inoperative, or that at all events the same is fraudulent and void as against her, and that the defendant, Gopaul Chunder Lahiry, is a trustee for her in respect to any right or interest he may have acquired thereunder.

(b) "That it may also be declared that the plaintiff is entitled to attach, levy and bring to sale in execution of the said decree of the 29th day of March 1884 the said property, and to reside in the said rooms until the sale thereof.

(c) "That the defendant Gopaul Chunder Lahiry may be restrained by and under the order and injunction of this Honourable Court from executing his said decree of the 5th day of February 1885 against the plaintiff pending the final determination of the suit.

(d) "That the proceedings in the matter of the said claim of the defendant Gopaul Chunder Lahiry may be stayed pending the final determination of this suit.

(e) "That should the said claim be allowed pending the final determination of this suit, then this suit may be taken as one to establish the plaintiff's right to the said property.

(f) "That a receiver may be appointed to take charge of the said property pending the final determination of this suit.

(g) "That the plaintiff may have such further or other relief as the nature of the case may require."

[774] On 2nd March notice was issued upon the plaintiff of an application that the decree which I had given him should not be executed until the suit filed by the defendant had been disposed of.

That application was heard by WILSON, J., on 30th and 31st March. Mr. *Bonnerjee* and Mr. *Gasper* appeared in support of it. Mr. *Hill* and Mr. *O'Kinealy* opposed it.

Shortly before Mr. *Bonnerjee* rose to reply to the arguments of Mr. *Hill* and Mr. *O'Kinealy*, he called for the conveyance, read it, and discovered, as he contended, that it was clear, on the face of it, that it did not pass the whole estate in the premises to the plaintiff, but only seventeen-twenty-fourths thereof, and he relied on this fact in his reply.

It was not until Mr. *Bonnerjee* read the conveyance on 31st March that it was discovered that Mr. *Phillips* had incorrectly stated its purport on 29th January. On the 31st March the defendants' solicitors were advised to make an application to me for review of judgment. I did not sit on 1st April; the Easter Vacation commenced on 2nd April, and application for a rule *nisi* was made to me on the re-opening of the Court on 9th April, which I granted.

The conveyance of 19th March 1883 was filed with the plaint and disclosed in the plaintiff's list of documents, but inspection thereof refused on the ground that it formed part of the plaintiff's title and was therefore privileged.

On 24th June and 4th July Mr. *Hill* showed cause against the rule, and on the latter day Mr. *Gasper* argued in support of it.

After hearing Mr. *Hill* I felt satisfied that the facts disclosed "sufficient reason" for my granting the review, but I doubted whether the affidavit upon which the rule had been obtained disclosed "sufficient cause" for not making the application within the period prescribed by the Statute of Limitation, viz., twenty days from the date of the decree.

Anyone reading the affidavit would, I think, come to the conclusion that it meant to convey the impression that the only two opportunities that the defendants' advisers had of reading the conveyance were on its production before me on 29th January and on its production before WILSON, J., on 31st March, and I am bound to say I was both surprised and pained to find that this [775] was not so, and to learn from the managing clerk to the defendants' solicitors that he had supplied a copy of it to the learned counsel who prepared the written statement, and had briefed a copy to both his counsel at the trial.

These facts to which I have last alluded cause the question as to whether there is "sufficient reason" for granting the review to assume a very different complexion from what it bore at the close of Mr. *Hill's* argument, and I have considerable hesitation in holding that there is "sufficient reason", but I think those words should receive a liberal construction, that they should be construed so as to do substantial justice to the parties, and as it appears to me that Mr. *Gasper's* construction of the conveyance is the correct one, I think I ought to grant the review provided the defendant has shown "sufficient cause" for not coming here within twenty days after the date of the decree.

This is a difficult question. At the hearing, I thought the case of *Anderson v. Corporation of Calcutta* (1 L., 10 Cal., 445), was fatal to the defendant. I am bound by that decision, (though I must respectfully say that I could not arrive at the same conclusion as the learned Judge who decided it arrived at), and unless I can clearly distinguish it from the present case, I must discharge this rule.

In that case *Anderson* had brought an action against the Corporation of Calcutta and the Secretary of State for India; he obtained a decree against the Corporation, and his suit against the Secretary of State was dismissed

with costs, and those costs were added to the costs he was to receive from the Corporation; the decree in that case was made on 27th June 1883; the Corporation gave notice of appeal on 20th July 1883, not making the Secretary of State a party respondent; the plaintiff's attorney, at the time he was served with the notice of appeal, did not observe that the Secretary of State was not a party respondent, and first noticed it on 8th January 1884, and on 22nd January he applied for leave to file a cross-appeal against the Secretary of State. A rule *nisi* was granted, and after argument discharged.

In that case the plaintiff's attorney no doubt ought at once to have noticed that the Secretary of State was not a party respondent; in this case the defendant's advisers ought to have [776] read the conveyance, but Anderson's attorney was not misled by some one else, in good faith, inaccurately stating the purport of the notice to him. Moreover, he waited for a fortnight after the discovery of the omission before he made his application, here the defendant has applied to the Court at the earliest available opportunity after discovery of the mistake, there has been no interval of negligent inactivity on the part of the defendants' advisers since the discovery of the mistake. On these grounds, without putting away the effect of the judgment in *Anderson v. Corporation of Calcutta* (L. L. R., 10 Cal., 445), I think the cases may be distinguished.

In connection with this object, and as affording a guide to the principles that should guide a Judge in dealing with such a case, I would refer to the judgment of BOWEN, L. J. in *re Manchester Economic Building Society* [L. R., 24 Ch. D., 488 (503)]. "It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted, except in certain special circumstances, and in a defined way, would be very perilous. The rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case, otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the rules of the Court have for the best of all reasons left undetermined and unfettered" and *Pritchard v Pritchard* (L. R., 55), is also somewhat in point.

Upon the whole then, though not without misgiving, I must make the rule absolute, but under the circumstances the defendant must pay the costs.

The plaintiff to have all his costs of, and incidental to, the rule, and the payment of these costs to be a condition precedent to the hearing of the 14 Q. B. D. review.

Rule absolute.

Solicitor for the Plaintiff: Mr. C. F. Pittar.

Solicitors for the Defendant: Messrs. Watkins & Co.

• NOTES.

[This case was reversed on appeal. See (1886) 13 Cal. 62.]

[777] PRIVY COUNCIL.

The 12th March, 1885.

PRESENT :

LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Raghunath Bali.....Plaintiff

versus

Maharaj Bali....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Limitation Act (XV of 1877), Sch II, art. 127—Exclusion from joint property.

A collateral member of a Hindu family, alleging it to be joint, claimed his share of ancestral property in Oudh, part of which formed a taluk inherited, for a considerable time past, by the eldest son, who taking the whole of it had given maintenance to the other members. This taking was entered in the first and second of the lists made under the provisions of the Oudh Estates Act I of 1869, and as to it there was no ground of claim. But with respect to the savings, accumulations, and investments made from the income and proceeds of the taluk before the confiscation and restoration of Oudh lands in 1858, the contention was that each member was entitled to his share, and that, by the presumption in respect of a joint family, the burden was on the talukdar to prove that there were no savings, or accumulations, made otherwise than out of the taluk, and before the confiscation.

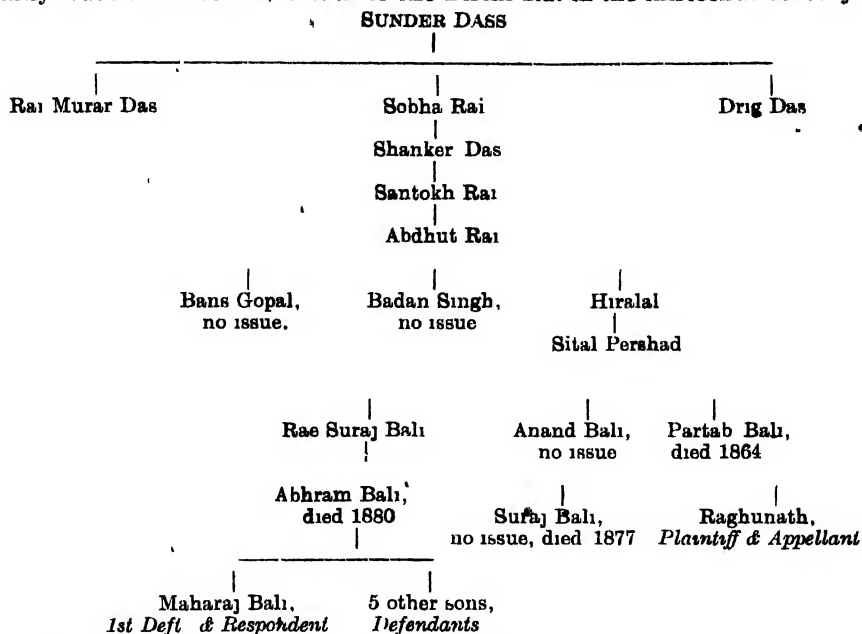
Held, that if it were assumed that the family was for some purposes undivided, still, this was not the case of an ordinary undivided Hindu family and that in such a case as this, the presumption must depend on somewhat special circumstances.

However, this case must be decided on the distinct ground that, as the claimant had been excluded from his share, if he had one, for more than twelve years, he knowing of this exclusion, the law of limitation enacted in Act XV of 1877, Sch. II, Art. 127, was applicable and the claim was barred by time.

APPEAL from a decree (25th April 1882) of the Judicial Commissioner of Oudh, affirming a decree (18th August 1881) of the District Judge of Lucknow.

The suit out of which this appeal arose was to obtain a declaration of the plaintiff's right as cousin of the defendant, the son of his paternal uncle, to a share in village lands, *pattis*, and groves, mainly included in taluk Rampur in pergunnah Dariabad, in the Barabanki district of Oudh; to a share in *maafi* villages and houses; and to a share also in personal effects, [778] bonds, cash, &c., the whole being alleged to have been the ancestral joint property of the family to which both parties belonged; and to be of the value of more than eight lakhs of rupees.

The following pedigree was given in the District Judge's judgment, and the family was said to be traced back to one Pirthi Rai in the thirteenth century :—



The defence was that the ancestral property was all comprised in the *sanad* taluk entered in the first and second of the lists prepared in conformity with s 8 of the Oudh Estates Act, I of 1869. The law of limitation under Act XV of 1877, Sch. II, Art. 127, was also relied on

The District Judge of Lucknow, distinguishing the taluk from the "non-talukdari" property, fixed issues raising questions whether the family was joint or divided, and whether the property was ancestral or not, also whether the talukdar was in the position of a trustee for the family or not. He was of opinion that, though nothing but the taluk came under Act I of 1869, the two kinds of property distinguished above were not subject to two sets of customs, but both to one set, and that there was evidence that the eldest son obtained all the property, not the taluk only. He concluded that there was no proof of joint possession of the property, moveable and immoveable, either within the period of limitation or at any previous time. As to the *maafi* or assigned revenue in the *maafi* villages, it had been assigned for two lives only, both having now terminated, while [779] as to the grant of the zamindari or ownership of these villages, no proprietary title or right to possession was shown by the plaintiff. As the defendant had not these villages in the list attached to his summary settlement *kabuliyat*, and showed no acquisition of them subsequent to confiscation, it might be that the proprietary right was still vested in the Government by the confiscation, but it was not vested in the plaintiff. No relation of trust was established or had been alleged, but such as would arise from the position of the plaintiff as a member of a joint family; and his claim in that character was disposed of by the above findings. The above decision was affirmed by the Judicial Commissioner in the following judgment :—

"Abhram Bali, the father of the defendant-respondent, and first cousin of the plaintiff-appellant, was a talukdar. He was engaged with at the summary

settlement, and again at the regular settlement. A *sanad* was granted to him, and his name is entered in the second list of talukdars (s. 8, Act I of 1869). On his death defendant-respondent succeeded him, and plaintiff-appellant now claims his share of the estate. *Primâ facie* the defendant-respondent is the owner of an estate which descends according to the rule of primogeniture, and it was for plaintiff to prove that he had a right to any portion of it. All that he has proved is that the talukdar had not disowned his relations. They lived with him and enjoyed favours from him, they assisted in the management of the estate, but there is no proof that they enjoyed any right of property in the estate. I can find nothing in the record to show that the plaintiff enjoyed anything except by the favour of the head of the family.

"In the 12th ground of appeal it is alleged that the head of the family held as trustee. This was not asserted in the plaint, and I find no evidence in support of the trust.

"A portion of the property claimed consists of villages which were held revenue-free for certain lives. The revenue of certain lands was remitted for the lives of Abhram Bali, Partab Bali and their eldest sons. Partab Bali was plaintiff's father. On his death his eldest son Sheoraj Bali succeeded to the share of the *maafi*. Sheoraj Bali died in 1878. Thus the two lives on plaintiff's side of the family have expired, and he has no claim to anything under [780] the *maafi* grant. And there is nothing to show that he has any share in the zamindari right.

"Plaintiff-appellant has entirely failed to prove his claim and his appeal must be dismissed with costs."

On this appeal—

Mr. J. D. Mayne, for the Appellant, argued that, although it was admitted that where property, having been confiscated, had been re-granted by the Government, the foundation of title was the grant from the authority having power to make or withhold it, so that the grantee took the estate granted to him as his separate acquisition, yet circumstances might exist requiring a Court to find that a person so obtaining an estate, previously the property of his family, was a trustee for the joint members of that family—*Hardeo Buksh v. Jowahir Sing* (L. R., 4 Ind. Ap., 178), *Harparsad v. Sheodual* (L. R., 3 Ind. Ap., 259).

That in this family there had ever been a partition had not been made out and, on the facts proved, the District Judge should have held that there was, on the part of the head of the family, a relation of trust existing, if not as to the taluk itself, at all events in regard to family property outside it. It was submitted also that certain further evidence should have been received. All savings and accumulations, down to the time of the confiscation in March 1858, should have been held divisible among the members of the family as joint property, as well as property purchased before that date. The plaintiff had lived, and had been maintained in the family house. He was entitled to his share from all sources other than the taluk itself, even if that belonged to the head of the family. This would appear from the application of general rules of Hindu law; and it had also been expressly decided in *G. N. D. Maharaj Ulungaru v. Raja Rao Puntulu, &c.* (5 Mad. H. C., 31) that the rule of impartibility applicable to zamindaries did not extend to the personal property of a zamindar left at his death, and that such property was divisible among his sons after his death. The appellant's position was that he was a member of a joint [781] family, of which the talukdar was the head or managing member. Accordingly, on the latter, if he alleged any part of the joint family property to be a

separate acquisition by him, or to be his separate estate, was the burden of proving it to be so. This resulted from the general presumptions applicable to Hindu families; and it followed that where, as here, there was a nucleus of joint family property out of which acquisitions in the possession of the managing member might have been made, the law threw on him the burden of proving them to be his separate property, if he claimed them to be so. As regards the property other than the taluk, the District Judge had wrongly laid upon the plaintiff the burden of proving union, joint property, and partibility, all of which attached by presumption to family estate. In supporting that judgment the Judicial Commissioner had erred.

Reference was made to portions of the judgments in the following cases: *Lekraj Kuar v. Mahpal Singh* (I. L. R., 5 Cal., 744, L. R., 7 Ind. Ap., 68); *Bewan Pershad v. Radha Bibi* (4 Moore's I. A., 168), *Neelkisto Deb Burmono v. Beerchunder Thakoor* (12 Moore's I. A., 540). Reference was made to the decisions in *Chhabila Manchand v. Jadavbhai* [3 Bom. H. C. (O. C. J.,) 87]; *Krisnappa Chetti v. Ramaswami Iyer* (8 Mad. H. C., 25), *Luximon Rao Sadasew v. Mulhar Rao Bai* (2 Knapp P. C. Ca., 60), *Paulhem Vallu Chetti v. Paulhem Surriah Chetti* (L. R., 4 Ind. Ap., 109), *Prankristo Mozumdar v. Bhagirati Gupta* (20 W. R., 158), *Umrithnath Chowdhry v. Goureenath Chowdhry* (13 Moore's I. A., 549), *Gobindchunder Mukerji v. Doorgapersad* (14 B. L. R., 337); *Vedavelli v. Narayana* (I. L. R., 2 Mad., 19), *Dharam Das Pandey v. Shamasondri Debi* (3 Moore's I. A., 229), *Harj v. Maruti* (I. L. R., 6 Bom., 741), *Hansji Chhibha v. Valabh Chhibha* (I. L. R., 7 Bom., 297).

Mr. J. Graham, Q. C., and Mr. J. H. A. Branson, for the respondent, were not called upon.

[782] Their Lordships' Judgment, after Mr. Mayne had been heard, was delivered by

Sir R. P. Collier.—In this case Rai Raghunath Bali sued Rai Maharaj Bali for the purpose of recovering the half of a taluk in Oudh, together with other property which is specified in the plaint, of various descriptions, some real property, some personal property, and some *maafi* villages. The relationship of the parties is sufficiently stated in a short pedigree to be found at the beginning of the judgment of the District Judge. It appears that Sital Parshad had three sons, Suraj Bali, Anand Bali, and Partab Bali. Anand Bali died without issue. Partab Bali had two sons, Sheoraj and the plaintiff, Sheoraj having died some years before the suit was instituted. The other son of Sital, Suraj Bali, had a son, Abhram Bali, who died in 1880, leaving the defendant his heir and successor.

The taluk in question is one which for a very considerable time has descended to the eldest son, who has taken the whole of it, and has given maintenance to other members of the family. In 1858 a summary settlement of this taluk was made with Abhram Bali, the father of the defendant, and in 1860 Abhram received a *sanad* in pursuance of that summary settlement, whereby the taluk was granted to him and to his heirs on the principle of primogeniture, and his name was subsequently inserted in the first and second list of talukdars in the Oudh Estates Act of 1869. This being so, no question has been raised on the part of the appellant as to the right to the taluk except on the suggestion of a trust—the proof of which has entirely failed.

The other descriptions of property remain to be dealt with. First, with respect to the *maafi* villages, it appears that there was a grant of them to Partab, the father of the plaintiff, and Sheoraj, his eldest brother, for their lives. Those lives having determined, the property reverted to the Government, and was granted to the defendant. With respect to them, also, no question arises.

We have only, therefore, to deal with accumulations which have been made by the defendant, or his father, or his ancestors. With respect to them it is admitted that any savings made [783] from the proceeds of the taluk since the summary settlement of 1858 would belong to the defendant. The question, therefore, is still further reduced to savings and investments which have been made at an earlier time, or from proceeds other than those of the taluk. As to them the plaintiff contends that the family being joint he is entitled to his share. A very able and ingenious argument has been addressed to their Lordships on the part of Mr. *Mayne* for the purpose of showing that the family was joint. The Subordinate Judge has found that they were not joint, but in the view which their Lordships take, of the case it is not necessary to decide this question.

It has been further contended by Mr. *Mayne* that the burden is thrown upon the defendant to prove that there were no savings or accumulations other than out of the proceeds of the taluk or before 1858. But it appears to their Lordships also unnecessary to determine this question. They observe, however, this is not the case of an ordinary undivided Hindu family, if it be assumed that the family was for some purposes undivided, and that the presumptions must here depend upon somewhat special circumstances.

Their Lordships are of opinion that there is a ground, and a very distinct one, upon which the cause must be decided. It has been distinctly found by the District Judge (and that finding has been adopted, though not in express terms, by the Judicial Commissioner of Oudh, who has affirmed the judgment, though without giving any lengthened reasons for his decision). "With respect to all the rest of the property other than the *maafi* villages, I am of opinion that it is not only not proved that plaintiff's branch had joint possession, but that the exclusive possession by Abhram Bali and defendant on their own behalf alone is established." If this finding is right, the Limitation Act of 1877, XV of 1877, Art. 127, Sch. II, applies, the term of twelve years, according to that Act, running from the time when the exclusion of the plaintiff was known to him. It appears to their Lordships that this finding of the Judge is altogether supported by the evidence, and that the plaintiff's exclusion must have been known to him at latest in 1858 or 1860. It has, indeed, been contended that there was [784] some joint possession on behalf of the plaintiff, on the grounds 1st, that he lived in the family house, though not in the same apartments with his cousin; 2ndly, that he obtained an allowance of some Rs. 90 either per mensem or per annum, ---it does not clearly appear which. The first of these grounds does not appear to their Lordships to establish joint possession; the second goes some way to negative it.

The plaintiff has been excluded from his share, if he had one, of the family property, for more than twelve years, and he must have known of this exclusion. If so, the Statute of Limitations has run against him.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Young, Jackson, and Beard.*

Solicitors for the Respondent: Messrs. *Watkins & Lattey.*

NOTES.

[A claimant admittedly out of enjoyment of property for the statutory period must prove the facts preventing the bar by limitation. --- (1886) 11 Bom., 216 (219), 18 Mad. 418. As regards the onus of proof in suits relating to joint family property see (1907) 11 C. W. N. 478 P. C.]

[11 Cal. 783]

APPELLATE CIVIL.

The 4th August, 1885.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE BEVERLEY.

Sarat Sundari Dabi and others.....Plaintiffs

versus

The Secretary of State for India in Council.....Defendant *

Assessment of accreted lands—Act IX of 1847, ss. 6, 9—Order of Board of Revenue when final under s. 6 of Act IX of 1847.

The effect of the words “ whose order thereupon shall be final ” in s. 6 of Act IX of 1847, is, that where an assessment has been made under s. 6, which has been approved by the Board of Revenue, such assessment is final and cannot be called in question in a civil suit ; but the fact of an assessment having been made is no bar to a suit raising the question, whether the Board of Revenue had jurisdiction under s. 6 of the Act to assess.

Act IX of 1847 applies to land re-formed on the site of a permanently settled estate.

THIS was a suit for a declaration that certain lands were a re-formation on the original site of the plaintiffs' permanently-settled village of mouzah Boyrampore, and as such, not subject to Government assessment.

[785] The plaintiffs stated that they were jointly in possession as zamindars of certain mehals in Pergunnah Luskurpore, in which the mouzah in dispute was situate; that at the time when their predecessors were in possession of these mehals, a portion of the land of Mouzah Boyrampore had been submerged in the bed of the river Mohanunda, and that subsequently this land re-formed on its original site, that in 1849. at the time of the Government survey, this land was again partly submerged, and as a consequence the survey and thak measurements made in 1849 included only such portions of this mouzah as had re-formed, that subsequently to this survey the portion which had re-formed was again submerged, and did not commence to re-form till the year 1865 when a portion only of the mouzah re-formed. That at about the time whilst the land re-formed was in possession of the plaintiffs, Government made a dearah survey, and in 1871 settled in *jarah* such of the land as had re-formed on its original site as excess land for a term of ten years under Act IX of 1847 with the plaintiff No. 1, and one Coomar Gopalendro, reserving to the other co-sharers, who refused to take settlement, *malikana*, as persons entitled to take settlement. that no remission of rent was allowed by Government for the land which had not re-formed, and that after the expiration of this settlement, they had held possession of this re-formed portion as *maliks* in zamindari right, and on the 10th February 1882 served notices on the Collector, under s. 424 † of Act X of 1877, signifying their intention to bring a suit to enforce their rights to the land, the Government having attempted to exercise *khas* rights thereon.

* Appeal from Original Decree No. 106 of 1884, against the decree of Baboo Pramatha Nath Mukerji, Rai Bahadur, Subordinate Judge of Rajshahye, dated the 18th of February 1884.

† [Sec. 424 —No suit shall be instituted against the said Secretary of State in Council or against a public officer until the expiration of two months next after notice in writing has been in the case of the Secretary of State in Council delivered to, or left at, the office of a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff ; and the plaint must contain a statement that such notice has been so delivered or left.]

The defendant contended that the land in question was not a re-formation on the original site of Mouzah Boyrampore, that at a dearah settlement in 1867-68, the disputed land was found to be excess land accreted to the plaintiffs' estate, and that it had been assessed with revenue under the sanction of the Board of Revenue, and that therefore under s 9 of Act IX of 1847 the suit would not lie, and that under s. 6 of that Act the assessment was final, and not liable to be set aside by a Civil Court. it was further contended that the plaintiffs not having been in possession of these lands as zamindars within twelve years before suit, the suit was barred.

[786] The Subordinate Judge decided in favour of the defendant, deciding the contention as to the effect of s. 6 of Act IX of 1847 in his favour, on the authority of the following cases. *Dewan Ramjewan Singh v. The Collector of Shahabad* (14 B. L. R., 221 note, 18 W. R., 64), *The Collector of Moorshedabad v. Dhunput Singh* (15 B. L. R. 49, 23 W. R., 38), *Nurain Chunder v Taylor* (I. L. R., 4 Cal., 103), and also holding s. 9 to be a bar to the suit.

The plaintiffs appealed to the High Court.

Baboo Srinath Das and Baboo Kishorilal Sarkar for the Appellants.

The Senior Government Pleader (Baboo Annoda Pershad Banerji) for the Respondent.

The Judgment of the Court (WILSON and BEVERLEY, JJ.), was as follows :—

This was a suit brought by the plaintiffs to establish their zamindari right to certain lands as having re-formed on the original site of Mouzah Boyrampore or Boyamari within the plaintiffs' permanently settled mehals of Pergunnah Luskurpore, and to have it declared that the Government had no *khas* right in the said lands, and that they were not liable to a fresh assessment of land revenue.

The plaint alleges that Mouzah Boyrampore formerly comprised some 7,284 bighas, but that the greater part of these lands had diluviated at the time of the revenue survey in 1849, that after that survey the whole of the lands disappeared, but that from 1865 portions began to be re-formed on the original site, that in 1868 the Government made a dearah survey of the lands thus formed, and on May 6th, 1871, settled them with two of the zamindars for a term of ten years "after maintaining the right of the proprietors;" and that since the expiry of that settlement the plaintiffs had been in possession as owners.

The plaint is inconsistent and indistinct. In one place it asserts that the Government was itself claiming the zamindari title to the lands in dispute, and in another that the Government had recognised the zamindari rights of the [787] plaintiffs, and had merely imposed an additional assessment on the lands.

The defence was virtually that the lands in suit, having been found at the time of the dearah survey, to be excess lands gained by alluvion since the date of the previous survey, had been settled under the provisions of s. 6 of Act IX of 1847, and that under ss. 6 and 9 of the Act that assessment was final and not liable to be set aside in a Court of Justice. It was further contended that the plaintiffs not having been in possession of the lands in dispute as zamindars within twelve years before suit, their claim was barred by limitation.

Several issues were framed in the case, of which the second and third were as follow .—

2nd.—Whether the suit is barred by limitation ?

3rd.—Whether plaintiffs are barred from bringing this suit, the lands in dispute having once been assessed as excess lands under the sanction of the Board of Revenue ?

The lower Court has found both these issues against the plaintiffs

As regards the question of limitation, we are unable to see how it can arise in the present suit. The case for Government is (see paragraph 7 of the written statement) that at the time of the dearah survey the lands in suit were found to be excess lands, which had accreted to the estates of the plaintiffs and their co-sharers, and that they were merely assessed with additional revenue as such accretions. It is no part of the defence that the lands were ever claimed by Government as the property of the State. The settlement proceedings show that the proprietors of all the nine mehals to which the lands were found to have accreted were invited to accept the settlement, and the settlement was made with the owners of two mehals only, because the others either refused to take it or omitted to appear. *Malikana* was, however, reserved for them; and although these owners who took the settlement are styled *jaradars*, the meaning of that phrase apparently was that the settlement was a temporary one only, and it cannot be contended from its use that the Government either had, or intended to set up, a proprietary interest adverse to the plaintiffs. On the contrary, the possession of the [788] settlement holders must be taken to be the possession of the zamindars, and the question of limitation does not therefore arise

On the second point we think that s. 9 of Act IX of 1847 does not apply to the present suit. This is not a suit against Government or any of its officers on account of anything done in good faith in the exercise of any of the powers conferred by that Act. On the contrary, it is a suit for a declaration that the provisions of that Act are inapplicable. We agree with the remarks of PHEAR, J., in the case of the *Collector of Moorshedabad v. Dhunpat Singh* (15 B. L. R., 49; 23 W. R., 38) that "the words of this section seem to be limited to forbidding a suit wherein the plaintiff seeks to make Government or any of its officers responsible in damages on account of anything done in good faith in the exercise of the powers conferred by the Act"

The next question is, whether the Subordinate Judge was right in holding that the suit was barred by the provisions of s. 6 of Act IX of 1847.

That section runs as follows :—

"Whenever on inspection of any such new map it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Sudder Board of Revenue, whose orders thereupon shall be final."

What we have to consider is, what interpretation is to be put on these words, that the orders of the Board of Revenue on the proceedings of the local revenue authorities shall be final? Is it intended that the Civil Courts shall be precluded altogether from enquiring into the legality of the proceedings of the revenue authorities; or are the orders of the Board final only as regards the conduct of the proceedings and the amount of the assessment?

By s. 11 of the Code of Civil Procedure the Civil Courts have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force.

[789] The present suit is not brought to contest the amount of the revenue assessed upon the lands in dispute, but to contest the right of the revenue authorities to assess those lands with any additional revenue at all.

The right to assess alluvial increments with Government revenue is conferred by Regulation II of 1819, s. 3, cl. 2; and ss. 24 and 26 of that Regulation provide for the institution of civil suits in certain cases to contest the awards of the revenue authorities.

Similarly, cl. 3 of s. 14 of the Settlement Regulation (VII of 1822) runs as follows — "The decisions passed by the Collectors under the above powers, if not altered or annulled by the Board or by Government, shall be maintained by the Courts, unless on an investigation in a regular suit it shall appear that the possession held under such a decision is wrongful and nothing herein contained shall be understood to authorize any Court to interfere with the decision of the revenue authorities relative to the *jama* to be assessed on any mehal or portion of a mehal, or to the extent and description of lands belonging to any mehal that may be assigned on the partition of the same to the several parceners concerned."

In the case of *Dewan Ram Jewan Singh v. Collector of Shahabad* (14 B. L. R., 221 note 18 W. R., 94), it was found as a fact that the lands in dispute were lands added to the estate within the meaning of s. 6 of the Act, and it was accordingly held that the Act applied, and that the orders of the Board of Revenue in regard to the assessment were final.

So in the case of *Collector of Moorshedabad v. Dhunput Singh* (15 B. L. R., 49 : 23 W. R., 38), the orders of the revenue authorities were held to be final, but only "as regards the person whom they may directly affect, viz., the zamindar."

We think, therefore, that the words of the Act and the reported cases go to this extent, that when an assessment has been made under s. 6 of the Act and approved by the Board of Revenue, that assessment is final and cannot be called in question in a civil suit. But the fact of an assessment having been [790] made is no bar to an enquiry as to whether the Act applied, and whether the revenue authorities had any right to make the assessment—in other words, whether they had jurisdiction under s. 6 of the Act. That is a question which we think it is open to the Courts to try, and that is precisely the question raised in the present suit.

It is contended before us that Act IX of 1847 was intended only to apply to lands gained by alluvion or dereliction from the sea or rivers in which no proprietary title existed, and that it does not apply to land re-formed on the site of a permanently settled estate.

We think, however, that on the face of the Act itself and the decisions of *Dewan Ram Jewan Singh v. Collector of Shahabad* (14 B. L. R., 221 note : 18 W. R., 64), *Ram Jewan Singh v. Collector of Shahabad* (19 W. R., 127), and *Collector of Moorshedabad v. Dhunput Singh* (23 W. R., 38) this contention cannot be allowed to prevail. The object of the Act is to provide for the assessment of riparian estates from time to time, in accordance with the changes which periodical surveys may show to have taken place in their area and boundaries. Section 3 of the Act refers to a revenue survey which is to be approved by Government as fixing the boundaries of estates, and provides that at intervals

of not less than ten years fresh surveys of such estates may be made. Section 5 then provides for a reduction in the sudder *jama* when on a comparison of two successive surveys it appears that the area of an estate has been diminished, and s. 6 provides for an addition to the *jama* when on inspection and comparison of the new map land appears to have been added to the estate since the last survey. In every case the starting point is to be the revenue survey which, it would appear, is to be taken as representing the boundaries of the estate as they existed at the time of the permanent settlement, and it is apparently not open to the revenue authorities to go behind that survey and enquire whether in fact the boundaries at the time of settlement were not other than therein represented.

In the present case the revenue survey admittedly took place in 1849, and if, as compared with the state of things ascertained at that survey, an accretion was found to have taken place at the subsequent dearah survey of 1867-68, we think the revenue authorities were bound by the provisions of s. 6 of the Act to assess such accretion.

Now it appears from the evidence that in 1868 there was an accretion to the estate mouzah Boyrampore as compared with the survey of 1849; and that being so, we must hold that the Act applied, and that the accretion was liable to assessment. It is true that (if we understand the settlement proceedings aright) the entire area found in 1868 was assessed without any deduction for the area existing in 1849, apparently on the ground that in the meantime the whole of the lands had been diluviated. But this objection to the settlement proceedings has not been taken in the present suit, and even if it had been taken, it is open to question whether we could have interfered. The matter was one affecting the settlement proceedings in respect of which the orders of the Board of Revenue are declared to be final.

That the excess lands, however, were liable to assessment, seems to admit of no doubt, and we think, therefore, that the suit was rightly dismissed.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

NOTES.

[This case must be deemed overruled in so far as it laid down that a former survey map was conclusive under Act IX of 1847 as to the original limits of each permanently-settled estate and therefore that the comparison of the two maps by the Revenue officer was conclusive on the question of addition to the estate. See 14 Cal., 67 (92) (F.B.), 17 Cal., 590; 30 Cal., 291 (P.C.). They are not conclusive and in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made.

The evidentiary value of the survey maps is authoritatively stated in (1902) 30 Cal., 291 (P.C.)

[11 Cal. 791]
APPELLATE CIVIL.

The 26th May, 1885.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE GHOSE

Kokilmoni Dassia.....One of the Defendants

versus

Manick Chandra Joaddar and another.....Plaintiffs.†

*Limitation Act, 1877, sch. II, cls. 140, 141—Adverse possession —
Hindu mother— Reversioner.*

Semble, that, in Hindu law, where a mother succeeds to property as heir of her son, and her right thereto becomes barred by adverse possession, the next heirs of her son on her death will have twelve years therefrom in which to sue for possession of the property.

[792] IN this case the judgment appealed from, in which the facts are sufficiently stated, was as follows —

This was a suit for recovery of possession of immoveable property on the basis of inheritance, plaintiffs alleging that one Haladhar died in 1266 (1859), that his property devolved in succession on his widow and his mother Bhagabati, and that on the death of the latter in 1287 (1880) the plaintiffs became entitled to it as next-of-kin, but were prevented from obtaining possession by defendants, the daughter and daughter's son of Giridhar, a brother of Haladhar.

The Subordinate Judge found that the plaintiffs had the better title, but dismissed their suit on the ground that the right of Bhagabati, and consequently that of the plaintiffs, was barred by limitation. The only question now to be decided is as to the correctness of this finding.

The Subordinate Judge found that Haladhar and Giridhar lived as members of an undivided Hindu family, and that after the death of Haladhar, there was no formal separation; that Giridhar died in 1273 (1866), and that although Bhagabati left the family dwelling-house and put up at Chuamallikpara, where the family had a *golabari*, she was maintained out of the profits of the joint property and used to come and reside occasionally at the family house, where she died in 1287 (1880) after residing there for a month and a half.

I think these findings are fully borne out by the evidence in the case; some attempts were made to show on behalf of the defendants that Bhagabati was turned out of the family house by the defendant Kokilmoni; that the latter refused to maintain her, and that Bhagabati maintained herself by her own private means and lived in a house built by herself with her own means. But these assertions are advanced in a random and contradictory manner, the statements of one witness being inconsistent with those of another, and the intention appears to be to make out at all hazards a case of exclusion from the family property; for example, Modhu Sudan says that Bhagabati formally resigned her

* Appeal from Appellate Decree No. 2416 of 1883, against the decree of G.G. Dey, Esq., Officiating Judge of Nuddea, dated the 1st of August 1878, reversing the decree of Baboo Amirta Lal Chatterji, Subordinate Judge of that District, dated the 31st of March 1882.

property—a statement which is not confirmed by any other witness, and which is inconsistent with the theory advanced by others that Kokilmoni drove her from the family dwelling-house at Dowlutpur and excluded her from participation in the family property. The admitted fact that she made very frequent visits to the family dwelling-house and ended her life there, is enough in conjunction with the evidence for the plaintiffs to show that she was never excluded from the joint family, and that she was maintained out of its resources all her life.

I also agree in the finding that Bhagabati never managed the property, and that the management of the whole family property was after the death of Haladhar conducted by Giridhar, and on his death by Kokilmoni, or rather by her husband Modhu Sircar in her name. the actions of Bhagabati, which are set forth as acts of proprietorship, appear to be of little importance, except the alleged appointment of a servant which is doubtful.

[793] On these facts the Subordinate Judge is of opinion that the possession of Giridhar was probably not adverse to his mother Bhagabati, but that the possession of Kokilmoni was adverse, inasmuch as after the death of Giridhar, she obtained a certificate under Act XXVII of 1860 to collect the debts due to the estate of Giridhar and Haladhar, that her application set up an adverse right; and that since the date of that application, she has been in possession on the right therein asserted for more than twelve years, thereby barring the claim of plaintiffs as reversioners.

I think that the lower Court has attached undue importance to the assertion of right made in the application for a certificate in 1867, the occasion for that application arose upon the death of Giridhar, whose daughter Kokilmoni was undoubtedly the proper person to obtain a certificate as regarding his estate. It is true that the body of the application contained a recital that Giridhar had been for twelve years in possession of Haladhar's share, and that the petitioner was now in possession of it. But this matter was not referred to by the Judge in his order granting a certificate to Kokilmoni on the ground of her proved relationship to Giridhar. No copy of the certificate actually granted is filed, and it is not clear that it was styled a certificate to collect debts due to the estate of Haladhar, as well as Giridhar, or that notice of the application had been issued as of an application affecting Haladhar's estate. From the way in which the petition was framed, it would appear that the drafter of it, at least, was aware that some other person had a better title than Giridhar to the estate of Haladhar. In any case there is no proof whatever that this assertion of right was brought to the notice of Bhagabati. But if not brought to her notice, it cannot operate to exclude her, I think, according to the rulings in force. For example, in *Sarafunnessa Bibi v. Kailash Chander Gungopadhya* (25 W. R., 53), it was held that possession of a co-sharer-defendant would not become adverse until the plaintiff claimed or asserted some right in the land held by her co-sharer and that right was denied by him. The case here is the converse one, the right was asserted by the defendant, but on the same principle it should be held that the assertion did not exclude Bhagabati unless it was clearly brought to her notice. She was, it appears, an illiterate woman, and it was natural that she should acquiesce in the management of the joint property, first by her son, and then by her son's son-in-law, so long as she was maintained out of the joint family resources, whether she knew of her right with regard to Haladhar's succession, there is nothing to show. It is not improbable that she may have been ignorant of it. But inasmuch as she remained in the joint family, and there is no proof that she was clearly excluded, it appears to me that her right was not barred at any time up to her death in 1287 B, and that the suit of the plaintiff-reversioners is consequently not barred either. An argument has been advanced by the respondent that there could be no joint family [794] of which Bhagabati and Kokilmoni were both members; that Kokilmoni, as a married woman, must be taken to belong to her husband's family, a separate one from her father's, and that therefore her possession of the property of Haladhar, to which she had no title, was a genuine adverse possession on her own account. But all the evidence in the case indicates that Kokilmoni remained in the family

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other things, provided that "the Company will retain a sum of money deposited by the conductor together with all his wages for the current month as security for the discharge of his duties, and in case of any breach by him of the rules, the Manager of the Company shall be the sole judge as to the right of the Company to retain the whole or any part of the deposit and wages, and his certificate in writing in respect of the amount to be retained and the cause of such retention shall be binding and conclusive evidence between the parties in all Courts of Justice." On a reference from the Calcutta Court of Small Causes as to the effect of this agreement, *held*, that it was a contract to refer to arbitration rendered valid by s. 28, example 1, of the Contract Act, and that the certificate of the Manager was conclusive.

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Arbitration—Application to file award, objections to—Civil Procedure Code (Act XIV of 1882), ss. 525, 520 and 521. When an application is made to a Court to file an award under s. 525 of the Code of Civil Procedure, and an objection is made to the filing of it upon any of the grounds mentioned in s. 520 or 521, the proper course for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award in which all the objections to its validity may be properly tried and determined. Where no such ground of objection is made to the filing of the award, and the Court consequently orders it to be filed, no appeal lies against that order.

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Civil Procedure Code, s. 525—Application to file award—Order rejecting appeal—Matters to be decided upon application to file an award—Court-fee on such application. No appeal lies from an order upon an application to file an award under s. 525 of the Civil Procedure Code. Upon an application to file an award under s. 525 of the Civil Procedure Code, the Court to which the application is made has no jurisdiction to enquire whether the defendant has agreed to the terms of the instrument referring the matter to arbitration, or whether the terms were obtained by fraud. When such objections are made, it is the duty of the Court to reject the application under s. 525, and refer the parties to a regular suit. The proper Court-fee upon an application to file an award under s. 525 is the Court-fee prescribed for applications and not the Court fee upon a plaint.

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From decision of Judge and Assessors under Land Acquisition Act See LAND ACQUISITION

From decree made in accordance with Compromise. See COMPROMISE WITHDRAWAL FROM.

From Order passed on application in execution of Decree upon bond specially registered under s. 53 of Act XX of 1866—Execution of Decree—Mofussil Small Cause Courts, Suit cognizable by—Act XX of 1866, ss. 53 and 55—Code of Civil Procedure, Act XIV of 1882, ss. 244 and 586 A suit upon a bond specially registered under the provisions of s. 53 of Act XX of 1866 for an amount less than Rs 500 is cognizable by a Mofussil Court of Small Causes, and under s. 586 of the Code of Civil Procedure no second appeal lies to the High Court against an order passed on an application for execution of a decree made in such a suit. *Quære*, whether an appeal lies at all against such an order passed in proceedings taken in execution of such a decree.

SRI BULLOV BHATTACHARJI v. BABURAM CHATTOPADHYA XI 169

From Order setting aside decree upon an award See AWARD, APPEAL FROM ORDER SETTING ASIDE DECREE UPON.

From Order under s. 562, from Code of Civil Procedure *Suit of the Small Cause Court Class—Civil Procedure Code (Act XIV of 1882), ss. 562, 586, 589, cl. (28) and 589.* A Court in the exercise of appellate jurisdiction passed an order under s. 562 of the Civil Procedure Code, remanding a case of the Small Cause Court class as described in s. 586. *Held*, that under the express words of the second portion of s. 589 of the Code, an appeal does lie to the High Court from such an order.

KIRTE MOHALDAR v. RAMJAN MOHALDAR X 523

It is no sufficient ground for admitting an appeal after time that the attorney for the appellant has omitted to notice that one of the defendants had not been made a party respondent.

CORPORATION OF THE TOWN OF CALCUTTA v. ANDERSON X 445

Letters Patent, cl. 15—Difference of opinion between Judges in Review. Where two Judges of a Division Bench have concurred in a final decree, the fact that there is a difference of opinion as to one point, amongst others, raised in review on the judgment on which such final decree is based, is no ground for an appeal under s. 15 of the Letters Patent.

IN THE MATTER OF THE PETITION OF HURBUNS SAHAY HURBUNS SAHAY v. THAKOOR PERSHAD X 108

Appeal—(continued)

On question of costs will lie where a matter of principle is involved See SECRETARY OF STATE *v* MARJUM HOSEIN KHAN XI 359

Order in execution of decree—Fraud—Cancellation of sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 2, 244, cl. (c) 311 and 588, cl. 16 Where it was shown that a judgment-creditor was himself the purchaser at an execution sale, and the amount for which he so purchased the property of his judgment-debtor was set off against the amount due to him under his decree, and where on the application of the judgment-debtor the Court passed an order setting aside the sale on the ground of fraud practised by the judgment-creditor on the judgment-debtor in connection with the sale in consequence of which fraud the property had been sold at an undervalue. *Held*, that inasmuch as the order involved the decision of a question between the parties to the suit relating to the execution, discharge on satisfaction of the decree, (the decree having been satisfied as far as the purchase-money bid by the decree-holder went, and the order cancelling that *pro tanto* satisfaction), though not appealable under the provisions of s. 588 cl. 16 was appealable as a decree under the provisions of the Code of Civil Procedure (Act XIV of 1882), s. 2, and s. 244, cl. (c)

BALLODEB LALL BHAGAT *v* ANADI MOHAPATTUR X 410

Order refusing to set aside sale in execution of decree—Civil Procedure Code, 1882, ss. 294, 312 and 313 There is no appeal to the High Court from an order refusing to set aside a sale, unless such order is made under ss. 294, 312, or 313 of the Civil Procedure Code

DURGA SUNDARI DEVI *v* GOVINDA CHANDRA ADDY X 368

Rejection of. See SECURITY FOR COST

To Privy Council See COSTS

To Privy Council Amount under Rs. 10,000—Civil Procedure Code (Act XIV of 1882), ss. 595, 596, 600—Appealable value Leave to appeal to Her Majesty in Council granted in one of six suits directed to be heard together, although the amount involved in such suit was under the appealable value, there being an important question of law which did not arise in the five other suits, the suit, however, involving other questions of law common to all the six suits, such suits having been, by agreement of counsel heard upon the same evidence, and concluded by the same judgment, five of such suits being appealable as of right, and the aggregate amount in the six suits being considerably more than the appealable value

BYJNATH *v* GRAHAM XI 740

Upon facts by Local Government from verdict of a jury See APPEAL BY LOCAL GOVERNMENT

When the judgment of a lower Court has been confirmed under s. 575 of the Code of Civil Procedure, by reason of one of the Judges of the Appeal Court agreeing upon the facts with the Court below, an appeal will lie against such judgment, notwithstanding the terms of s. 575.

GOSSAMI SRI SRI GRIDHARJI MAHARAJ TICKAIT *v* PURUSHOTUM GOSSAMI X 814

Appealable Order—

Civil Procedure Code, Act XIV of 1882, ss. 2, 244 (cls. a, b and c)—Execution of Decree The ancestors of B mortgaged their share in a certain mehal to A. Subsequently B became entitled to this share in the mehal, and A obtained a decree on his mortgage, in execution of which the right, title and interest of B was sold and purchased by C. Subsequently to this latter decree and sale B obtained a decree against D for possession of certain lands which were proved to belong to this mehal. E then obtained a decree against B, in execution of which the right, title and interest of B in this same mehal was sold and purchased by F, C and F transferred their rights under their respective purchases to E. E thereupon, as purchaser of the right, title and interest of B from F, applied to execute the decree obtained by B against D. This application was rejected by the Subordinate Judge, but on appeal to the District Judge was allowed. B thereupon applied to the High Court to have this order set aside. *Held*, that the order should be set aside, inasmuch as no appeal lay from the order of the Subordinate Judge, the order not being a decree within the meaning of ss. 2 and 244 (cls. a, b and c) of the Civil Procedure Code

MOHABIR SINGH *v* RAM BAGHOWAN CHOWBEE .. XI 150

Appealable Value--

See APPEAL TO PRIVY COUNCIL.

Appellate Court--*Will expunge unnecessary findings from judgment* See JUDGMENT CONTAINING FINDINGS UNNECESSARY FOR DISPOSAL OF CASE.**Application--***For order revoking probate* See PROBATE*For proclamation of sale as a step in aid of execution* See STEP IN AID OF EXECUTION.*To appeal against a defendant after time for appealing has expired.* See LIMITATION ACT, 1977*To file award.* See APPEAL.**Apportionment --***Of Compensation* See LAND ACQUISITION ACT, 1870*Of Rent, Suit for* See ABATEMENT OF RENT, SUIT FOR**Approver--***Weight of Statement of* See MISDIRECTION**Arbitration--**

See APPEAL

Agreement to refer contract to See AGREEMENT TO REFER TO MANAGER QUESTIONS ARISING OUT OF AGREEMENT

Defence of submission to arbitration and award upon the matter in suit before suit brought An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award. Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow, who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole. The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only. *Held*, that, in the absence of mistake, or misconduct, on the part of the arbitrators, the award was binding on the parties.

RANI BHAGOTI v. RANI CHANDAN

XI 386

Defendants not all joining in reference to See AWARD, APPEAL FROM*Proceedings without notice to the plaintiff* See AWARD, APPEAL FROM ORDER SETTING ASIDE DECREE UPON**Arbitrator--***Merely recommending solution of disputed point* See AWARD, OBJECTION TO**Arrears of Rent -***Ind ejectment, Appeals in, Suit for* See SECOND APPEAL*Sale of tenure for* See SMALL CAUSE COURT*Suit for* See LANDLORD AND TENANT*Suit for, against one of several joint holders in a tenure who is alone registered.* See SALE OF INTEREST.**" Arrest " --***In s. 34 of Act XIV of 1882 should be read as meaning under detention or detained in custody*

IN THE MATTER OF HASTIE

.. .. XI 451

Assessment --

Of accreted lands Act IX of 1847, ss. 6, 9—*Order of Board of Revenue when final under s. 6 of Act IX of 1847* The effect of the words "whose order thereupon shall be final" in s. 6 of Act IX of 1847, is, that where an assessment has been made under s. 6, which has been approved by the Board of Revenue, such assessment is final and cannot be called in question in a civil suit; but the fact of an assessment having been made is no bar to a suit raising the question, whether the Board of Revenue had jurisdiction under s. 6 of the Act to assess. Act IX of 1847 applies to land re-formed on the site of a permanently settled estate.

SARAT SUNDARI DASI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL

.. .. XI 784

Of Damages See DAMAGES FOR BREACH OF CLAUSE IN LEASE.*Of house rate by Municipal Commissioners.* See CERTIORARI.

Assets--

In hands of Administrator-General, Distribution of Succession Act (X of 1865), s. 282
Judgment-creditor--Execution of Decree--Priority--Executor--Administrator
Administrator-General's Act (II of 1874), s. 35 A decree for money was obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator-General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator-General. *Held*, that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate.

REMPRY v. DEPENNING

X 929

Assignee--

Of recorded proprietors is not then representative within the meaning of s. 31 of Act XI of 1859 See RECORDED PROPRIETOR, REPRESENTATIVE OF

Attachable Property--

See ATTACHMENT

Attaching Creditor--

Entering caveat. See PROBATE

Of next of kin applying for revocation of probate See PROBATE

Attachment--

After satisfaction of decree by private sale See ATTACHMENT

Before judgment See INSOLVENCY

Civil Procedure Code (Act XIV of 1882), s. 266, proviso, cl. 1--Attachment of monthly allowance. A heritable right to receive a certain monthly allowance originally assigned in lieu of a share of landed property is not a mere right to maintenance or anything else exempted by the proviso to s. 266 of the Civil Procedure Code, and is saleable in execution of a decree.

SALAMAT HOSSEIN v. LUCKHI RAM

X 521

Civil Procedure Code (Act XIV of 1882), s. 266--Property exempted from attachment--Execution of decree--Rules of High Court. Before property of a judgment-debtor can be exempted from execution as falling under the head of the property described in s. 266 of the Code of Civil Procedure, it is necessary that the Court should first express its opinion that such property is necessary to enable the execution-debtor to earn his livelihood, and the Court, which must decide this point, is the Court which issues the execution. Section 14 (a), part II, chapter V, of the General Rules and Circular Orders of the High Court commented on

BAKHIR MOHAMMED v. DOORGA CHURN SHAHA

X 39

Civil Procedure Code (Act XIV of 1882) ss. 280, 281--Satisfaction of decree, by private sale--Purchaser--Subsequent attachment--Claim under s. 275. A and B attached in execution of their decree property of C and his two brothers, their judgment-debtors. Subsequently D obtained a decree against C alone, and on the 11th January 1884, applied for attachment of the one-third share of C, in the property attached by A and B, which belonged to C and his two brothers jointly. No order was on that date passed on the application. On the 14th January 1884 E purchased from C his one-third share in the attached properties, and the purchase-money was, by arrangement between the brothers, applied in satisfying the debt due to A and B. On the 28th January 1884 an order was passed on the application of the 11th January 1884, granting the attachment asked for by D. And on the 23rd April 1884 E preferred his claim to the one-third share purchased by him, and which had been since the purchase attached by D. The claim was disallowed on the ground that E had no title to the property, he having purchased whilst the property was under attachment. *Held* on appeal that the Judge should have, in accordance with s. 280 of the Code of Civil Procedure, confined himself to determining whether or no the property was in the possession of E on his own account at the time that D attached the property.

KOYLASH CHUNDER SEN v. KOYLASH CHUNDER CHAKRAVARTI

X 1057

Execution of Decree--Attachable Property--Doors and Windows--Immoveable Property. The doors and window-shutters of a *pucca* building cannot be separately attached in execution of decree, forming, as they do, part of an immoveable property, and having no separate existence.

PERU BEPARI v. RONUO MAIFARASH

... XI 164

Of monthly allowance. See ATTACHMENT

Attendance

Of Executant before Registrar, Time for See REGISTRATION ACT (III OF 1877), ss. 23, 34, 77

Of Witnesses See CRIMINAL PROCEDURE CODE (ACT X OF 1882), s. 145.

Attorney—

Omitting to notice that a certain defendant had not been made a party respondent is no sufficient ground for admitting an appeal after time
CORPORATION OF THE TOWN OF CALCUTTA L. ANDERSON .. X 47

Auction-purchaser—

May sue for actual possession, after possession given by Court has been infructuous
See LIMITATION ACT, 1877

Award—

Appeal from Judgment in accordance with Award—Appeal—Defendants not all joining in reference to arbitration The question whether, under s. 522 of the Code of Civil Procedure, an appeal will lie against a decree given in accordance with an award, depends upon whether the award upon which the decree is based is a valid and legal award. A plaintiff and some of the defendants to a suit applied to refer the suit to arbitration (certain other of the defendants not having joined in the application), an award was passed and a decree made in accordance with such award. The plaintiffs objected to the validity of the award on the ground that all the parties to the suit had not joined in referring the suit to arbitration, the objection was dismissed, and judgment given in accordance with the award. Held that an appeal would lie from a decree dismissing the objection and confirming the award, but that under the special circumstances of the case, justice was so clearly in favour of the view that the award was good, that the Court, although not entirely approving of certain decisions of the High Court (*Shulanath Biswas v Kishen Mohan Mookerjee*, *Ram Soonder Mookerjee v Ram Shurun Mookerjee*, *Durga Chun Thakom v Kally Doss Hazrah*, *Bishoka Dasra v Ananto Lal Pain*), which laid down that such an award is good, notwithstanding that some of the parties to the suit may not have joined in the reference to arbitration, did not think fit to differ from those decisions on that occasion.

JOY PROKASH LALL v SHEO GOLAM SINGH

XI 37

Application to file See APPEAL.

Matters to be decided upon application to file. See APPEAL.

Objection to Arbitrator recommending solution of disputed points - Act XIV of 1882, s. 525. A document, although headed as an 'award' and signed by the arbitrator, which merely recommends a solution of the questions referred to arbitration, will not be treated by the Court as an award on an application made under s. 525 of the Code of Civil Procedure.

NUNDOLOL MOOKERJEE v. CHUNDER KANT MOOKERJEE

XI 356

Order setting aside decree upon Appeal—Order setting aside decree upon award—Civil Procedure Code (Act XIV of 1882), s. 521. All matters in dispute in a suit were referred to arbitration. An award was duly made and filed, and a decree passed in accordance with the terms thereof. Subsequently, on the application of the plaintiff in the suit, the Court passed an order setting aside the decree and the award, and ordering the case to be set down for hearing upon the ground that the proceedings in connection with the arbitration had been taken, and the award had been filed, without notice to the plaintiff, and that, although the award was alleged to have been made with the consent of the parties, the plaintiff had not consented to it. Held, that no appeal lay from such order. *Howard v Wilson* dissented from; *Mothooranath Tewari v Brinabun Tewari* followed.

AMBICA DASIA v. NADYAR CHUND PAL

XI 172

Benamidar—

Suit by. See 'RES JUDICATA'

Bench of Magistrates—

Municipal offence—Salaried officer of municipality, disqualification of—Criminal Procedure Code (Act X of 1882), s. 555. Notwithstanding anything contained in s. 555 of the Criminal Procedure Code, a conviction for an offence against any municipal law or regulation, laid before a Bench of Magistrates which includes a salaried officer of the Municipality is bad.

NOBIN KRISHNA MOOKERJEE v THE CHAIRMAN OF THE SUBURBAN MUNICIPALITY

X 194

Bengal Act—

VII of 1868, s. 8 See SALE FOR ARREARS OF REVENUE

VIII of 1869—

s. 4. See ENHANCEMENT OF RENT SUIT FOR

s. 6 See OCCUPANCY RIGHTS RIGHT OF OCCUPANCY, ACQUISITION OF.

s. 11 See ABWAAS, ILLEGALITY OF

s. 14 See ENHANCEMENT OF RENT, SUIT FOR NOTICE OF ENHANCEMENT, SUBSTITUTED SERVICE OF NOTICE TO QUIT ON PAYMENT OF ENHANCED RENT RENT FOR LAND IN EXCESS OF QUANTITY HELD UNDER KABULIAT.

ss. 14, 38. *Measurement of land—Fractional proprietor—Parties* A part proprietor of an estate is competent, under s. 38 of Bengal Act VIII of 1869, to apply for measurement of its lands after making the remaining proprietors parties to the proceedings

ABDOOL HOSSEIN v. LALL CHAND MOHTAN DASS

X 36

s. 19 See ABATEMENT OF RENT

ss. 22, 59 See LANDLORD AND TENANT

ss. 23, 31, 52 See RECEIVER IN SUIT FOR ARREARS OF RENT AND EJECTMENT

s. 26 See SALE IN EXECUTION OF DECREE

s. 38 See RES JUDICATA

ss. 59, 64. See SALE OF INTEREST

VI of 1870, ss. 58, 60, 61 See CHOWKIDARI CHAKRAN LANDS

I of 1876, s. 6, Sch. A See REGISTRATION OF MAHOMEDAN MARRIAGES

IV of 1876—

ss. 88, 104, 117 See CERTIORARI.

ss. 189, 191, 213, 214, 219, 220, 252 See LIABILITY OF COMMISSIONER OF CORPORATION FOR BREACH OF STATUTORY DUTY

V of 1876, s. 256. See DISQUALIFICATION OF JUDGE

VII of 1876—

ss. 52, 55 See JURISDICTION OF CIVIL COURT

s. 55 See MALIKANA

s. 89 See LAND REGISTRATION ACT.

VIII of 1876, Part II, s. 1 (cls. 8 and 9) See PARTITION

I of 1879, ss. 37, 137 See SECOND APPEAL

IX of 1879, s. 10 See CERTIFICATE OF GUARDIANSHIP, CANCELLATION OF

VII of 1880 See WARRANT

IX of 1880, s. 56 See CESSSES FROM DEBUTTER LANDS

II of 1882, ss. 6, 76 (cl. b) and 80 See EMBANKMENT, ADDITION TO

Bengal Civil Court's Act -

VI of 1871, s. 24 See MAHOMEDAN LAW (SUCCESSION)

Bill of Lading—

Exemption from damage occasioned by neglect of Company's servants—Suit to recover goods destroyed The plaintiff shipped two plate glass show cases from Calcutta to Rangoon by a steamer of the defendant Company, and accepted a bill of lading which contained the following clause "Carried and delivered subject to the conditions after mentioned loss or damage for any act, neglect or default whatsoever of the pilot master or mariners or other servants of the Company, etc., excepted." In landing the two cases, one of them was entirely destroyed owing to the carelessness of the Company's servants. The plaintiff sued the Company, setting out that the damage was occasioned by the negligence of the Company's servants. The defendant Company (who were not subject to the Carriers' Act) relied on the abovementioned clause in their bill of lading. Held that the defendant Company were protected by their bill of lading, the terms of which had been accepted by the plaintiff.

JELlicoe v. BRITISH INDIA STEAM NAVIGATION CO

X 489

Board of Revenue—

Order of, when final See ASSESSMENT OF ACCRETED LANDS

Bond—

Minority of obligee See MINORITY OF OBLIGEE OF BOND, EFFECT OF

Suit on. See PENALTY CLAUSE IN BOND

Under Rs. 100 See REGISTRATION ACT, 1877, s. 17.

Breach of Contract—

See CONTRACT IN RESTRAINT OF TRADE.

Breach of the Peace—

Dispute likely to cause See POSSESSION, ORDER OF CRIMINAL COURT AS TO

Buddhist Law—

Of marriage in British Burmah Act XVII of 1875, s 4—*Wife's claim upon husband for maintenance* By the Buddhist law of marriage, as administered in the Courts of British Burmah, it is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries, but it appears that this law would not be applicable where she has sufficient means of her own. No authority has been found for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so. A wife married according to Burmese rights and customs, claimed from her husband in a Court in British Burmah, a certain sum for her expenses of necessaries and living for a past period during which she had maintained herself. *Held*, that this was a question "regarding marriage," within the meaning of the Burmah Courts Act XVII of 1875, s 4 and that, therefore, the Buddhist law formed the rule of decision. The law, as stated above, was accordingly applicable. *Semble*, that if this had been a case in which, by the above Act, a Court would have had to act according to the rule of justice, equity, and good conscience, there would have been no ground for making the husband liable upon this claim regard being had to the Burmese law as to the property of married persons.

MOUNG HMOON HTAW v MAH HPWAH.

X 777

Burden of Proof—

See CUSTOM NOT ALLOWING ADOPTION, GOVERNING A FAMILY NOT SUBJECT TO HINDU LAW EASEMENT

In cases of Substituted Service of Notice of Enhancement. See NOTICE OF ENHANCEMENT, SUBSTITUTED SERVICE OF

Burmah Courts Act—

XVII of 1875, s 80—

See TRANSFER OF CASE

Reference under, to High Court See MISDIRECTION

Butwara—

Under Regulation XIX of 1814 Partition—Revenue-paying estate—Beng. Act VIII of 1876, Part II, and s 4, cls (8) and (9)—Civil Procedure Code (Act XIV of 1882), s 265 In 1851 an estate was brought under *butwara* under the provisions of Regulation XIX of 1814. At such *butwara* a portion of the estate being land covered with water and unfit for cultivation was not divided, but left joint amongst all the co-sharers, the land-revenue payable on account of the whole estate being apportioned amongst the several estates into which the portion divided was split up. Subsequently, on the portion remaining joint becoming dry and fit for cultivation, an application was made by one of the co-sharers to the Collector to partition the same under the provisions of Beng. Act VIII of 1876 but that officer refused to do so, on the ground that the land did not bear an assessed revenue and was not "shown in the *taux*." In a suit brought under the above circumstances to compel the Collector to make the partition and in the alternative to have it made by the Civil Court, *Held*, that though the reason given by the Collector for refusing was an erroneous one, he was not bound to make the partition under the provisions of Beng. Act VIII of 1876, as the land in suit was not liable for the payment of one and the same demand of land-revenue, and was therefore not a joint undivided estate within the terms of s 4, cl (9) of that Act. *Held*, also, that the word "estate," as used in s 265 of the Civil Procedure Code, must not be construed in the same limited and defective sense in which it is used in Bengal Act VIII of 1876, but must be taken to be there used in its ordinary signification, and that consequently the plaintiff was entitled to a decree for partition under the provisions of that section. *Chundernath Nundia v Hun Varan Deb*, approved.

SECRETARY OF STATE v NUNDIN LALL.

X 435

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Notification under s 6 of Bengal Act II of 1882, not sufficiently published if only published in. See EMBANKMENT, ADDITION TO.

Calcutta Municipality—

See LIABILITY OF COMMISSIONER FOR STATUTORY BREACH OF DUTY.

Cancellation of Deeds—

Of sale and hypothecation for fraud. Equitable conditions. Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee, who had advanced money and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction, *held*, that the

Cancellation of deeds—(continued)

condition of cancellation should be, not the repayment of all money received by the manager, but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager, as he would have been justified in borrowing in the course of a prudent management of the estate

AJIT SINGH v. BLJAI BAHADUR SINGH XI 61

Carriers Act, 1865—

See CARRIERS, LIABILITY OF

Carriers, Liability of—

Common carriers—English law—Contract Act (IX of 1872), ss 151, 152—Carriers Act (III of 1865)—Railways Act (IV of 1879), s 10—Statement of objects and reasons of the Contract Act The common law of England regulating the responsibility of common carriers, was at the time of the passing of the Carriers Act, 1865, and is still in force in this country, and is unaffected by the provisions of the Indian Contract Act. *Kutepu Tulaydas v. G. I. P. Railway Co.*, dissented from. The plaintiffs entrusted to the defendants who were common carriers under the Carriers Act (III of 1865), certain goods which were lost in the course of their carriage on one of the defendants' steamers. On the facts it was found that the defendants took as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed; and that the loss was not occasioned by the act of God or the Queen's enemies. There was no special contract of the nature provided for by s. 6, Act III of 1865. *Held*, that ss 151, 152 of the Contract Act did not apply, and that the defendants were liable for the loss of the goods.

MOOTHORA KANT SHAW v. THE INDIA GENERAL STEAM NAVIGATION CO. X 166

Special Contract—Railway Act (IV of 1879), s 10—Contract Act (IX of 1872), ss 151-161—Railway Company The plaintiff despatched certain goods by the E. I. Railway Co., for carriage to A and signed a special contract, in conformity with the form approved by the Governor-General in Council under section 10 of Act IV of 1879, holding the Company 'harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever before, during, and after transit over the said Railway or other Railway lines working in connection therewith.' The goods were short delivered, and the plaintiff brought a suit to recover their value. *Held—Per* GARTH, C. J., PRINSEP, J., and WILSON, J.—That the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge, inasmuch as the plaintiff had entered into a special contract to hold them harmless in accordance with s. 10 of Act IV of 1879. *Held—Per* O'KINEALY, J., that it was doubtful whether ss 151 and 161 of the Contract Act applied to carriers by rail, but even assuming that these sections did not apply, the Railway Company would be in the position of carriers before the passing of the Carriers Act, and were entitled to protect themselves from liability by special contract.

MOHESWAR DAS v. CARTER X 210

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GUNAMANI DAS <i>v</i> . PRANKISHORI DAS, 5 B L R, 223, followed	X	354
HURUPADAPA BASAPA <i>v</i> VIRBHADRAPA IRSANGAPA, 1 L R, 7 Bom, 459, discussed	X	748
HANSBUTTI KOERAIN <i>v</i> ISHRI DUTT KOER, 1 L R, 5 Cal, 512, overruled	X	325
HEM CHUNDER CHOWDHRY <i>v</i> BROJO SOONDURY DEBIE, 1 L R, 8 Cal, 89, dissented from	X	549
HEM CHUNDER SOOR <i>v</i> KALLY CHURN DASS, 1 L R, 9 Cal, 528, approved and distinguished	X	765
ISHAN CHUNDER BUNDOPADHYA <i>v</i> INDRO NARAIN GOSSAMI, 1 L R, 9 Cal, 788, followed	X	355
JADOMONEY DABEE <i>v</i> SARODA PROSONO MOOKERJEE, 1 Boul., 120, approved	X	1111
JAN ALI <i>v</i> JAN ALI CHOWDHRY 1 B 15 R, A C, 56, distinguished	X	221
JUGGESHUR CHUCKERBUTTY <i>v</i> PANCH COWREE CHUCKERBUTTY 14 W R, 154, approved	X	1054
JUGGOBUNDHU MUKERJEE <i>v</i> RAM CHUNDER BYSACK, 1 L R, 5 Cal, 584, explained	X	993
KALLEE PROSUNNO BOSE <i>v</i> DINO NATH BOSE MULLICK, 19 W R, 434, discussed	X	697
KISTOMOYEE DASSEE <i>v</i> PROSUNNO NARAIN CHOWDHRY, 6 W R, 304 approved	X	845
KOMOLLOCHUN DUTT <i>v</i> NILRUTTUN MUNDIE, 1 L R, 4 Cal, 460, distinguished	X	19
KOWAR BIJOI KESAL ROY <i>v</i> SAMASUNDARI, B I. R, Sup Vol 172, commented on	X	244
KUVERJI TULSIDAS <i>v</i> G I P RY CO, 1 L R, 3 Bom, 109, dissented from	X	166
LACHMAN DAS <i>v</i> DIP CHAND, 1 L R, 2 All, 851, referred to and followed	IX	662
LALJI SAHU <i>v</i> TRE COLLECTOR OF TIRHOOT, 6 B I. R, 649, followed	X	612
LUCKUMSEY OORKEBA <i>v</i> FAZULLA CASSUMBHROY, 1 L R, 5 Bom, 177, commented on	X	1061
MANCHESTER ECONOMIC BUILDING SOCIETY, IN RE, 1 L R, 24 Ch D, 488	XI	768
MEHEROONISSA BIBEE <i>v</i> . HUR CHURN BOSE, 10 W R, 220, discussed	X	697
MEWA LAL THAKUR <i>v</i> BHUPHUN JHA, 13 B L R, App 11, followed	X	612
MOHIMA CHUNDRA ROY CHOWDHY <i>v</i> . RAM KISSORE CHOWDHY, 15 B L R, 142, discussed	X	845
MUTHOORA DOSS <i>v</i> SHAMSHOO DUTT, 20 W R, 53, dissented from	X	748
NOBI KRISTO MOOKERJEE <i>v</i> RUSSICK LALL LAHA, 1 L R, 10 Cal, 268, followed	X	551
NURSINGH DOYAL <i>v</i> HURRYHUR SAHA, 6 C L R, 489 approved	X	748
PANCHAM <i>v</i> JHINGURI, 1 L R, 4 All, 278, dissented from	X	80
PATANKAR <i>v</i> . DEVJI, 1 L R, 6 Bom, 146, not followed	X	355
PROSUNNO COOMAREE DEBEA <i>v</i> RUTTON BEPARY, 1 L R, 3 Cal, 696 followed	X	503
QUEEN <i>v</i> . FLETCHER, 1 L R, 1 C. C. R, 320, followed	X	604
QUEEN <i>v</i> . HUGHES, 1 L R, 4 Q B D, 614, followed	X	604
QUEEN <i>v</i> . MAHOMED HUMAYOON SHAH, 13 B L R, 324, followed, X 940, J45 and distinguished	X	943
QUEEN <i>v</i> MUSHAMUT ZUMREERUN, B L R, F B, 521, followed, X 940, 945 and distinguished	X	943
QUEEN <i>v</i> SMITH, 1 L R, 1 C C. R, 110, followed	X	604
RAM CHUND SEAL, 1 L R, 5 Cal., 2, departed from	X	557
RAMANADAN CHETTI <i>v</i> KUNNAPPU CHETTI, 6 Mad II C, 304 approved	X	541
RAM SABHAG DAS <i>v</i> . GOBIND PRASAD, 1 L R, 2 All, 622, not followed	X	87
RAO KARAN SINGH <i>v</i> BAKAR ALI KHAN, L. R. 9 I. A., 99, explained and distinguished	X	374
REGINA <i>v</i> JAMES BERRY, 28 L.J. (M.C.) 86, followed	X	604
SAH MAKHUN LALL PANDEY <i>v</i> SAH KUNDUN LALL, 15 B. L. R., 228, followed	XI	750

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SERGEANT, <i>v.</i> DALE, 1 L. R., 2 Q. B. D., 558, followed	X	1031
SHADI <i>v.</i> GUNGA SAHAJ, 1 L. R., 3 All., 538 followed	X	355
SHAKUR MAHOMED <i>v.</i> CHUNDER MOHUN SHA, 21 W. R., Cr. 38, disapproved.	X	408
SHIB CHANDRA CHUCKERBUTTY <i>v.</i> JOHA BUX, 1 L. R., 7 Cal., 570; 9 C. L. R., 224, referred to and followed	XI	662
SHUMBU NATH SAHA CHOWDHRY <i>v.</i> GURU CHURN LAHIRY, 6 C. L. R., 437 approved	X	748
SITANATH SHAH <i>v.</i> NOBIN CHUNDER ROY, 5 C. L. R., 102 discussed	X	697
SITA RAM <i>v.</i> MAHIPAL, 1 L. R., 3 All., 533, followed	X	355
SOLANO <i>v.</i> LALA RAM LAL, 7 C. L. R., 481, followed	X	250
SOORMUKHI KOER, <i>In re</i> , 1 L. R., 2 Cal., 272, approved	X	557
SUDANUND MOHAPATTUR <i>v.</i> SOORIAMONEY DAYEE, 11 W. R., 436, dissented from	X	1017
SYUD NUDIR HOSSEIN <i>v.</i> BABOO PHAROO THOVILDARINEE, 19 W. R., 255, commented on	X	572
TOULMIN <i>v.</i> STERRE, 3 Mer., 210, held not applicable to India	X	1043
TURNER <i>v.</i> POST MASTER GENERAL, 5 B. & S., 756, followed	X	604
VENKATARAYALU <i>v.</i> NARASIMHA, 1 L. R., 2 Mad., 174, dissented from	X	549
VIRABAGHAVA REDDI <i>v.</i> SUBBAKA, 1 L. R., 5 Mad., 337, followed	X	354
WOMESH CHUNDER GOOPTO <i>v.</i> RAI NARTIN ROY, 10 W. R., 15, explained	X	1077
<i>Not triable exclusively by Court of Session, Pardon in</i> See PARDON IN CASES NOT EXCLUSIVELY TRIABLE BY COURT OF SESSION		

Cause of Action—

See CIVIL PROCEDURE CODE, 1882, s. 295 LIMITATION ACT, 1877, ART. 64

Misjoinder of—Detention in Jail—Suit by thirteen persons jointly for damages for detention—Plaint taken off the file—Separate causes of action—Practice—Act XLV of 1882, s. 26 Thirteen persons who had been committed to jail under one warrant, and for the same offence, jointly sued the Superintendent of the Presidency Jail for their wrongful detention in jail after the term of imprisonment to which they had been sentenced had expired, claiming Rs. 2,600 as damages. The defendant applied to have the plaint taken off the file on the ground that the plaintiffs had improperly joined in one suit several distinct and separate causes of action belonging to them as separate individuals. *Held*, that the plaint must be taken off the file.

ALI SERANG *v.* BEADON

XI 524

Cause of like nature—

See LIMITATION ACT, 1877, s. 14

Causing disappearance—

Of evidence of an offence. See PENAL CODE, ACT XLV OF 1860 ss. 176, 201

Caveat entered by Attaching Creditor—

See PROBATE

Ceremonies of Pre-emption—

See PRE-EMPTION

Certificate—

Of Guardianship, Cancellation of. Act XL of 1858, ss. 10, 12 and 21—Bengal Act IX of 1879, s. 10 Where an application is made under the provisions of s. 21 of Act XL of 1858 to have a certificate granted under that Act recalled, and a fresh certificate granted to another the applicant should set forth in his petition a sufficient cause for such course being taken, and the Court should thereupon proceed to enquire *judicially* whether such sufficient cause is established, when the estate of a minor consists in whole or in part of land or any interest in land, and when such application is made, the Court can only proceed to act in accordance with the provisions of s. 12 of Act XL of 1858, and has no jurisdiction to grant another certificate to any fit person, such a course being confined to cases in which the property is of the description indicated by s. 10

SAKHAWAT ALLY *v.* NOORJEHAN BEGUM

X 429

Of purchase by Registrar See SALE IN EXECUTION OF DECREE.

Of sale under s. 8 of Bengal Act VII of 1863, Effect of. See SALE FOR ARREARS OF REVENUE.

Sale. See STAMP ACT, 1879, s. 24.

To collect debts under Act XXVII of 1860. See HINDU LAW.

Certifying part payment—

Of decrees. See CIVIL PROCEDURE CODE, ACT XIV OF 1882, s. 256.

Certiorari—

Bengal Act IV of 1876, ss. 88, 104, and 117—Municipal Commissioners, their jurisdiction—Assessment—House rate—Annual value—Power of the High Court. The power of the High Court to quash proceedings on *certiorari* is not affected by the provision of s. 117 of the Municipal Act, and if it should appear either on the face of the proceedings or upon affidavits that the Commissioners have acted without or in excess of jurisdiction, the Court will interfere. *Per* WILSON, J.—The words “annual value” in s. 88 of the Municipal Act must be taken to mean “annual letting value.” *Quere*—Whether s. 104 of the Act is in the nature of an interpretation clause, or merely directory, as containing instruction to the Commissioners how to proceed when exercising the jurisdiction conferred by s. 88?

NUNDO LAL BOSE *v* CORPORATION FOR THE TOWN OF CALCUTTA . . . XI 275

Cesses from debutter lands—

“Owner and holder”—Bengal Act IX of 1880, s. 56. Bengal Act IX of 1880 contemplates the payment of the cesses by persons beneficially interested in the land in respect of which the cesses are levied. The words “owner and holder” in s. 56 of that Act are not limited to any one person, nor for the purposes of that section must the owner be in actual possession. The plaintiff, who was a putnidar of the defendant, having paid certain cesses in respect of what he described in his plaint to be “debutter lakhraj lands” lying within the ambit of his putni, sued the defendant to recover the amount of such cesses. The defendant admitted that he was proprietor of the estate in which the lands were situated, but denied his liability for the cesses. *Held*, that the defendant was not liable to pay the amount of the cesses, but that the person liable was the idol through its shebait, or some person in receipt of the rents and profits of the land, or some person in actual possession of the land in occupation of it.

GOPAL CHUNDER SIRCAR *v* ADHIRAJ AFTAB CHAND MAHATAB . . . X 743

Cestuis que trust—

Conveyance by and suit by purchaser to compel Trustee to join in the Conveyance. See TRUSTEE DELAYING IN ASSIGNING THE LEGAL ESTATE.

Charge—

Form of. Accused entitled to know exact value of charge made against him—*Criminal Procedure Code, Act X of 1882, s. 221.* An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, and unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.

BEHARI MAHTON *v* QUEEN-EMPRESS XI 106

Misunderstanding of. See MISDIRECTION.

Of murder, Statement by the accused in answer to. See PLEA OF GUILTY AND EXPLANATION BY ACCUSED.

Splitting of, For purposes of jurisdiction. See SUMMARY TRIAL.

Charitable Gift—

See WILL, CONSTRUCTION OF

Charitable Trust—

See MUTWALI, SUIT BY

Charter of 1865—

s. 26. See MISDIRECTION

Letters Patent, ss. 15, 96. See CIVIL PROCEDURE CODE, ACT XIV OF 1882, ss. 575, 597

Cherrapoonjee Raj—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 431 (CL. b).

Chota Nagpore Landlord and Tenant Procedure Act—

Beng. Act I of 1879, ss. 37, 137. See SECOND APPEAL.

Chowkidari Chakran Lands—

Decision of commission under Bengal Act VI of 1870, final and conclusive—Civil suit—Bengal Act VI of 1870, ss. 58, 60, 61. The words “final and conclusive” used in s. 61 of Bengal Act VI of 1870, must be taken to be used in their ordinary and literal sense. Where, therefore, a commission has been appointed under s. 58 for the purpose therein mentioned, and such commission has ascertained and determined that certain lands are chowkidari chakran lands, in the absence of fraud or non-compliance by the Commissioners with the provisions of the Act, their decision is conclusive evidence in any civil suit of the fact that the lands are what they have found them to be.

NOBOKRISTA MUKHERJI v. THE SECRETARY OF STATE FOR INDIA

XL 632

Civil Procedure Code—

Act VIII of 1859—

See GUARDIAN OF MINORS DEFENDING SUIT

s. 2 See ‘RES JUDICATA.’

s. 15. See DECLARATORY DECREE, SUIT FOR

s. 97 See WITHDRAWAL OF SUIT

s. 229. See ONUS OF PROOF

s. 246 See ESTOPPEL

Act X of 1877—

s. 13 See ‘RES JUDICATA’

s. 244. See EXECUTION OF DECREE.

s. 331 See ONUS OF PROOF

s. 602 See EXTENSION OF TIME FOR SECURITY IN APPEAL.

s. 622. See MATERIAL IRREGULARITY.

Act XIV of 1882—

ss. 1, 3. See SONTHAL PERGUNNAS

ss. 2, 244 (cls. a, b, and c) See APPEALABLE ORDER.

ss. 2, 244 (cl. c) 294, 311, 312, 313, 520, 521, 525, 586 (cl. 16) See APPEAL

s. 3. See LIMITATION ACT, 1877, SCH. II, ART. 171b

ss. 13, 43 See ‘RES JUDICATA’

s. 25. See JUDGE, DISQUALIFICATION OF

s. 26. See CAUSES OF ACTION, MISJOINDER OF

s. 30. See SUIT BY LEGATEES ON BEHALF OF THEMSELVES AND OTHER LEGATEES

ss. 30, 539. See MUTWALI, SUIT BY

s. 44 See SPECIFIC PERFORMANCE

s. 54 See REJECTION OF PLAINT.

ss. 108, 647, 230 The only proper mode of dealing with cases, whether a regular suit or a miscellaneous proceeding, when the parties do not appear is to dismiss it. A case so dismissed can be restored on application under s. 108, which is by s. 647 applicable as well to execution proceedings as to suits and appeals.

BISWA SONAN CHUNDER GOSSYAMY v. BINANDA CHUNDER DIBINGAR ADHICAR GOSSYAMY

XL 417

See LIMITATION IN EXECUTION PROCEEDINGS.

s. 111. See SET-OFF

ss. 121, 126, 136. See INTERROGATORIES

ss. 131, 133, 135. See INSPECTION OF DOCUMENTS.

s. 133 See DISCOVERY

s. 147 See ISSUES, FRAMING OF

s. 203. See JUDGMENT CONTAINING FINDINGS UNNECESSARY FOR DISPOSAL OF CASE.

ss. 210, 232, prov. (b), 239, 243, 244 (cl. c), 246, 250, 291. See EXECUTION OF DECREE.

ss. 244 (cl. c.) 263, 264. See SUIT FOR POSSESSION AFTER FORMAL POSSESSION HAS BEEN GIVEN IN EXECUTION

ss. 244, 316 See EXECUTION OF DECREE WHICH IS BARRED BY LIMITATION, SALE IN.

ss. 244, 586. See APPEAL FROM ORDER PASSED IN EXECUTION OF DECREE ON BOND SPECIALLY REGISTERED UNDER S. 53 OF ACT XX OF 1866.

ss. 244, 586. No second appeal lies to the High Court against an order passed on an application for execution of a decree made in a suit under s. 53 of Act XX of 1866.

SRI BULLOV BHATTACHARJI v. BABURAM CHATTOPADYA

IX 169

Civil Procedure Code- (continued.)

Act XIV of 1882—(continued).

ss 244, 647 See EXECUTION PROCEEDINGS

s 251 See WARRANT.

ss 257 a, 258 *Adjustment of decree out of Court—Instalment bond—Consideration—Execution of decree.* The provisions of s 257a of Act XIV of 1882 are intended to prevent binding agreements between judgment-debtors and judgment-creditors for extending the time for *enforcing decrees by execution*, without consideration, and without the sanction of the Court, and are not intended to prevent the parties from entering into a fresh contract for the payment of the judgment debt by instalments or otherwise.

JHABAR MAHOMED v. MODAN SONAHAR ...

XI 671

s 258 *Certifying part payment of decree—“To show cause,”* Meaning of In determining under s 258 of Act XIV of 1882 whether or no the cause shown by the decree-holder is sufficient, it is incumbent upon the Court to investigate and decide any questions of fact upon which the parties may not be agreed. In such an investigation the evidence may be given either orally or by affidavit. The term ‘to show cause’ does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

RUNG LALL v. HEM NARAIN GIR

XI 166

s 258 See RIGHT OF SUIT.

ss. 261, 262 See DECREE FOR EXECUTION OF CONVEYANCE.

s 265. See BUTWARA

ss 266 (prov. cls. h, l) 278, 280, 281 See ATTACHMENT

ss. 281, 283 See ESTOPPEL.

s 287 See EXECUTION SALE

ss. 289, 311 See SALE PROCLAMATION, IRREGULARITY IN SERVICE OF

s 294, 311. See SALE IN EXECUTION OF DECREE

s 295. *Decree-holder's sharing rateably in sale proceeds must be bonâ fide decree-holder.* The words ‘decree-holders’ or ‘persons holding decrees for money against the same judgment-debtor’ in s 295 of the Code of Civil Procedure, signify *bonâ fide* decree-holders. A Court is bound, in cases falling within this section, to satisfy itself whether the claimants are *bonâ fide* decree-holders within the meaning of the section, and where it is unable to satisfy itself as to the *bonâ fides* of the claim, the Court should exclude such claimant from the distribution of assets.

IN RE SUNDER DASS

XI 42

s 295 *Rateable distribution of sale proceeds—Decree for money—Causes of action—Mortgage decree—Mortgagee purchasing under his own decree, Execution of decree by* The cause of action given by the last para but one of s 295 of the Civil Procedure Code does not arise until the money has been actually paid over to the person who is alleged not to be entitled to receive the same, and a suit brought by a person claiming to be entitled to be paid a share of sale proceeds under that section, and to recover the same from another to whom such sale proceeds have been ordered to be paid, if brought before they have been actually paid to such other person, is premature and should be dismissed. Every decree by virtue of which money is payable, is to that extent a ‘decree for money’ within the meaning of that term as used in s. 295, even though other relief may be granted by the decree, and the holder of such decree is entitled to claim rateable distribution of sale proceeds with holders of decrees for money only under that section. There is nothing in s. 295 which takes away the right from a mortgagee who has obtained a decree upon his mortgage to proceed against the property of his mortgagor other than that subject to his mortgage. Thus the holder of a mortgage decree which directs that the amount be realized from the mortgaged property and from the mortgagor personally, is entitled to claim rateable distribution under that section, and is not in the first instance bound to proceed against his mortgage security and exhaust that. A mortgagee who has obtained a decree on his mortgage is not restricted to proceedings in the first instance against his mortgage security before proceeding against other property of his mortgagor, but when he sells any portion of the property, the subject of his mortgage, and purchases it himself, he is bound, before he can proceed further against the

Civil Procedure Code—(continued.)

Act XIV of 1882—(continued)

mortgagor or claim rateable distribution under s. 295, to prove that there is still a balance due to him, and that the property sold and purchased by him realized a fair amount, the mere fact of the property having been sold at auction not being alone sufficient to prove its value, and this ought to be enquired into most carefully by the Court to which an application is made to further execute the decree or to share rateably under s. 295

HART v. TARA PRASANNA MUKHERJI

XI 718

s. 295 (cl. b). See LIEN

s. 311. See SALE IN EXECUTION

ss. 311, 312. See LIMITATION ACT, XV OF 1877, SS. 4, 14, AND SCH. II, ART. 12

ss. 311, 312. The word "disallowed" in s. 312 of the Civil Procedure Code has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under s. 311 are taken

MAHOMED HOSSEIN v. PURUNDUR MAHTO

XI 287

s. 311, 313. See SALE IN EXECUTION OF DECREE

s. 331. See ONUS OF PROOF

ss. 336, 337. See IMPRISONMENT IN JAIL NOT NAMED IN WARRANT

ss. 336, 339, 344, 345, 349, 350, 351, 359. See JUDGMENT-DEBTOR IMPRISONED, APPLICATION OF, TO BE DECLARED AN INSOLVENT

s. 368. See LIMITATION ACT, 1877, SCH. II, ART. 171b

s. 375. See COMPROMISE, WITHDRAWAL FROM

s. 131 (cl. b). *Cherrapoonjee Raj—Public and private rights—Foreign State—Succession to land in India—Intestate Succession—Succession Act, Act X of 1865,*

s. 5. The "private rights" spoken of in s. 131, cl. (b) of the Code of Civil Procedure do not mean individual rights as opposed to those of the body politic or State but those private rights of the State which must be enforced in a Court of justice, as distinguished from its political or territorial rights, which must from their very nature be made the subject of arrangement between one State and another. They are rights which may be enforced by a Foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another state in its political capacity. *The Emperor of Austria v. Day, United States of America v. Wagner* approved of. There is nothing to prevent a foreign or feudatory State from holding immoveable property in British India, and to such property the rule of intestate succession laid down in s. 5 of the Succession Act (Act X of 1865) does not apply. The State must be regarded as a *quasi* corporation which continues to exist as a State so long as it is recognized as such by Her Majesty, whatever the rule of succession to it may be, and whatever may be its form of Government. Case in which it was found on the facts that certain immoveable property situated in British India, which had formerly belonged to the State of Cherrapoonjee, having been granted by a former Raja of that State to the defendant, was still the property of the State on the ground that the Raja was not competent to alienate it, and that the defendant's plea of adverse possession and limitation was not supported by the evidence

HAJON MANICK v. BUR SING

XI 17

s. 432. *Suit by independent Prince in Court in British India—Recognised agent for institution of suit*. Section 432 of the Civil Procedure Code does not prevent the institution by an independent prince of a suit in a Court in British India in his own name, and through a recognised agent other than one appointed under that section.

BEER CHUNDER MANIKYA v. ISHAN CHUNDER BURDHUN

X 136

s. 440. See MINOR, SUIT BY

s. 443. See GUARDIAN OF MINORS DEFENDING SUIT

ss. 443, 464. See GUARDIAN AD-LITEM, APPOINTMENT OF.

s. 457. See MINORS.

s. 492, 546. See INJUNCTION IN ONE SUIT PENDING APPEAL IN ANOTHER.

ss. 503, 505. See RECEIVER IN SUIT FOR ARREARS OF RENT AND EJECTMENT

s. 521. See ARBITRATION. AWARD, APPEAL FROM ORDER SETTING ASIDE DECREE UPON.

s. 522. See AWARD, APPEAL FROM

s. 525. See AWARD, OBJECTION TO

s. 526. See CIVIL PROCEDURE CODE, ACT XIV OF 1882, s. 258.

Civil Procedure Code—(concluded.)

Act XIV of 1882—(concluded.)

s. 549. See SECURITY FOR COSTS.

b. 561. *Cross appeal—Respondent cross appealing in formâ pauperis.* A plaintiff who has obtained leave to sue in *formâ pauperis*, and has been successful in obtaining a decree for a portion of his claim, but has failed as to the other portion, is not entitled on an appeal by the defendant to be heard in *formâ pauperis* on cross appeal as to the portion of his claim decided against him in the lower Court

IN THE MATTER OF BROJESHWARI DAS v GURU CHURN DAS ...

XI 735

s. 566. See SECOND APPEAL, INTERFERENCE ON QUESTION OF FACT IN

ss. 566, 574, 587. See JUDGMENT OF APPELLATE COURT, CONTENTS OF

s. 568, (cls a and b). See ADDITIONAL EVIDENCE

ss. 575, 597. *Decision when appeal heard by two or more Judges—Letters Patent of 1865, cls 15, 36.* Section 575 of Act XIV of 1882 does not take away the right of appeal which is given by clause 15 of the Letters Patent. When the judgment of a lower Court has been confirmed under s. 575 of the Code of Civil Procedure, by reason of one of the Judges of the Appeal Court agreeing upon the facts with the Court below, an appeal will lie against such judgment, notwithstanding the terms of s. 575. *Appar Bhuvrao v. Shublal Khubchand* approved.

GOSSAMI SRI SRI GRIDHARJI MAHARAJ TICKAIT v. PURUSHOTAM GOSSAMI X 814

s. 582. See LIMITATION ACT, 1877, SCH II, ART 171b

ss. 595, 596, 600. See APPEAL TO PRIVY COUNCIL

s. 622. See SALE IN EXECUTION OF ESTATE OF DECEASED SMALL CAUSE COURTS PRESIDENCY TOWNS ACT (XV OF 1882)

s. 624. See REVIEW.

ss. 623, 624, 626, 629. See REVIEW OF JUDGMENT

Civil Suit—*To remove obstruction in a thoroughfare.* See PUBLIC NUISANCE**Claim—***Under s. 278 of Act XIV of 1882.* See ATTACHMENT**Collection—***Charges. Deduction of, from rent.* See LAND ACQUISITION ACT*Of rents separately.* See CO-SHARER SUING FOR ENHANCEMENT OF A PROPORTIONATE SHARE OF THE RENT, SUIT BY ONE.*Papers.* See EVIDENCE**Collusion—**

Divorce—Act IV of 1869, s. 13—Collusion in presentation of petition for dissolution. Subsequently to the institution of a suit for dissolution of marriage, and on the same day on which the suit came on for hearing, the petitioner and the respondent each filed petitions, setting out that it was agreed between them that from that date the marriage between them should be dissolved, that neither of them should have any claim against the other, that each should marry again at pleasure, and prayed that dissolution of the marriage might be granted on these terms, each party bearing his own costs. *Held*, that this amounted to collusion within the meaning of s. 13 of Act IV of 1869, and that the petition must be dismissed

UZIR CHRISTIAN v. ELI SEBA CHRISTIAN XI 651

Commission—*Under Bengal Act VI of 1870, Decision of.* See CHOWKIDARI CHAKRAN LANDS.**Compensation—***Apportionment of.* See LAND ACQUISITION ACT, 1870.**Complaint—***Dismissal of.* See MAGISTRATE, POWERS OF.**Compoundable Offence—**

See CRIMINAL PROCEDURE CODE.

Compounding of charge—

No answer to charge under s. 211, Penal Code—False Charge—Compoundable offence—Discharge of accused charged under s. 211, Indian Penal Code, upon plea of original charge having been compounded—Act XIV of 1860 (Indian Penal Code), s. 211—Act X of 1882 (Criminal Procedure Code), ss. 342, 345. The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211 of the Penal Code. A laid a charge against M for wrongful confinement. The Police reported the case as a false one, and A not appearing to prove his complaint the District Magistrate ordered him to be prosecuted under s. 211 of the Penal Code, and made over the case to a Deputy Magistrate. Upon the hearing of such charge, A pleaded that he had compounded the original charge, laid by him against M, and that, therefore, the charge against him under s. 211 could not lie. The Deputy Magistrate without hearing any evidence dismissed the case. *Held*, that the course so taken was illegal, as such plea was no conclusive answer to a charge under s. 211.

QUEEN-EMPRESS v. ATAR ALI

XI 79

Compromise—

And decree thereon. Application to set aside compromise—Review of judgment—New suit. For the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court, there are two available modes of procedure—(1) by suit (2) by a review of the judgment sought to be set aside, the latter being the more regular mode of procedure. *Lalji Sahni v. The Collector of Tehsil, Mewa Lal Thakur v. Bhupin Jha, Gilbert v. Endean* followed.

AUSHOOTOH CHANDRA v. TARAPRASANNA ROY

X 612

Application to set aside Procedure on. See COMPROMISE AND DECREE THEREON

Construction of Deed of. See MAHOMEDAN LAW

Withdrawal from. Agreement of Parties—Decree on. Compromise—Appeal—Code of Civil Procedure, Act XIV of 1882, s. 375. After suit filed by the plaintiff against several defendants, one of whom was an infant, a petition of compromise entered into between the adult parties was filed in Court. The petition stated the terms of arrangement, and also that an application would be made by the guardian of the minor praying the Court to allow the compromise to be carried out on his behalf. Ten days after the petition of compromise was filed, the first defendant and the plaintiff presented petitions to the Court withdrawing from the compromise, and praying that the suit should proceed. The second defendant presented a petition praying that the compromise should be recorded, and a decree passed according to its terms. The Court made a decree in accordance with the prayer of the second defendant's petition. The first defendant appealed. *Held*, that an appeal lay, and that the lower Court was wrong in enforcing the compromise at the instance of the second defendant. *Semble*, that s. 375 of the Code of Civil Procedure merely covers cases in which all parties consent to have the terms entered into, carried out and judgment entered up. *Ruttonsey Lalji v. Pooribai* questioned.

HARA SUNDARI DEBI v. KUMAR DUKHINESUR MALIA

XI 250

Compulsory and Optional Registration—

See REGISTRATION ACT, 1877, s. 50.

Confession—

Inducement to confess—Criminal Procedure Code, Act X of 1882, s. 163—Evidence Act—Act I of 1872, s. 24. A Deputy Magistrate, before taking down a statement from a person brought before him by the Police, noted on the paper on which he was about to take down the statement, the following words which, after excluding the Police Officers from his presence, he had verbally addressed to the accused: "After excluding from my presence the Police Officers who brought him, I warned the accused that what he would say would go as evidence against him; so he had better tell the truth." *Held*, that the use of such language was calculated to hold out an inducement to the prisoner to confess, and that such a confession was therefore inadmissible in evidence against him.

QUEEN-EMPRESS v. UZEER

X 775

Made to a Police Officer. Evidence Act—(Act I of 1872, s. 27)—Murder, Charge of, when body is not forthcoming—Theft, Intention to convert. No judicial officer dealing with the provisions of s. 27 of Act I of 1872 should allow one word more to be deposed to by a Police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in

Confession—(*continued.*)

itself to be a relevant fact against him. Section 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence. *Empress of India v. Pancham, Queen-Empress v. Babu Lal*, discussed and commented on. Thus, when a Police officer deposed that an accused had told him that he had robbed K of Rs 48, whereof he had spent Rs 8 and had got Rs 40, and that he had made over the Rs 40 to him, *held*, that the statement that he robbed K of Rs 48 was not necessarily preliminary to the surrender of the Rs. 40, and was inadmissible in evidence against him. When also a Police officer deposed to the fact that the accused who was charged with murder had stated to him that he and K had stolen some hides from C, and upon such statement he had sent for C, and recorded his information, and when it appeared that C had already informed the Police of the fact of the theft, though the witness was not aware of it, *held*, that the statement was inadmissible upon the ground that it would be most dangerous to extend the provisions of s 27, and allow a Police officer, who is investigating a case, to prove an information received from a person accused of an offence in the custody of a Police officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another Police officer. Although, under some circumstances, a charge of murder may be sustained when the body of the person said to have been murdered is not forthcoming, still, when that is the case, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted. When an accused charged with murder was alleged to have taken a boat from a place where it had been secured by its owner, and after proceeding some distance in it had abandoned it, and when he was charged with the theft of the boat, *held*, that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping.

ADU SHIKDAR v. QUEEN-EMPRESS

XI 635

Of one of several prisoners See MISDIRECTION

Of prisoners against their fellow prisoners and in their absence are not such corroborative evidence of statement of a prisoner as would warrant conviction See MISDIRECTION

Conflict of opinion—

In High Courts See SUBORDINATE COURTS, DUTY OF

Consent of next Reversioner—

See INJUNCTION.

To transfer by Hindu widow See HINDU LAW

Consideration —

See CIVIL PROCEDURE CODE 1882, ss 257a, 258

Consideration money—

For promise to give in marriage a minor daughter, suit for return of See MARRIAGE CONTRACT.

Consolidation of suits—

See PRACTICE.

Construction—

Of Deed of Compromise See MAHOMEDAN LAW

Of gift See GRANT

Of gift as to quantity of estate given Limitation Act XV of 1877, Sch II, arts. 134 and 144—*Gift when operative without delivery of possession—Hindu Law.* The rule as to the construction of the language in which a gift is made, independently of the "Transfer of Property Act." Act IV of 1882 (which may, or may not, have been expressed so as to lay down in favour of absolute gifts, a rule more positive) is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention. A gift being thus expressed—"I put a stop to my interest in those taluqs, and withdraw my enjoyment thereof, and I make them over to you," *held*, that this must be read with what preceded it, *viz.*, "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control"; and that the words of gift must be taken to be limited by the purpose of the gift; the whole taken together showing that the donor's intention was that the

Construction—(continued)

donee should take the property for life only *Held*, also, that consistently with the authorities in the Hindu law, a gift, where the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession; and that where a donee, or vendee, is under the terms of the gift, or sale, entitled to possession, there is no reason why such gift, or sale, though not accompanied by possession, whether of moveable or immoveable property (where the gift or sale is not of such a nature as would make the giving effect to it to be contrary to public policy), should not operate to give the donee, or vendee, a right to obtain possession

KALI DAS MULLICK v. KANHAYA LAL PUNDIT XI 121

Of gift to a person in virtue of his being adopted son of donor See CUSTOM NOT

ALLOWING ADOPTION, (GOVERNING A FAMILY NOT SUBJECT TO HINDU LAW)

Of Hindu will, under Orissa Estates' Act See WILL, LEGAL CONSTRUCTION OF

Of Instrument of Mortgage See MORTGAGE, CONSTRUCTION OF

Of Power of Attorney See POWER OF ATTORNEY, CONSTRUCTION OF

Of s. 622 of Act X of 1877 as amended by s. 22 of Act XII of 1879 See MATERIAL IRREGULARITY

Consul—

To receive notice of suits brought against his countrymen in Courts in British India

FRITZ OLNER v. LAVEZZO X 878

See JURISDICTION

Contempt of Court—

Publication of libel reflecting upon a Judge in his judicial capacity—Offence not included in Penal Code—Defamation—Criminal Procedure Code (X of 1882), s. 5—Power of Courts of Record under common Law—Jurisdiction of High Court to punish summarily The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High Courts to punish it, are the same in such Courts as in the Superior Courts in England. Those powers, which formed part of the common law, were conferred upon the Supreme Courts, when they were established in the Presidency Towns. The Indian Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting, and neither in chapter XXI "of Defamation" nor elsewhere provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. Because the publisher can be punished for "defamation" under the Code, it does not follow that he cannot be punished summarily by the High Court for a contempt of Court. He can be so punished with fine, or imprisonment, or both. The provisions of s. 5 of the Code of Criminal Procedure, 1882, relating to the procedure under which "all offences under the Indian Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court committed by the publication of a libel out of Court, when the Court is not sitting, although such contempt may include defamation. Such a contempt is more than mere defamation, and is of a different character. The jurisdiction of the High Court to commit for contempt has not been affected by the Code of Criminal Procedure, 1882. By the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.

SURENDRA NATH BANERJEE v. THE CHIEF JUSTICE AND JUDGES OF THE HIGH COURT AT FORT WILLIAM IN BENGAL X 109

Contract—

By letters See SPECIFIC PERFORMANCE

In Restraint of trade—Restraint of trade—Contract Act—Act IX of 1872, ss. 27-74—

Breach of contract—Damages A contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer, is bad under s. 27 of the Contract Act. *Quære*, as to the effect of an agreement of service by which a person binds himself, during the term of his agreement, not directly or indirectly, to compete with his employer

BRAHMAPUTRA TEA COMPANY, LD. v. SCARTH XI 545

Vind as against public policy See ANTE-NUPTIAL SETTLEMENT

Contract Act—

IX of 1872—

ss. 10, 11 See MINORITY OF OBLIGEE OF BOND, EFFECT OF

s. 23 See ABWABS, ILLEGALITY OF

ss. 27, 74 See CONTRACT IN RESTRAINT OF TRADE.

Contract Act—(continued.)

IX of 1872—(continued.)

s. 28, ex. 1. See AGREEMENT TO REFER TO MANAGER QUESTIONS ARISING OUT OF AGREEMENT.

ss. 151, 152, 161. See CARRIERS, LIABILITY OF

As affecting an assignment of a share in a partnership See PARTNERSHIP.**Conveyance—***Purchasers' right to, after execution sale.* See SALE IN EXECUTION OF DECREE**Conviction—***On alternative charge of giving false evidence.* See ALTERNATIVE CHARGE.**Corporation—***Liability for breach of Statutory duty* See LIABILITY OF COMMISSIONERS FOR BREACH OF STATUTORY DUTY**Corroborative evidence —**

See MISDIRECTION

Co-sharer—

Suing for enhancement of a proportionate share of the rent, Suit by one co-sharer in an undivided estate—Suit for enhancement of a proportionate share of the rent by one co-sharer—Collection of rents separately A, an eight-anna sharer in an undivided estate, who collected his portion of the rent separately, brought a suit upon notice issued by himself against a tenant, in which he made the other co-sharers parties defendants to recover arrears of rent at an enhanced rate in proportion to his share. *Held*, that such a suit was not maintainable, unless it could be shown that the co-sharers had refused to join as plaintiffs. *Bidhu Bhusun Basu v. Kamaraddi Mundul* distinguished.

KALI CHANDRA SINGH v. RAJKISHORE BHUDDRO XI 615

Co-sharer's Right—*To sue for share in proceeds remaining after sale of the joint tenure* See SMALL CAUSE COURT**Costs—**

See EXECUTION OF DECREE WHICH IS BARRED BY LIMITATION, SALE IN AGAINST NEXT FRIEND See SUIT BY LEGATEES ON BEHALF OF THEMSELVES AND OTHER LEGATEES

Appeal on question of. See RECORDED PROPRIETORS, REPRESENTATIVE OF

Practice—Costs of printing and translation—Appeal to Privy Council Costs of printing and translation, certified by the Deputy Registrar of the High Court, are a necessary part of the costs of an appeal to the Privy Council. The amount of such costs is left to be ascertained by the High Court, and is not assessed by the Privy Council office

RAM COOMAR GHOSE v. PROSUNNO COOMAR SANNYAL X 106

Where trustee delays in executing a document, and a suit is brought to compel him to execute. See TRUSTEE DELAYING IN ASSIGNING THE LEGAL ESTATE**Counsel, Mistake of—**

See REVIEW OF JUDGMENT

Court fee—*On application to file award* See APPEAL**Court Fees Act—**

s. 7 (cl. 3) (sub-cl. f) and Sch. II, Art. 17. See VALUATION OF SUIT.

VII of 1870, s. 7 (cl. c')—*Suit to set aside a trust deed and to recover trust money—Appeal by trustee—Duty payable on memorandum of appeal.* A brought a suit against B, a trustee, and others, to set aside a trust deed and to recover Rs. 2,50,000, the amount of the trust money, and valued his suit at Rs. 2,50,000. A obtained a decree. B appealed and sought to affix to his memorandum of appeal a ten-rupee stamp, under Art. 17 (cl. 6) of Sch. II of Act VII of 1870. *Held*, that the duty payable on the memorandum of appeal was the same as that paid on the plaint in the suit.

MOHAMED MASIK v. MALKAI MUKHADRAI UZWA BADSHAH MEHAL SAHEBA X 380

s. 19, cl. 17. *Stamp on memorandum of appeal by judgment-debtor in custody from order refusing application to be declared insolvent* A judgment-debtor, whilst in custody, applied to the Court, under chapter XX of the Civil Procedure Code, to

Court Fees Act—(continued.)

be declared an insolvent The application was refused, and the judgment-debtor appealed against the order rejecting his application. No Court-fee was affixed to the memorandum of appeal *Held*, that no Court-fee was leviable under cl 17 of s. 19 of the Court Fees' Act

KALI PRASAD BANERJI *v* GIBBORNE & CO.

X 61

Court of Jurisdiction—

Competent to try such subsequent suit, Meaning of. See 'RES JUDICATA'.

Court of Record—

Power of, under common law See CONTEMPT OF COURT

Covenants—

For quiet enjoyment. See STAMP ACT, 1879, SCH. I, ART. 41 (CLAS. a AND b).

Creditor—

Of next-of-kin Right to apply for revocation of probate See PROBATE

Criminal Procedure Code—

Act X of 1872—

ss 314, 451 See CUMULATIVE SENTENCES

s. 530. See CRIMINAL PROCEDURE CODE, ACT X OF 1882, S. 145

Act X of 1882—

s. 5 See CONTEMPT OF COURT

ss 30, 31, 209 See JURISDICTION OF CRIMINAL COURT

ss 35, 235. See CUMULATIVE SENTENCES

s. 45 See PENAL CODE, ACT XLV OF 1860, SS. 176, 201

s. 107 See RECOGNIZANCE TO KEEP THE PEACE.

ss 109, 110, 112. *Security for good behaviour.* Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet.

QUEEN-EMPRESS *v* ISHWAR CHANDRA SUR

XI 13

s. 133 See PUBLIC NUISANCE, REMOVAL OF

ss 133, 134, 135 136, 137 See RIGHT OF WAY USED BY THE PUBLIC

ss 133, 138, 139 See JUROR REFUSING TO ACT

s. 145 See POSSESSION, ORDER OF CRIMINAL COURT AS TO POSSESSION, TIME AT WHICH MAGISTRATE IS TO DETERMINE WHO IS IN

s. 145 A dispute as to the right to collect rents is a dispute concerning tangible immovable property within the meaning of s. 145

XI 413

s. 145 *Procedure under that section—Attendance of witnesses—* Process to enforce attendance Proceedings under s. 145 of the Criminal Procedure Code should on all points of procedure be regarded as summons cases, and although it is discretionary with a Magistrate to issue a summons on a witness in such a case, yet, when any one of the parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance, and where such refusal is made it is incumbent on the Magistrate to record his reasons for such refusal.

IN THE MATTER OF THE PETITION OF HURENDRO NARAIN SINGH CHOWDHRY

XI 762

s. 147 See EASEMENT

s. 161 The law laid down by the Full Bench in 1 L R, 7 Cal. 121, has been altered by the provisions of s. 161, Act X of 1882, and a witness who makes a false statement to a Police officer in reply to a question which he is bound to answer, would be guilty of intentionally giving false evidence See FALSE EVIDENCE.

s. 163. See CONFESSION

s. 178. See TRANSFER OF CASE.

s. 195. See SANCTION TO PROSECUTE MORE THAN SIX MONTHS AFTER EXPIRY OF FORMER SANCTION.

s. 195 (cl. c., para. 2). See SANCTION TO PROSECUTE.

s. 221. See CHARGE, FORM OF.

ss. 233, 554, Sch. 5, XXVIII, II, 4. See ALTERNATIVE CHARGE.

ss. 247, 253. See JOINDER OF CHARGES.

Criminal Procedure Code—(continued.)

Act X of 1882—(continued.)

ss. 248, 259, 345, 435, 437 *Further enquiry, Power of District Magistrate to direct—"Subordinate Magistrate"—Compoundable offence.* A criminal charge under s. 448 of the Indian Penal Code having been instituted, the accused was sent up by the Police before a Deputy Magistrate of the first class. Previous to any evidence being taken the complainant intimated to the Magistrate that the case had been amicably settled, and that he did not wish to proceed further in the matter, upon which the Magistrate recorded an order, "Compromised, defendant acquitted." Subsequently the Magistrate of the district, relying upon ss. 248 and 259, and professing to act under s. 437 of the Criminal Procedure Code, directed the Deputy Magistrate to send up the parties and proceed regularly with the case. *Held*, that ss. 248 and 259 had no bearing on the case, and that the mere fact of the accused having been sent up by the Police did not prevent the offence, which was legally compoundable, from being compromised, and that consequently the order of the Deputy Magistrate was perfectly correct and legal. *Held*, further, that in addition to the Magistrate's order not being warranted by the fact, it was *ultra vires*, inasmuch as the Deputy Magistrate was a Magistrate of the first class and not "inferior" to the District Magistrate, and to give the District Magistrate jurisdiction to call for a record under s. 435 from another Magistrate and to act under s. 437, the latter must be inferior. *Nobin Kristo Mookerjee v Russick Lall Laha* followed.

QUEEN-EMPRESS *v* NOWAH JAN ..

X 551

ss. 253, 259 See MAGISTRATE, POWERS OF.

ss. 253, 437 See DISCHARGE OF ACCUSED.

s. 257. See WITNESSES, RIGHT OF ACCUSED TO CLAIM ATTENDANCE OF

s. 260 See SUMMARY TRIAL.

ss. 271, 299. See PLEA OF GUILTY AND EXPLANATION BY ACCUSED

ss. 289, 292. See EVIDENCE

ss. 289, 290, 292, 301, 303, 307 See RIGHT OF REPLY

s. 298 See MISDIRECTION IN CHARGE

s. 303 See JURY

s. 307 See VERDICT NOT MANIFESTLY ERRONEOUS

ss. 330, 423, 439 See ENHANCEMENT OF SENTENCE ON APPEAL.

ss. 337, 338 See PARDON IN CASES NOT EXCLUSIVELY TRIABLE BY COURT OF SESSION.

s. 342 *Examination of prisoner by Judge—Nature of Examination.* It is improper on the part of a Judge when examining a prisoner under s. 342 of the Criminal Procedure Code to cross-examine him. The only questions which are permissible are such as will enable the prisoner to explain any circumstances appearing in the evidence against him.

HURRY CHURN CHUCKERBUTTY *v* THE EMPRESS ..

X 140

ss. 342, 345 See COMPOUNDING OF CHARGE.

ss. 367, 421, 426. See JUDGMENT, CONTENTS OF

ss. 417, 418, 423 See APPEAL BY LOCAL GOVERNMENT.

s. 435 See REVISION ON FACTS

ss. 135, 437 *Further enquiry, Power of District Magistrate to direct—"Inferior Criminal Court"—Notice to accused.* The words "Inferior Criminal Court," in s. 435 of the Criminal Procedure Code mean, inferior so far as regards the particular matter in respect to which the superior Court is asked to exercise its revisional jurisdiction. A criminal charge instituted before a Magistrate of the first class was finally disposed of by him by an order discharging the accused. Subsequently the Magistrate of the district proceeding under s. 437 of the Code of Criminal Procedure directed a further enquiry to be made by a Subordinate Magistrate. The order was made without notice to the accused. *Held*, that the Magistrate of the district had no jurisdiction to direct a further enquiry. *Semble*, that as a matter of strict law the accused was not entitled to be heard by the District Magistrate before granting the order directing the enquiry.

NOBIN KRISTO MOOKERJEE *v* RUSSICK LALL LAHA ..

X 268

s. 437 *Further enquiry under—Proceedings against accused—Notice.* No order affecting an accused in a criminal matter should be made without giving him notice, so as to enable him to appear and show cause against it. A Sessions Judge has no power under s. 437 of the Criminal Procedure Code to direct a particular Magistrate by name to make the further enquiry contemplated by that section. The further enquiry contemplated by s. 437 of the Criminal Procedure Code is an

Criminal Procedure Code—(concluded.)

Act X of 1882—(concluded)

enquiry upon further materials, not a rehearing of the matter upon the same evidence which was before the Magistrate who held the first enquiry

CHUNDI CHURN BHUTTACHARJEA v. HEM CHUNDER BANERJEA . . . X 207

197. See JURISDICTION OF DEPUTY MAGISTRATE PLACED IN CHARGE OF CURRENT DUTIES OF DISTRICT MAGISTRATE

s. 510. See EVIDENCE

s. 512. See DEPOSITION WHERE ACCUSED HAS ABSCONDED . . .

s. 514. See SECURITY BOND FOR PRODUCTION OF PERSONS BEFORE POLICE.

s. 555. See BENCH OF MAGISTRATES

Criminal Trespass—

See SUMMARY TRIAL

Cross Appeal—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 561

Where cross appellant might have supported the decree without appealing, on the ground that the decree had been rightly made (though not the reason given) in her favour

RUN BAHADUR SINGH v. LUCHO KOER . . . XI 301

Cross Demands—

Arising out of same transaction allowed to be set off. See SET-OFF

Cumulative Sentences—

Practice—Conviction of rioting and causing hurt by dangerous weapons—Distinct offences—Separate charges—Penal Code—Act XLV of 1860, ss. 71, 148, 149, 324—Act X of 1882 (Criminal Procedure Code), ss. 35, 235—Act X of 1872 (Criminal Procedure Code) ss. 314, 454—Act VIII of 1882, s. 4 The offences of rioting armed with a deadly weapon and voluntarily causing hurt with a dangerous weapon to two persons are distinct offences and a person charged with such offences can be convicted and sentenced in respect of the rioting and of the hurt caused to each of the persons injured. A and B were charged with rioting armed with deadly weapons under s. 148 of the Penal Code, and they were also charged under s. 324, coupled with s. 149, with causing hurt by a dangerous weapon to X, and B was further charged under s. 324, with causing a like hurt to Y, A being also charged under s. 324, coupled with s. 149, in respect of the hurt caused by B to Y. A and B were convicted on all charges, and separate sentences, to take effect in succession, were awarded in respect of each offence charged. The offences under s. 324 were committed during the riot. *Held*, that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Indian Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that consequently under s. 235 of the Criminal Procedure Code the several sentences passed were strictly legal.

LOKE NATH SIKKAR v. QUEEN-EMPEROR . . . XI 319

Custody—

Of document thirty years old—Evidence Act (I of 1872), s. 90—Documents thirty years old, their natural and proper custody Where a daughter professed to hold under a pottah, more than thirty years old, in favour of her father, and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of the father's heirs, *held*, that the daughter's custody of the pottah was a natural and proper custody within the meaning of s. 90 of the Evidence Act. The rule laid down in s. 90 as to proof of execution of documents thirty years old ought to be applied in this country with special care and caution.

TRAILOKIA NATH NUNDI v. SHURNO CHUNGONI . . . XI 539

Of female minors before puberty See MAHOMEDAN LAW (GUARDIAN)

Stamp on memorandum of appeal by judgment-debtor in See COURT FEES ACT, 1870, s. 19, CL. 17.

Custom—

Among the Nomosudras. See HINDU LAW, MARRIAGE.

Excluding females from inheritance See EXTENSION OF TIME FOR SECURITY ON APPEAL.

Custom—(continued.)

Not allowing adoption, governing a family not subject to Hindu law. Adoption—Construction of gift—Burden of proof—Invalidity of gift made to a person as being the adopted son of donor, where the adoption failed. A family in Bengal, affecting to be Hindu, but not Hindu by descent and origin, may be governed by customs at variance with Hindu law. A family took its origin in a tribe not Hindu, and its customs differed from Hindu customs. The question having arisen whether succession in virtue of adoption was consistent with, or was contrary to, the customs of the family, *held*, first that, with regard to the origin and history of the family, the point for inquiry was not whether the general Hindu law was, in this case, modified by a family custom forbidding adoption, but was whether, with respect to inheritance, the family was governed by Hindu law, or by customs not allowing an adopted son to inherit, secondly, upon the evidence that this family had retained, and was governed by, customs at variance with Hindu law, and that whatever Hindu customs might have been introduced into it, the custom of succession upon adoption had not. Whether, if the family had been shown to be Hindu, out and out, save only special customs, the evidence would have been sufficient to prove a special custom was not the question. *Held*, also, in reference to the burden of proof that, in a suit brought to maintain the plaintiff's title as heir against a defendant, who relied upon an adoption as defeating the title of the plaintiff, the burden of proving the adoption to be permitted by the family custom was upon those who alleged it to be so, whereas, if the family had been generally governed by Hindu law, the onus would have been on those who alleged the exclusion of the right to adopt. *Rajah Bishnath Singh v Ram Charn Maymoadai*, referred to, as showing that even in Hindu family there might be a custom which barred inheritance by adoption. *Held*, upon the true construction of an *angkar-patro* whereby an estate was given to the donee in virtue of his being, "adopted son" of the donor, that the gift did not take effect, inasmuch as the adoption was invalid. The distinction between what is description only, and what is the reason or motive for a gift or bequest, may often be fine, but it must be drawn from a consideration of the language and the surrounding circumstances. *Nidhoomoni Debva v Saroda Pershad Mookerjee* distinguished.

FANINDRA DEB RAIKAT *v* RAJESWAR DAS

XI 463

Of Akhotees. See HUNDI PAYABLE ON ARRIVAL, PRESENTATION OF

Of Hindus amongst Mahomedans. See ONUS OF PROOF

Tribal. See GRANT

When not alleged not to be presumed. See ONUS OF PROOF.

Customary Rule—

Of succession in a family to impartible estate

.. X 792

Cypres—

Doctrine of. See WILL, CONSTRUCTION OF

Damages—

Assessment of. See DAMAGES FOR BREACH OF CLAUSE IN LEASE

For breach of clause in lease. Rent suit—Assessment of damages—Substantial damage—Nominal damage. B obtained a lease of certain lands from A, agreeing thereunder to pay to A a certain rental for the land, and also a sum of Rs 183-6-3 yearly to A's superior landlord, obtaining a receipt therefor. A sued B for the rent due to himself, and for the sum due to his superior landlord. *Held* that A was entitled to recover the sum due to his superior landlord as damages for breach of the contract, and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which A might become liable to his superior landlord.

RUTNESSUR BISWAS *v* HURISH CHUNDER BOSE

.. XI 221

For personal injury. Assessment of. See LIABILITY OF COMMISSIONERS FOR BREACH OF STATUTORY DUTY

Occasioned by neglect of Company's servants exempted by Bill of Lading. See BILL OF LADING

Suit for, by thirteen persons jointly. See CAUSE OF ACTION, MISJOINDER OF

Where a sum is named in the contract as the amount to be paid. See CONTRACT IN RESTRAINT OF TRADE.

Dasiputra—

Or son by a slave girl. See HINDU LAW, INHERITANCE.

Death—

Of respondent. See LIMITATION ACT, 1877 SCH. II, ART. 171 b.

Debt—

Incurred during the life interest of Hindu widow for repairs to the estate, liability for. See HINDU LAW.

Debts—

Binding on joint family See HINDU LAW, JOINT FAMILY.

Debutter lands—

Liability for Cesses for. See CESSES

Decision—

Of Collector in Measurement Proceedings See 'RES JUDICATA'

Of Commission under Bengal Act VI of 1870, final and conclusive See CHOWKIDARI CHAKRAN LANDS

Subsequently disapproved of by Full Bench can be pleaded as Res judicata See 'RES JUDICATA'

Declaration of title—

Suit by a landlord for during continuance of tenancy See SPECIFIC RELIEF ACT

Declaratory Decree—

See JURISDICTION OF CIVIL COURT

Suit for Civil Procedure Code (Act VIII of 1859), s 15—Suit by reversioner during life of Hindu widow A Suit brought during the life of a Hindu widow by the presumptive heir, entitled on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life, is among the exceptions to the general rule established by decision upon Act VIII of 1859, s 15, viz, that except in certain cases, a declaratory decree is not to be made unless the plaintiff shows a title to, though he does not ask for, consequential relief—*Kallama Natchiar v Don a Singa Teven* Held, that although to grant a declaratory decree under the above section, was discretionary with a Court, yet in a suit of this class, known to the law, and in many cases the only practical mode of enforcing the presumptive heir's right to interfere with the widow's alienation, the grounds for the discretionary refusal of the decree should be strong In this case, the difficulty of the question raised, and the expense of the litigation, which had been referred to as grounds for refusing it, were insufficient reasons

ISRI DUT KOER v. HANSBUTTI KOERAIN

X 324

Declaratory Suit—

By reversioners against Hindu Widow's alienee See HINDU LAW

Decree—

Construction of. Penalty—Higher rate of interest upon default in payment of instalment A decree, of which the terms had been arranged by a solahnama between the parties, for payment of money by instalments with interest at six per cent, was construed to provide also for three contingencies, viz, non-payment at due date, (a) of the first instalment, two consecutive instalments being in arrears at the same time, (b) of instalments, other than the first, (c) of the first instalment, simply Upon the occurrence of (a) or of (b), execution might issue for the whole decretal money with interest thereon at 12 per cent Upon the occurrence of (c) execution might issue for that instalment, with interest at twelve per cent, from the date of the decree The decree-holder having accepted payment of the first instalment on the footing of (c), held that he had not by any admission or settlement, precluded himself from insisting on the above construction as to (b) Held, also, that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower, in a given state of circumstances, and were not in the nature of a penalty against which equitable relief might be claimed

BALKISHEN DAS v. RUN BAHADUR SINGH

X 305

Deduction of time requisite to obtain copy of See LIMITATION ACT, 1877

For execution of Conveyance See SPECIFIC PERFORMANCE.

For money. See CIVIL PROCEDURE, CODE, 1882, s 235.

For partition, Effect of, on subsequent suit for partition.

X 97

For Possession, Subsequent suit for possession after execution of decree See SUIT FOR POSSESSION AFTER FORMAL POSSESSION HAS BEEN GIVEN IN EXECUTION

For rent and ejectment. See NOTICE TO QUIT OR PAY ENHANCED RENT.

Decree (continued.)

Indistinct in its terms. Evidence inadmissible to explain Where the terms of a decree are uncertain, it is not competent to the Court of execution to make any enquiries, by taking oral or documentary evidence, to ascertain the meaning of such terms.

NUDDYAR CHAND SHAHA *v* GORIND CHUNDER GUHA .. X 1092

In previous suit when evidence See EVIDENCE

Made on registered obligation See LIMITATION ACT, 1859, s. 22

Obtained ex parte against registered tenant not admissible against tenant's transferee, who was not a party to the suit. See EVIDENCE

On compromise See COMPROMISE, WITHDRAWAL FROM

Under s. 210 of Act XIV of 1882, a fresh starting point for limitation in Execution Proceedings. See EXECUTION OF DECREE.

Decree-holders—

Bidding at sale without permission of the Court See SALE IN EXECUTION OF DECREE

Sharing rateably in sale Proceeds must be bonâ fide decree-holders See CIVIL PROCEDURE CODE, ACT XIV OF 1882, s. 295

Deduction—

Of time during prosecution of other suit See LIMITATION ACT, 1877 s. 14

Defamation—

See CONTEMPT OF COURT

Defect of Jurisdiction—

See LIMITATION ACT, 1877 s. 14

Defence—

Of submission to arbitration and award upon the matter in suit before suit brought See ARBITRATION.

Defendant—

Right of, to set off a claim for an unascertained amount See SET-OFF

Deposit—

In hands of Collector after revenue sale See RECORDED PROPRIETOR, REPRESENTATIVE OF.

Of Title Deeds See EQUITABLE MORTGAGE

Of will is distinct from registration under Act VIII of 1871 See REGISTRATION OF WILL UNDER OUDH ESTATES' ACT.

Deposition—

Of accused when admissible in evidence against him in a subsequent proceeding—

Evidence—Evidence Act (I of 1872), s. 80 A deposition given by a person is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition. A pardon was tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate. Held, that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.

QUEEN-EMPRESS *v*. DURGA SONAR .. XI 580

Where accused has absconded Where an accused person has absconded, and it is intended to record evidence against him in his absence, it is requisite, under s. 512 of the Code of Criminal Procedure, that the fact of the absconding of the accused should be alleged, tried, and established before the deposition is recorded.

GHURBIN BIND *v*. QUEEN-EMPRESS* X 1097

Derivative title—

See ESTOPPEL OF TENANT.

Detention—

In jail after expiry of sentence See CAUSE OF ACTION, MISJOINDER OF.

Device of taluq—

By unregistered Will. See WILL.

Difference of opinion—

Between Judges in review See APPEAL

Between Judges of Small Cause Court on a point of law in an application for new trial
See SMALL CAUSE COURT'S PRESIDENCY TOWNS ACT (XV OF 1882), s. 69.

Dilution—

See ABATEMENT OF RENT.

Discharge of accused—

See MAGISTRATE, POWERS OF

Charged under s 211, Penal Code, upon plea of original charge having been compounded
See COMPOUNDING OF CHARGE.

Further enquiry, Powers to direct—Criminal Procedure Code (Act X of 1882), ss 253, 437. An accused having been discharged after a full enquiry before a competent Court is entitled to the benefit of such discharge, unless some further evidence is disclosed. Consequently an order made by a District Judge directing a further enquiry to be held under s 437 of the Criminal Procedure Code in a case where a Magistrate had discharged the accused under s 253 was not warranted by law, when there had been a full enquiry by a competent Court and when no further evidence was disclosed, such order being based merely upon the ground that, in the opinion of the District Judge, the evidence recorded was sufficient for the conviction of the accused.

JEEBUNKISTO ROY v SHIB CHUNDER DAS

X 1027

Subsequent retrial ordered on account of insufficiency of evidence given See RETRIAL, DISCRETION IN JUDGE IN ORDERING

Discovery—

Production of documents—Privilege—Solicitor and Client—Act XIV of 1882, s 133

Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor.

BIPRO DOSS DEY v. SECRETARY OF STATE FOR INDIA

XI C55

Discretion of Court—

To allow a volunteer guardian to sue. See MINOR, SUIT BY.

Dismissal—

Of Complaint. See MAGISTRATE, POWERS OF.

Of suit for non-jouder, other findings expunged See JUDGMENT CONTAINING FINDINGS UNNECESSARY FOR DISPOSAL OF CASE

Of suit under s 136 of Civil Procedure Code See INTERROGATORIES

Disobedience of Lawful order—

Of Municipal Commissioner, Prosecution for. See DISQUALIFICATION OF JUDGE.

Disposition—

Of profits of estate for indefinite period. See HINDU LAW, WILL.

Dispossession—

During unexpired lease granted by plaintiff's predecessor. See LIMITATION ACT, 1877

Dispute—

As to the right to collect rents. Criminal Procedure Code, Act X of 1882, s. 145—Tangible immovable property—Act X of 1872, s. 530. A dispute as to the right to collect rents is a dispute concerning tangible immovable property within the meaning of s. 145 of the Code of Criminal Procedure.

PRAMATHA BHUSANA DEB ROY v DOORGA CHURN BHATTACHARJI

XI 413

Likely to cause breach of the peace. See POSSESSION, ORDER OF CRIMINAL COURTS AS TO.

Disqualification—

Of Judge. Penal Code, Act XLV of 1860, s 188—Act V (B. C.) of 1876, s. 256—

Disobedience of lawful order—Interest of Magistrate in convicting the prisoner—Disqualification of Judge. On the 29th of March 1883, the Municipal Commissioners of Commillah at a meeting issued an order under s. 256 of the Bengal Municipal Act of 1876. The accused was tried and convicted before the District Magistrate under s. 188 of the Indian Penal Code, and fined Rs. 100 for having disobeyed that order.

Disqualification—(continued.)

The Magistrate, who tried and convicted the accused, was present as Chairman of the Municipal Commissioners at the meeting of the 29th of March, when the order was passed for disobedience of which the accused was tried and convicted. *Held*, that the conviction was illegal, and must be set aside. *Sergeant v. Dale* cited and followed

KHARAK CHAND PAL *v* TARACK CHUNDER GUPTA X 1080
Of Officer of Municipality. See BENCH OF MAGISTRATES.

Dissolution—

Of Marriage, Collusion in presentation of petition for See COLLUSION

Distant Kindred—

Being heirs share in the "return" in preference to a widow of the deceased
 KOONARI BIBI *v*. DALIM BIBI. XI 14

Distinct Offences—

See CUMULATIVE SENTENCES.

Distribution—

Of sale proceeds See CIVIL PROCEDURE CODE, 1882, s. 295

District—

Magistrate's office, Locum tenens of See JURISDICTION OF DEPUTY MAGISTRATE
 PLACED IN CHARGE OF CURRENT DUTIES OF DISTRICT MAGISTRATE

Divorce Act—

IV of 1869, s. 13 See COLLUSION

ss. 36, 37. *Alimony pendente lite—Permanent alimony—Practice* Alimony pendente lite cannot be granted on an application made after a decree nisi in the suit has been passed, nor is it in the power of the Court to grant permanent alimony until an application is made to make such decree absolute

BENNETT *v* BENNETT XI 354

Documents—

Affidavit of See INSPECTION OF DOCUMENTS

More than thirty years old, their natural and proper custody See CUSTODY OF DOCUMENT.

Production of See DISCOVERY

Doors—

And window frames separate attachment of. See ATTACHMENT

Earnest money—

As element of contract See SPECIFIC PERFORMANCE

Easement—

Burden of proof—Act X of 1882, s. 147 The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land, the burden of proof would, therefore, lie upon the party alleging such rights.

HARI MOHUN THAKUR *v* KISSEN SUNDARI XI 52

Difference between, under Prescriptive Act and Limitation Act. See RIGHT OF WAY.

Effect of Payment—

Of prior mortgage by a subsequent incumbrancer as against intermediate charge. The mortgagor's right, title, and interest in certain immoveables in the Deccan, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser, who afterwards paid off the first mortgage. *Held*, that, as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English practice, to have it assigned to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable. But in India, a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive ever formally expressed. It was ruled in the English Court of Chancery in *Toulmin v. Steere*, that the purchaser from an owner of an equity of redemption, with actual or

Effect of Payment—(continued.)

constructive notice of another intermediate incumbrance, is precluded, in the absence of any contemporaneous expression of intention, from alleging that, as against such other incumbrance, the prior mortgage, paid off out of the purchase-money, is not extinguished. That case was not identical with this, where the prior mortgage was not paid off out of the purchase-money, but was paid off afterwards by the purchaser. The above ruling, however, is not to be extended to India, where the question to ask is, in the interest, of justice, equity, and good conscience, there applicable,—what was the intention of the party paying off the charge.

GOKALDAS GOPALDAS v PURANMAL PREMSUKHDAS. X 1035

Ejectment—

See ADVERSE POSSESSION BY VENDOR LANDLORD AND TENANT

Of tenant from lands formerly settled at an annual rental. See LANDLORD AND TENANT.

Suit for See LANDLORD AND TENANT, ONUS PROBANDI

Embankment—

Addition to Addition to existing embankment—Notification, Publication of, under Bengal Embankment Act—Bengal Act II of 1882, (Bengal Embankment Act), ss 6, 76, cl. (b), and 80. The words "shall add to any existing embankment" in cl. (b), s. 76 of Beng Act II of 1882, are not intended to mean any repair of an existing embankment, even if the effect of such repair be to make the embankment higher or broader, but only mean an extension in the length of an existing embankment. The notification referred to in s. 6 of the Act must be published in the manner provided by s. 80, and it is not sufficient for such notification merely to be published in the Calcutta Gazette.

GOVERDHAN SINHA v QUEEN-EMPRESS XI 570

Encroachment by Tenant—

Acquiesced in by Landlord. See ENCROACHMENT BY TENANT.

Landlords' right—Encroachment acquiesced in by Landlord. If a tenant during his tenancy encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment not for his own benefit, but for that of his landlord, and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself.

NUDDYARCHAND SHAHA v MEAJAN X 820

Endowed Property—

Suit as to. See JOINDER OF PARTIES.

Endowment—

See VALUATION OF SUIT

English Law—

See CARRIERS, LIABILITY OF

Enhancement—

Sentence on appeal. Criminal Procedure Code—Act X of 1862, ss 423, 439—Penal Code, s 330. A head constable was convicted under s. 330 of the Penal Code, and at a trial before a Sessions Judge sentenced to four months' simple imprisonment, the prisoner appealed. The High Court, in dismissing the appeal, directed, as a Court of Revision, that the sentence passed should be enhanced.

MEHTER ALI v QUEEN-EMPRESS XI 530

Enhancement of Rent—

See ONUS OF PROOF.

Enhancement by one out of a number of co-sharers when possible—Imali mehal—Practice of separate leases by several co-sharers. The mere fact of there being other co-sharers in an undivided mehal is not sufficient to put the plaintiff out of Court in a suit for enhancement in respect of a particular plot of land, and the proper issue in such a case is, whether the defendant tenant has been holding under the plaintiff separately, or under a joint lease from the plaintiff and his co-sharers in the mehal. *Guni Mahomed v. Moran, Jogendra Chunder Ghose v Nobin Chunder Chattopadhyaya distinguished.*

RASHEBHARI MUKHERJI v. SAKHI SUNDARI DAS XI 644

Notice of. See NOTICE OF ENHANCEMENT, SUBSTITUTED SERVICE OF.

Enhancement of Rent—(continued.)

- Suit for. Landlord and tenant—Beng. Act VIII of 1869, s. 4—Presumption of Evidence* In a suit for arrears of rent at enhanced rates, where the defendant relies on the presumption contained in s. 4 of Beng. Act VIII of 1869, it is not sufficient, in order to do away with that presumption, to show that the land has not been in cultivation from the time of the permanent settlement. It must be shown that the land has not been held since the time of the permanent settlement. **PEARI MOHUN MUKHERJI v. BANSHI MAJHI** XI 757
- Suit for. Service of notice of enhancement—Bengal Act VIII of 1869, s. 14.* Service of notice of enhancement under s. 14 of Bengal Act VIII of 1869 must be made strictly in the manner provided by that section. *Chunder Monee Dossee v. Dhuroneedhur Lahory* followed. When a tenure was held by a Hindu and three Santhals, and it was shown that service of the notice of enhancement had been personal on the latter, but only on the son of the former, who was an adult and living with his father as a member of a joint Hindu family, held, that this was not sufficient service on the Hindu tenant. *Quare*—Whether, if it had been shown that the notice though served on the son had come into the lands of the father, that would not amount to a sufficient service of the notice. **BOIDONATH MASHANTA v. LAIDLAY** X 493

Enquiry in Criminal Case—

See CRIMINAL PROCEDURE CODE, 1882, s. 437.

Entry in Register—

Copy of. See REGISTRATION OF MAHOMEDAN MARRIAGES

Equitable Conditions—

Of cancellation of deeds for fraud See CANCELLATION OF DEEDS OF SALE AND HYPOTHECATION FOR FRAUD

Equitable Grounds—

Of setting aside sale in execution. Where a sale in execution took place under an order obtained notwithstanding a consent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for a postponement, the petition, so consented to, having been by mistake, afterwards presented to, and filed by, the judgment-debtor in the wrong Court, held that the judgment-debtor was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby.

GANGA PERSHAD SAHU v. GOPAL SINGH... XI 36

Equitable Mortgage—

See REGISTRATION ACT, 1887, s. 17, CL. (u).

Deposit of title deeds—Priority—Registration Act (III of 1877), s. 48 A deposit of title deeds of certain property, under a verbal arrangement to secure payment of a debt, is not an "oral agreement or declaration relating to such property" within the meaning of s. 48 of the Registration Act

COOGAN v. POGOSE.. XI 158

Equity and good conscience—

See FRAUD UPON CREDITORS.

Application of principles of. See MAHOMEDAN LAW (SUCCESSION)

Error—

In measurement of chur lands, Effect of. See MEASUREMENT OF CHUR LANDS ACCORDING TO AGREEMENT.

Estate—

Acquired by daughter on transfer by widow, Effect of as against collateral heirs. See HINDU LAW, ALIENATION.

Descending to single heir. • See OUDH ESTATES' ACT, I OF 1869, s. 8.

Limited to take effect in favour of a person after another's death. See MAHOMEDAN LAW.

Meaning of, as used in Act XIV of 1882, s. 265. See BUTWARA UNDER REGULATION XIX OF 1884.

Estoppel—

Civil Procedure Code (Act VIII of 1859), s. 246—Civil Procedure Code (Act XIV of 1882), ss. 281, 283—Limitation Act (XV of 1877), Sch. II, Art. 11—Limitation (Act IX of 1871), Sch. II, Art. 15—Suit for possession. In certain execution proceedings land was attached, but before the sale the judgment-debtors, with the

Estoppel—(continued.)

permission of the Court, sold the land to the plaintiffs. Previous to this sale, certain persons had come forward in the execution proceedings, and had claimed the land as having been sold to them by the father of the judgment-debtors, this claim was disallowed in November 1876. In 1881 the plaintiffs, alleging that they had been dispossessed by certain persons, amongst whom were the claimants in the execution proceedings, brought a suit to recover possession of this land against these persons. This suit was decided against the plaintiffs in the lower Appellate Court, on the ground that they had failed to prove that they had been in possession of the land 12 years before suit. On appeal to the High Court the plaintiffs, appellants, contended that the claim of the defendants in the execution proceedings having been rejected, and they not having brought a regular suit within one year from the order of rejection to establish their right to possession, the defendants were prevented by that order from contending that the plaintiffs had not been in possession at the time of that order. *Held*, that the order did not operate as an estoppel against the defendants, and even if it could so operate, it would not do so until the time had run out, within which they could have brought a suit to establish their right to possession, and that such time had not expired.

GEND LALL TEWARI v. DENONATH RAM TEWARI ... XI 673

Evidence Act, 1872, s. 115—Petition to postpone sale in execution of decree. To petition for the postponement of a sale in execution of decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed, and occasions no estoppel within the Indian Evidence Act, 1872, s. 115. The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by lapse of time.

MINA KONWARI v. JUGGAT SETANI ... X 196

Of tenant. Evidence—Act I of 1872, s. 116—Derivative title. A, a ryot, being in possession of a certain holding, executed a *kabuliat* regarding this holding in favour of B (who claimed the land, in which the holding was included, under a derivative title from the last owner), and paid rent to B thereunder. *Held*, that A was not estopped by s. 116 of the Evidence Act from disputing B's title. The words "at the beginning of the tenancy" in s. 116 of Act I of 1872 only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants had previously been in possession.

LAL MAHOMED v. KALLANUS ... XI 519

Evidence—

EVIDENCE ... X 1024
See ESTOPPEL OF TENANT. REGISTRATION OF MAHOMEDAN MARRIAGES

A deposition of a person who has accepted a pardon and given evidence in the Magistrate's Court, is not admissible against himself, when the pardon is revoked, and he is put upon his trial before the Sessions Court, without proof of his identity with the person who gave evidence before the Magistrate.

QUEEN-EMPRESS v. DOORGA SONAR ... X 580

An accused is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *prima facie* to convict him of the offence.

QUEEN-EMPRESS v. BEPIN BISWAS ... X 970

As to nature and extent of grants of julkur rights in tidal navigable rivers. See JULKUR RIGHTS IN TIDAL NAVIGABLE RIVERS, GRANT OF BY CROWN.

By comparison of hand-writing. See REVISION ON FACTS.

Collection papers are no evidence *per se*, they can only be used when they are produced by a person who has collected rent in accordance with them, and who merely uses them for the purpose of refreshing his memory.

MAHOMED MAHMOOD v. SAFAR ALI ... XI 407

Criminal Procedure Code—Act X of 1882, s. 510—Report of "Additional Chemical Examiner." A document purporting to be a report under the hand of an "Additional Chemical Examiner" upon a matter or thing submitted to him for analysis and report, cannot be received in evidence under s. 510 of Act X of 1882.

QUEEN-EMPRESS v. AUTAL MUCHI ... X 1026

Decree in previous suit. Effect of a previous decree, as evidence in a subsequent suit, stated.

RAMJAN KHAN v. RAMJAN CHAMAR ... X 89

10—(continued.)

- admissible in execution proceedings to explain the terms of a decree. ... X 1092
- ODDYAR CHAND SHAHA v. GORIND CHUNDER GUHA ... X 1092
- prior suit, by one co-sharer admissible in subsequent suit against all the co-sharers—Admission made by one co-sharer evidence against the others—Evidence Act (I of 1872), s. 18 In a suit between a zamindar and his *jaradars* for rent, a person, who was one of several *jotedars* in the mehal, was called as a witness for the zamindar, and admitted the fact that an arrangement existed whereby he and his co-*jotedars* had agreed to pay rent to the zamindar direct; this suit was decided in favour of the zamindar. The *jaradars* then brought a suit against the *jotedars*, amongst whom was the witness abovementioned, to recover the sum which the *jotedars* ought to have paid to the zamindar direct, and which the *jaradars* had been decreed to pay. The *jotedars* disclaimed all liability to pay rent to the *jaradars*, in this suit the evidence given by the *jotedar* in the zamindar's suit was received as evidence on behalf of the plaintiffs against all the defendants. Held, that the evidence was admissible.
- KOWSULLAH SUNDARI DASI v. MUKTA SUNDARI DAST ... XI 588
- Invalidating written agreement Evidence of oral agreement—*Fiaud*—Act I of 1872, s. 92, proviso 1—(contract)—Unlawful consideration—Act IX of 1872, s. 23 Plaintiff sued to recover rent under a *kabuliat*. The defendant admitted execution of the *kabuliat*, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs 282 out of the purchase money, and to obtain for him from the purchaser a *mourasi* pottah of the land, it never having been intended that any rent should be payable under the *kabuliat*. Held, that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties.
- KASHI NATH CHUKERBATI v BRINDABUN CHUKERBATI ... X 649
- Irrelevant statement of a person who died before suit. See REVISION ON FACTS.
- Judgments, not inter partes—Admissibility of evidence In a suit for possession of land, the defendant, in order to show the character of his possession, offered in evidence a judgment obtained by him in a suit to which the plaintiff or his predecessors in title were not parties. Held, that the judgment was admissible in evidence.
- PEARI MOHUN MUKERJI v DROHOMOYI DABIA ... XI 745
- Jumma-wasil-baki papers—Right of witness preparing them to refresh his memory from them. Jumma-wasil-baki papers are not admissible as independent evidence of the amount of rent mentioned therein but it is perfectly right that a person who has prepared such jumma-wasil-baki papers on receiving payment of the rents, should refresh his memory from such papers when giving evidence as to the amount of rent payable.
- AKHIL CHANDRA CHOWDHRY v NAYU ... X 248
- Of an offence causing disappearance of. See PENAL CODE, ACT XLV OF 1860 ss 176, 201.
- Of approver See MISDIRECTION
- Of integration. See GRANT
- Of market rate. See MARKET RATE.
- Of Marriage insufficient in criminal case, Retrial ordered for further evidence. See RETRIAL, DISCRETION OF JUDGE IN ORDERING
- Of oral evidence when admissible to show intention of parties to treat a clause in a bond as penal. See PENALTY CLAUSE IN BOND.
- Of Police Officer See INCRIMINATING STATEMENT BY PRISONER TO POLICE OFFICER.
- Of substituted service for purposes of enhancement, Nature of. See NOTICE OF ENHANCEMENT, SUBSTITUTED SERVICE OF.
- Record of where accused has absconded. See DEPOSITION WHERE ACCUSED HAS ABSCONDED.*
- Reference to text books on trial—Right of prisoner as to calling evidence—Presumption. A well-known treatise, such as Taylor's Medicinal Jurisprudence, may be referred to in the course of trial. *Halim v. The Empress* followed. A prisoner, or his Counsel, is at liberty to offer evidence or not, as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another.
- HURRY CHURN CHUCKERBUTTY v. THE EMPRESS ... X 140
- Rent suit—Decree obtained ex parte against registered tenant. In a suit for rent the plaintiff claimed that he was entitled to payment both in cash and kind; and in order to show that he was entitled to recover rent in kind tendered two *ex parte* decrees obtained by his predecessor against the persons registered as tenants of the

Evidence—(concluded.)

tenure at the time the decrees were obtained, such decrees being for rent both in cash and kind. It appeared that the defendant was the owner of the tenure at the time the two decrees were passed having acquired the tenure by foreclosure, although he had not registered the transfer in the plaintiff's books, and that he was not made a party to the suits in which the decree was passed. *Held*, that as the defendant was not a party to the suits in which the decrees were obtained, and did not claim through the parties against whom they were passed, they were not admissible in the suit as evidence against him. The decision in *Sham Chand Koondeo v. Brajonath Pal Choudhry* does not lay down that a decree against a registered tenant is to be evidence for ever in future proceedings against an unregistered transferee not a party to it, but all that case decides is, that for the purpose of satisfying that particular decree an unregistered transferee is bound by it whether he was a party to the suit or not, the tenure being liable for the rent.

RAM NARAIN RAI v RAM COOMAR CHUNDER PODDAR

.. XI 562

Statement against interest. See HINDU LAW.

Varying written agreement—Oral evidence when admissible to prove that consideration money stated in contract to have been paid, has not been paid but has been applied in a way agreed on between the parties—Evidence Act, I of 1872, s 92
A deed of *putoua* contained a recital of the payment of the sum of Rs. 2,000 as bonus to the plaintiff by the defendant, the mode of payment being stated to be in cash in one lump sum. The plaintiff sued to recover the sum of Rs. 1,850 alleging that only Rs. 150 had been paid and not Rs. 2,000 as recited in the *putoua*. The defendant admitted that Rs. 850 was due, and as to the remaining Rs. 1,000 alleged that, at the time of the transaction, it was agreed that the sum of Rs. 1,000 was to be retained by him on account of a debt due by one of the plaintiff's relation to him. The plaintiff objected that the evidence to the agreement set up by the defendant was inadmissible. *Held*, that, inasmuch as it was open to the plaintiff under proviso 1 of s 92 of the Evidence Act to prove by oral evidence that the whole of the consideration money had not been paid, it was equally competent to the defendant, in answer to such case, to adduce evidence to prove the true nature of the contract, and that the consideration was different from that stated in the contract. *Held*, also, that the plea of the defendant substantially was that, although the consideration was fixed at Rs. 2,000, there was a separate oral agreement to the effect that out of that sum the plaintiff was to refund Rs. 1,000 on account of the debt due from his relative, and that on this ground the oral evidence tendered was admissible under proviso 2 of s 92 of the Act, the stipulation as to the refund of the Rs. 1,000 not being inconsistent with the recital as to the consideration in the contract.

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Evidence Act—

I of 1872—

s. 6 *Statement made to third person by person injured.* The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person, immediately after the commission of the offence. The prisoner did not, when the statement was made, deny that she had done the act complained of. *Held*, that the evidence was admissible under s. 6 and s. 8, Illustration (g) of the Evidence Act.

IN THE MATTER OF THE PETITION OF SURAT DHOBN

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s. 19. See EVIDENCE IN PRIOR SUIT BY ONE CO-SHARER ADMISSIBLE IN SUBSEQUENT SUIT AGAINST ALL THE CO-SHARERS.

s. 27. See CONFESSION MADE TO A POLICE OFFICER.

s. 80. See DEPOSITION OF ACCUSED WHEN ADMISSIBLE IN EVIDENCE AGAINST HIM IN A SUBSEQUENT PROCEEDING.

s. 90. See CUSTODY OF DOCUMENT THIRTY YEARS OLD.

s. 92. See EVIDENCE VARYING WRITTEN AGREEMENT.

s. 115. See ESTOPPEL.

s. 116. See ESTOPPEL OF TENANT.

Examination—

Of prisoner by Judge. See CRIMINAL PROCEDURE CODE, 1882, s. 342.

Exclusion—

From joint property. See LIMITATION ACT (XV OF 1877), SCH II, ART 127.

Of time of proceeding bona fide in Court for a cause of like nature to want of jurisdiction. See LIMITATION ACT, XV OF 1877, s. 14.

Execution—

See STEP IN AID OF EXECUTION: SYMBOLICAL POSSESSION, EFFECT OF.

Informal application for. See STEP IN AID OF EXECUTION.

Execution of Decree—

See APPEALABLE ORDER. APPEAL FROM ORDER PASSED IN EXECUTION OF DECREE UPON HOND SPECIALLY REGISTERED UNDER S. 53 OF ACT XX OF 1866. CIVIL PROCEDURE CODE, 1882 SS 257 a, 258 LIMITATION APPLICABLE TO EXECUTION OF DECREE PASSED WHEN ACT XIV OF 1859 WAS IN FORCE. SALE IN EXECUTION OF DECREE. SALE IN EXECUTION OF DECREE AGAINST ESTATE OF DECEASED. STEP IN AID OF EXECUTION.

After satisfaction. See RIGHT OF SUIT

Barred by limitation. See SALE IN EXECUTION OF DECREE.

By mortgagee purchasing under his own decree. See CIVIL PROCEDURE CODE, 1882, s. 295.

By what limitation governed. See EXECUTION OF DECREE.

Civil Procedure Code (Act XIV of 1882), ss 232, proviso (b), and 244 (cl. c)—Transferee of a money decree to one of several co-judgment-debtors. Certain property was mortgaged by A to B. Subsequently, this property was purchased by C at a sale held in execution, of a decree obtained by a third person against A. B then brought a suit on his mortgage-bond against A and C, and obtained a decree for the sale of the mortgaged properties, and also a personal decree against A; B assigned his rights under this decree to C, who applied for execution under s 232 of the Code. A objected to execution issuing, relying on proviso (b) to s. 232. *Held*, that proviso (b) to s 232 applies only to decrees for money personally due by two or more persons, and that the decree obtained by B against A and C, not being a personal decree against C (he having been made a defendant only by reason that he had purchased the mortgaged property subject to the mortgage debt), C, as assignee of B, was entitled to take out execution

LALLA BHAGUN PERSHAD *v* HOLLOWAY

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Decree under s. 210 of Act XIV of 1882, Limitation—Civil Procedure Code, Act XIV of 1882, s. 210. On the 23rd February 1878, an application was made for execution of a decree dated the 3rd December 1877, in which the decree-holder stated that the judgment-debtor had agreed to pay the balance then due on the 13th August 1878. The application was then struck off on the 26th June 1878. On the 30th June 1881 the decree-holder again applied for execution, and on the 11th July 1881 the judgment-debtor, with the consent of the decree-holder, applied for time to pay the balance due till the 8th September 1881, and that application was also struck off. On the 1st March 1883 the decree-holder again applied for execution. *Held*, that the application was not barred by limitation upon the ground that the application by the judgment-debtor, made on the 11th July 1881, alleging that he had come to an arrangement with the decree-holder for the payment of the amount due by instalments, having resulted in its being registered and the proceedings struck off, amounted to a direction that the decretal amount be paid by instalments as stipulated in the petitions, and that this being so, there was a decree passed on that date under the provisions of the second paragraph of s 210 of the Code of Civil Procedure, of which the decree-holder was entitled to have execution.

JHOTI SAHU *v* BHUBUN GIR

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Limitation—Application for execution by what limitation governed—Act XV of 1877—Act XIV of 1859, s. 20—Proceeding to enforce decree. Act XV of 1877 operates from the date on which it came into force as regards all applications made under it. *Behari Lal v. Gobardhan Lal* dissented from. An application for execution was made on the 2nd of March 1872. In the execution proceedings certain properties were attached and a sale proclamation was issued. A claim to a portion of the properties was then preferred by third parties, and allowed on the 17th of June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. A subsequent application for execution was made on the 14th of June 1875. *Held*, that the subsequent application was not barred by the provisions of s. 20, Act XIV of 1859. *Bona fide* proceedings in resistance of a claim to attach properties are proceedings to enforce a decree within the meaning of s. 20 of Act XIV of 1859.

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Obstruction to. See ONUS OF PROOF.

Obtained by giving formal possession, Subsequent suit for possession. See SUIT FOR POSSESSION AFTER FORMAL POSSESSION HAS BEEN GIVEN IN EXECUTION.

